1897

SHIBU HALDAR v. GUPI SUNDARI DASYA.

It is admitted that the appeal numbered 71 will be governed by this decision. That appeal, therefore, will also be dismissed with costs.

S. C. G. *Appeal dismissed.*

ORIGINAL CIVIL.

Before Mr. Justice Sale.

1896
September 4.

E. D. SASSOON AND OTHERS (PLAINTIFFS) *v.* HURRY DAS BHUKUT (DEFENDANTS).

Presidency Small Cause Court Act (I of 1895), sections 37 and 38—New trial—Jurisdiction—Powers of Bench sitting on application for new trial—Ground for new trial—Question of Evidence.

The Fourth Judge of the Presidency Small Cause Court, in a suit tried by him, delivered judgment for the plaintiff. The defendant applied under section 38 of the Presidency Small Cause Court Act (I of 1895) for a new trial, and the Judges (the First and Fourth) on such application set aside the judgment and dismissed the plaintiff's suit with costs, and on the plaintiff's application the Full Bench of the Small Cause Court refused to interfere.

Held, by the High Court that the Judges exercised the powers of an Appellate Court in setting aside the original decree, and exceeded the jurisdiction vested in them by section 38 of the Act, such jurisdiction being a revisional jurisdiction only.

Held, also that, where the question is one of evidence, the judgment of the Original Court could be reversed, and a new trial directed, only when such judgment is manifestly against the weight of evidence.

Sadasook Gambir Chund v. *Kannayya* (1), followed.

IN this case the defendants entered into a contract with the plaintiff on the 17th September 1894 for the purchase of certain bales of *dhooties* to arrive by November and December shipment. The vessel containing the *dhooties* arrived, and was entered at the Custom House on Saturday, the 22nd December 1894. The plaintiffs, belonging to the Jewish faith, transacted no business on Saturday. The 23rd December being a Sunday the Custom House was closed, and remained so until the 28th of December, upon which date the plaintiffs applied for delivery of the goods. The goods, however, in the meantime became liable to duty; the Indian Tariff Act (III of 1896) having

(1) I. L. R., 19 Mad., 96.

1896

SASSOON v. HURRY DAS BHUKUT.

come into operation on the 27th ; and the plaintiffs had to pay duty on the goods to the extent of Rs. 154-2-6 before delivery thereof from the vessel could be obtained by them. The defendants took delivery of and paid the contract price of the said goods, but denied their liability to pay the sum of Rs. 154-2-6.

The plaintiffs filed a suit in the Court of Small Causes on the 8th July 1895, praying for the recovery of the said sum and costs, and on the 1st of November 1895 judgment was delivered by the Fourth Judge of the said Court in favour of the plaintiffs. The defendant then applied under section 38 of the Act amending the Presidency Small Cause Court Act (Act I of 1895) to have the judgment set aside and for a new trial. This application was heard by the Officiating Chief Judge and the Fourth Judge on the 17th April 1896, and they set aside the judgment and dismissed the plaintiffs' suit with costs. Thereupon the plaintiffs applied under section 38 of the said Act for an order to set aside the decree dismissing the suit. This application was dealt with, and dismissed with costs on the 10th July 1896 by a Full Bench, consisting of the Chief Judge, and the Second and Fourth Judges of the Court. The plaintiff thereupon moved the High Court under section 622 of the Code of Civil Procedure, and obtained a rule calling upon the defendant to show cause why the judgment and decree, dated respectively the 17th of April and the 10th of July 1896, should not be set aside.

Mr. *Avetoom* for the defendants showed cause.—In this case the Bench under section 38, Act I of 1895, had power to hear the application of the defendant, and to reverse the decree against him, and to non-suit the plaintiffs, which was what they had done. See *Sadasook Gambir Chund* v. *Kannayya* (1). It was there held by Best, J., that the language of section 37 of Act XV of 1882 (sections 37 and 38 of Act I of 1895) seemed to indicate that, though a party was not entitled to appeal as of right, the Court might, if it thought fit, reconsider any decree or order with all the powers of an ordinary Appellate Court. The High Court of Bombay in *Hussanbhoy Visram* v. *The British India*

(1) I. L. R., 19 Mad., 96.

Steam Navigation Company (1) refused to interfere upon an application for a rehearing of a suit which had already been decided by a Judge of the Small Cause Court, where the evidence was of a conflicting character and not such as to justify a distinct opinion that the Small Cause Court Judge was wrong in his decision.

