1910

RAM LAL SUKUL v. BHELA GAZI.

WOODROFFE J.

have an *under-raiyat* under him and may create a protected interest under section 160, clause (*g*), if his landlord allows him so to do. An incumbrance may be created by a non-occupancy *raiyat* on his holding in limitation of his own interest, however limited, by way of sub-lease. I am of opinion, therefore, that there was an incumbrance which plaintiffs had power to annul, and the appeal must therefore be allowed with costs and the decree of the first Court restored.

RICHARDSON J. I agree.

Appeal allowed.

S. M.

ORIGINAL CIVIL.

Before Mr. Justice Pugh.

1910

May 2.

RAMADHIN BANIA

v.

SEWBALAK SINGH.*

High Court, Original Side, jurisdiction of—Revisional jurisdiction over Presidency Small Cause Court—Civil Procedure Code (Act V of 1908) s. 115—"Appeal"—Practice—Sanction to prosecute—Code of Criminal Procedure (Act V of 1898) ss. 195, 195 (6), 439.

A Judge of the Presidency Small Cause Court, Calcutta, had summarily refused an application for sanction to prosecute the plaintiff for making a false claim in a suit before him. On an application to the High Court under section 115 of the Code of Civil Procedure, to set aside this order and to compel the Judge to determine the application :—

Held, that the jurisdiction of the High Court in all such revisional applications, whether in respect of suits or other matters, is vested in a single Judge sitting on the Original Side.

Samsher Mundul v. *Ganendra Narain Mitter* (1), *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (2) followed. *Haladhar Maiti* v. *Choytonna Maiti* (3) referred to.

A civil Court, when acting under section 195 of the Criminal Procedure Code, is not in any way exercising criminal jurisdiction, and is subject to the revisional jurisdiction of the High Court under section 115 of the Code of Civil Procedure.

*Application in Original Civil Suit No. 7½ of 1910.

(1) (1902) I. L. R. 29 Calc. 498. (2) (1903) I. L. R. 30 Calc. 986.
(3) (1903) I. L. R. 30 Calc. 588.

Salig Ram v. *Ramji Lal* (1), *In the matter of the petition of Bhup Kunwar* (2), *Ram Prosad Roy* v. *Sooba Roy* (3), *Guru Churn Saha* v. *Girija Sundari Dasi* (4), *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi* (5), *Eranholi Athan* v. *King-Emperor* (6), referred to.

An application under section 195, sub-section 6 of the Criminal Procedure Code is not an appeal, hence the revisional jurisdiction under section 115 of the Civil Procedure Code is not excluded.

Hardeo Singh v. *Hanuman Dat Narain* (7) distinguished.

APPLICATION.

This was an application by Sewbalak Singh, the defendant in a suit instituted in the Court of Small Causes, Calcutta, for an order that the order passed by the 5th Judge, refusing sanction to prosecute the plaintiff, Ramadhin Bania, might be set aside, and that the Judge might be directed to hear and determine the application for sanction according to law.

It appears that on the 27th September 1909, Ramadhin instituted a suit against Sewbalak Singh in the Court of Small Causes, Calcutta, for the recovery of Rs. 34 alleged to be due for money lent in Calcutta on the 11th July 1909. It was alleged by the petitioner that on the 27th January 1910, the plaintiff desired to withdraw his suit, but the Judge refused to allow the withdrawal. The suit proceeded: the plaintiff was examined, but called no further evidence. The defendant denied all liability and alleged that the claim was entirely false and dishonest. The suit was dismissed with costs.