Mr. *Jackson* for the plaintiffs in support of the rule.—The application in this case was made on behalf of the defendant, against whom a decree had been passed. It was made in the form of an appeal against the decision of the Fourth Judge and on grounds which related to the question of appreciation of evidence. In their judgment the Full Bench dealt with the case exactly as an Appellate Court might have treated it. This the Full Bench could not do. See *Sadasook Gambir Chund* v. *Kannayya* (2). The view taken by the majority of the Judges in that case was that the Full Bench of the Presidency Small Cause Court had transgressed the limits of the jurisdiction given by Act XV of 1882, section 37, as the case was one on which different minds might not unreasonably have come to different conclusions. An order for a new trial is unnecessary, as upon the admitted facts the plaintiffs are entitled to judgment. *Johnson* v. *The Credit Lyonnais* (3).

SALE, J.—This application raises the question whether a decree by two Judges of the Small Cause Court, dated the 17th of April 1896, was made in excess of the jurisdiction of the Court, and, if so, what other order ought now to be made.

The plaintiffs in this suit are Messrs. Sassoon & Co., and the object of the suit was to recover a sum paid by them as duty on goods sold to the defendant.

The cause of action is thus stated in the plaint:—

(1) That the defendants entered into a contract in Calcutta with plaintiffs on the 17th September 1894 for purchase of certain bales of *dhooties*.

(2) That the defendants have taken delivery of the goods and paid plaintiffs the contract value of the goods, but have failed to pay the amount of duty on the goods which was legally payable by defendants, and which the plaintiffs are entitled to recover back from defendants having

(1) I. L. R., 12 Bom., 579. (2) I. L. R., 19 Mad., 96.
(3) L. R., 3 C. P. D., 32.

1896

SASSOON v. HURRY DAS BHUKUT.

to meet the same to get the *dhooties* delivered and passed out from the Custom House authorities.

The defence set up was as follows :—

Admit contract, deny that the defendant is liable to pay any duty, if the plaintiffs had exercised ordinary diligence.

The goods arrived before the Indian Tariff Act came into operation.

The payment of the money claimed in the suit seems never to have been disputed, but the defence in substance was that by the exercise of ordinary diligence the payment of the tariff duty might have been avoided, and that therefore the plaintiffs were not entitled to recover the same from the defendant. At the first hearing, which took place before the learned Fourth Judge of the Small Cause Court, only one witness was called, and that was by the plaintiffs.

The defendants adduced no evidence in support of their defence, and the Fourth Judge made a decree in favour of the plaintiffs for the full amount of their claim. The defendant then filed an application for a new trial on the grounds therein set forth relating chiefly to the questions of evidence. On the 17th April 1896 a Bench was formed for the hearing of the new trial, consisting of the learned Officiating Chief Judge and the learned Fourth Judge, who set aside the decree and dismissed the suit. The next proceeding was an application by the plaintiffs for a new trial in respect of the decree made on the 17th April 1896. That application was dismissed.

The main question which has been discussed before me is whether the learned Judges of the Small Cause Court exercised a jurisdiction, which was not vested in them, in reversing the original decree and dismissing the suit; the ground alleged being that in so doing they exercised the powers of an Appellate Court and exceeded the powers given them by section 38 of the Small Cause Court Act.

The facts as set forth in the judgment of the learned Chief Judge delivered on the occasion of the last application for a new trial are as follows: "The plaintiffs entered into a contract for the sale to the defendants of goods to arrive, delivery to be taken within ninety days from the date of arrival, *i. e.*, the

date when the vessel is entered at the Custom House. The goods arrived and the vessel was entered at the Custom House on Saturday, 22nd December 1894."

Section 38 of the Presidency Small Cause Court Act provides that "where a suit has been contested the Small Cause Court may, on the application of either party made within eight days from the date of the decree or order in the suit (not being a decree passed under section 522 of the Code of Civil Procedure), order a new trial to be held, or alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and may in the meantime stay the proceedings."

It is clear this section must be read with the preceding section 37, which provides that "save as otherwise provided by this chapter or by any other enactment for the time being in force, every decree and order of the Small Cause Court in a suit shall be final and conclusive."

The only reasonable meaning to be deduced from these sections taken together is, that the Legislature did not intend that each and every decree and order of the Small Cause Court should be subject to appeal.