On the 10th February 1910, an application was made to the 5th Judge by a pleader on behalf of the defendant, but instructed by the Criminal Investigation Department, for the issue of a notice upon the plaintiff to show cause why sanction should not be given to prosecute the plaintiff for fraudulently and dishonestly, and with intent to injure the defendant, making a claim which he knew to be false in a Court of Justice. The Judge refused the application on two grounds: *first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that it did

(1) (1906) I. L. R. 28 All. 554.
(2) (1903) I. L. R. 26 All. 249.
(3) (1897) 1 C. W. N. 400
(4) (1902) 7 C. W. N. 112.
(5) (1903) 8 C. W. N. 73.
(6) (1902) I. L. R. 26 Mad. 98.
(7) (1903) I. L. R. 26 All. 244, 247.

1910

RAMADHIN BANIA v. SEWBALAK SINGH.

not appear from the records that the suit was false or fraudulent, and that he was not bound to go beyond the records or take evidence to establish fraudulent intent.

The present application was, thereupon, made to a single Judge, sitting on the Original Side of the High Court, for the purpose of setting aside the above order. A rule was obtained in the first instance, and it came on for hearing, on the 2nd May 1910, before PUGH J.

Mr. Stokes and *Mr. R. C. Bonnerjee*, for the petitioner. The main points are: *first*, is this application properly made under section 115 of the Code of Civil Procedure? *Secondly*, should the application be made to a single Judge sitting on the Original Side, or to a Divisional Bench of the High Court? On the first point, it is established that the application is of a civil nature and could not be made before the Criminal Bench: *Mahomed Bhakku* v. *Queen-Empress* (1), *Shama Charan Das* v. *Kasi Naik* (2), *Guru Churn Saha* v. *Girija Sundari Dasi* (3); Roy's Sanction to Prosecute, pages 127-128. The term "case" in section 115 has a larger signification than "suit" and would cover applications of this nature. This is a proper matter over which the Court may exercise its revisional jurisdiction. The 5th Judge of the Small Cause Court summarily refused to hear the application for sanction to prosecute, and so failed to exercise the jurisdiction vested in him. On the second point, it is submitted that this application is properly made before a single Judge sitting on the Original Side and not before the Presidency Bench: *Shamsher Mundul* v. *Ganendra Narain Mitter* (4), *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (5). *Haladhar Maiti* v. *Choytonna Maiti* (6) is distinguishable: the jurisdiction of a single Judge, sitting on the Original Side, was not denied; but only for the sake of convenience, Maclean C.J., by virtue of the power conferred on the Chief Justice under section 14 of the Charter, specially constituted a Bench to deal with the application.

(1) (1896) I. L. R. 23 Calc. 532.
(2) (1896) I. L. R. 23 Calc. 971.
(3) (1902) 7 C. W. N. 112.
(4) (1902) I. L. R. 29 Calc. 498.
(5) (1903) I. L. R. 30 Calc. 986.
(6) (1903) I. L. R. 30 Calc. 588.

The opposite party appeared in person and stated that the suit in the Small Cause Court was not false, and that it failed as his witnesses were absent.

PUGH J. This is an application under section 115 of the Civil Procedure Code for an order that what is described as a judgment, but is really an order of the 5th Judge (now officiating 4th Judge) of the Calcutta Small Cause Court, refusing sanction to prosecute the plaintiff in a certain case, may be set aside; that the record should be sent for, and such order as the Court may think fit and proper may be passed.

The order actually asked for is that the 5th Judge, now the officiating 4th Judge, may be directed to hear and determine the application according to law. It is made by Sewbalak Singh, the defendant in the Small Cause Court suit, who is represented by Mr. Hume as his attorney, who is in fact the Public Prosecutor, and it is stated that this application is made by him officially, and not as a merely private attorney. It appears from the affidavit of Surjya Pada Banerjee, a pleader, that he made the application on behalf of Sewbalak, but instructed by the Criminal Investigation Department, and it was refused on two grounds—*first*, that if such an application was entertained, there would be numerous similar applications every day; and, *secondly*, that the Court was not bound to go beyond its record, which, I take it, means there is nothing on the record to show that the case was false.