A similar view was taken by the majority of the Bench of the Madras Court in the case of *Sadasook Gambir Chund* v. *Kannayya* (1). And turning to page 113 of MacEwen's Small Cause Court Practice it would appear that it has not been the practice of the Small Cause Court to deal with applications for a new trial except under the powers ordinarily exercised by a Revisional Court. The learned author of the "Small Cause Court Practice" states various grounds upon which the Small Cause Court have granted new trials, all showing that the jurisdiction exercised has been that of a Revisional Court.

Where the question is one of evidence the judgment of the Original Court could be reversed, and a new trial directed only when such judgment is manifestly against the weight of evidence.

Now turning to the facts of the case which are exceedingly simple, there can be no doubt that in setting aside the original decree made in this suit, the learned Judges proceeded on the supposition that the first Court had taken an incorrect view of

(1) I. L. R., 19 Mad., 96.

1896

SASSOON v. HURRY DAS BHUKUT.

the evidence or had wrongly construed the contract in suit. It is, I think, obvious that on the evidence as given in the first trial it would be impossible for any Court to disturb the judgment upon any ground which would be open to a Revisional Court, and there can, I think, be no doubt that the learned Judges exercised the functions of an Appeal Court in setting aside the original decree and dismissing the suit. It would therefore follow that in so doing they had exceeded the jurisdiction vested in them by section 38 of the Act.

The next question is as to the proper order which under the circumstances this Court should make.

There is, as I have already pointed out, no dispute as to the facts. The ground upon which the learned Officiating Chief Judge thought that the original decree was wrong is thus stated by him in his judgment in the last application: "But here I think there was a duty cast on the plaintiff under the contract to clear the goods on arrival, for the defendant was entitled to take delivery at any time within ninety days from the date of arrival, and therefore the plaintiff should have had the goods cleared and ready for delivery all that time.

The learned Second Judge also thought that the plaintiffs ought to have cleared the goods on the day when the steamer was entered at the Custom House; but, so far as appears, he does not regard this as a duty arising on a construction of the contract. At page 6 he says: "If the sellers had cared to do so the goods would have been cleared on the day of their arrival and the payment of duty avoided;" and in a later portion of his judgment there is this passage: "It was obviously the duty of the plaintiffs in the first instance to take charge of the goods and clear them from the Custom House. It was all the more necessary therefore that as ordinary men of business they ought to have cleared the goods on the day of their arrival."

A good deal is said by both the learned Judges with reference to the admission made by the witness called by the plaintiffs that the members of the plaintiffs' firm being of the Jewish faith, their business was closed on a Saturday, there being no evidence that the defendant had any notice of this practice on the part of the plaintiffs.

It appears to me that this is a matter of very small importance; it is only one of the circumstances which had to be taken into consideration in determining the question as to whether the plaintiffs in failing to clear the goods on the first day of their arrival in port had failed to exercise due diligence in discharging their duty under the contract. It seems to me that the learned Judges in dealing with the case overlooked the fact that the plaintiffs would be entitled to a reasonable time for the purpose of clearing the goods from the Custom House.

Nor would there be any duty cast upon the plaintiffs to clear the goods on the first day of their arrival, unless there was an express agreement to that effect, or the evidence showed that in failing to do so, they had been guilty of unreasonable delay.

There was nothing in the evidence upon which there could be any finding that there had been any improper or unreasonable delay in clearing the goods. Nor do I think that the provision that the defendant had ninety days from the arrival to take delivery of the goods necessarily implies that the plaintiffs had undertaken to clear the goods on the first day of their arrival in port. To hold that there is such a duty cast upon importers, apart from an express agreement, would, I think, be doing a serious injustice; and in the absence of any evidence as to what is or is not a reasonable time within which the goods should be cleared from the Custom House, I should have thought in common experience that it would be extremely improbable under any circumstances that the goods could be cleared from the Custom House on the first day of their arrival. On the evidence it seems to me that the original decree was quite correct, and that, having regard to the fact that there is no dispute as to facts, no good purpose would be served by now ordering a new trial. I think the order which I ought to make is that the decree of the learned Officiating Chief Judge and the learned Fourth Judge of the Small Cause Court of the 17th April 1896 be set aside, and that the original decree of the learned Fourth Judge be restored. The costs in the suit, including the present application, will abide the result, and will be dealt with by the lower Court.

Attorneys for the plaintiffs: Messrs. *Orr, Robertson & Burton.*

Attorneys for the defendants: Messrs. *Manuel & Sen.*

O. E. G.