In my opinion, neither of these grounds are valid grounds, and I come to the conclusion that the Judge has declined to exercise a jurisdiction vested in him, in that he has refused to hear and determine the application, for rejecting an application on these grounds is not a judicial decision of the matter before him.

Certain points, however, arise, (*i*) whether the application is properly made to me, and (*ii*) whether the application is a case within section 115, if it is not, I certainly cannot deal with it; (*iii*) whether the application to me is of a civil or criminal nature; (*iv*) whether there is in fact an appeal, or a procedure

1910

RAMADHIN BANIA v. SEWBALAK SINGH.

PUGH J.

so similar to an appeal, as to provide an effective remedy, and whether, in consequence, an application in revision is excluded.

A rule has been issued in the first instance, which has been served on the plaintiff in the Small Cause Court suit, and he has appeared in person and of course cannot assist me on the legal questions. All he says is that in fact the case was not false, and that he only withdrew it because his witnesses were absent.

As to the first point, the application is novel and of first impression so far as this Court is applied to in respect of the giving or withholding of sanction by the Small Cause Court; but there have been a number of cases under the old section 622 in which the question as to the proper Bench for applications in respect of cases proper, or suits in the Small Cause Court, was considered, and which afford some assistance on this point.

There has been a well-established practice for at least 50 years that these applications should be made on the Original Side of this Court, and it was considered settled that these applications should be made on the Original Side by counsel.

For some short time prior to 1902, similar applications were successfully made on the Appellate Side by vakils. This was, however, put an end to by a decision of Rampini and Pratt JJ. in *Shamsher Mundul* v. *Ganendra Narain Mitter* (1), who hold that the Bench taking the Presidency Group had no jurisdiction in Calcutta, and therefore no jurisdiction over the Calcutta Small Cause Court. This question turned on the order of the Chief Justice allocating business to the various Benches, and while this order gave the Presidency Group jurisdiction over cases from the 24-Parganas—the 24-Parganas is not Calcutta. However, another application was made by a vakil in the case of *Haladhar Maiti* v. *Choytonna Maiti* (2) to the then Chief Justice, Sir Francis Maclean, and Mr. Justice Mitra. A preliminary objection was taken based on the last case, but it was overruled on the ground that the learned Judges were not dealing with the matter as the Judges taking

(1) (1902) I. L. R. 29 Calc. 498. (2) (1903) I. L. R. 30 Calc. 588.

1910

RAMADHIN BANIA v. SEWBALAK SINGH.

PUGH J.

the Presidency Group, but as a Bench constituted by the Chief Justice to deal with the case, and there could be no question but that the Chief Justice had the power to constitute such a Bench and deal with the application. With regard to the practice he says : ' applications have invariably been made to the Chief Justice, who can appoint, and who does then and there appoint, himself and the Judge who may be sitting with him to be the Bench to hear the application.'

There is a different statement as to the practice in the case of *Sarat Chandra Singh* v. *Brojo Lal Mukerjee* (1) made by Mr. Justice Sale as follows :—

" It is a remarkable fact that the jurisdiction of a Judge, sitting on the Original Side to exercise revisional powers over the Presidency Small Cause Court, which is now challenged for the first time, has been exercised ever since the establishment of the High Court, over 40 years ago, as its records abundantly show. Within this period innumerable applications have been heard and determined by single Judges sitting on the Original Side of this Court."

This decision was called for in consequence of a claim by a vakil to make such an application on the Original Side, for the exclusive jurisdiction of the Original Side, had been in the meantime, and between the decision of these two cases, settled by a rule made by the High Court on the Appellate Side on the 12th June 1903. Rule IV A. is as follows :—Applications under section 622 of the Code of Civil Procedure for revision of orders of the Calcutta Presidency Small Cause Court shall be heard by a single Judge sitting on the Original Side of the High Court.*

Having regard to the fact that the statement in the later case was made by Mr. Justice Sale shortly after the rule in question was passed, when, no doubt, the whole position had been fully considered by all the Judges, there can be little doubt that the later statement as to the practice with regard to these applications is the more authoritative, and there can also be little doubt that the practice was incorrectly presented to the

(1) (1903) I. L. R. 30 Calc. 986.

* See Rule V of the High Court Rules, App. Side, Ed. 1910, p. 9

1910

RAMADHIN BANIA v. SEWBALAK SINGH.

PUGH J.

Chief Justice: but the matter is now merely academical because of the rule in question.

In practice, since then the Chief Justice has never constituted a Bench to hear such applications, and they are no longer made to him.

It follows from this, and the decision in *Shamsher Mundul* v. *Ganendra Nath Mitter* (1), that no other Bench has jurisdiction to hear the ordinary application in revision from the Small Cause Court.

This rule is in the widest terms and it seems to me by process of elimination of any other Bench to vest in a single Judge on the Original Side the jurisdiction in all such revisional applications.

It remains, however, to consider whether the application for sanction is a "case" under section 115, and whether it is of a criminal nature so as to oust the jurisdiction that I would otherwise have, and whether the applicant has another and more proper remedy. The first two of these points are covered by a Full Bench decision of the Allahabad High Court, *Salig Ram* v. *Ramji Lal* (2), following another Full Bench decision, *In the matter of the petition of Bhup Kunwar* (3). The point is shortly dealt with by Sir John Stanley C.J. and Sir W. Burkitt J., but very fully and completely by Sir George Knox J., in which he reviews the whole legislation on the subject and holds that the High Court on the Criminal Side has no jurisdiction under section 439 of the Criminal Procedure Code to interfere with an order of a Civil Court passed under section 195, but that the High Court has such power under section 622 of the Code of Civil Procedure, and that a Civil Court, when acting under section 195, is not in any way exercising criminal jurisdiction. The reasoning in this judgment seems to me conclusive, and I follow it. It is not, therefore, necessary for me to discuss the matter further beyond mentioning that it appears that *Ram Prosad Roy* v. *Sooba Roy* (4) was a case where a sanction granted by a Civil Court was revoked under the Civil Revisional Juris-

(1) (1902) I. L. R. 29 Cals. 498.
(2) (1906) I. L. R. 28 All. 554.
(3) (1903) I. L. R. 26 All. 249.
(4) (1897) 1 C. W. N. 400.

diction, and that in *Guru Churn Saha* v. *Girija Sundari Dasi* (1), an application of this kind was dealt with on the Civil Side of the High Court, while in *Kali Prosad Chatterjee* v. *Bhuban Mohini Dasi* (2) following *Eranholi Athan* v. *King-Emperor* (3), it was held that the Criminal Revision Bench had no power to interfere with an order of a Civil Court under section 476 of the Criminal Procedure Code, though there have been some earlier cases collected in *In the matter of the petition of Bhup Kunwar* (4), at which a different conclusion was arrived at. However much difference there may have been as to whether a Criminal Bench had the power or not, I do not find any reported decision in which the power under section 622 to interfere has been questioned, except a reference in Sanjiva Row's Notes on the Code of Civil Procedure to a *case* (5) in the Punjab Chief Court which I am unable to discuss as I have not access to the report, but which does not commend itself to me and is contrary to the Allahabad Full Bench case to which I have referred and with which I agree. I notice also that Mr. S. Roy, in his work on Sanction to Prosecute, pages 127-128, mentions two unreported cases, in which it was held that the Criminal Bench have no jurisdiction. There only remains to consider whether my jurisdiction to interfere is excluded by reason of there being an appeal. In *Hardeo Singh* v. *Hanuman Dat Narain* (6), Sir John Stanley says: "Sub-section 6 of section 195 gives a right of appeal in very clear terms. Whether it is called an appeal or a right to make a substantive application to have an order refusing or giving sanction set aside, appears to us to be immaterial."

It was immaterial for the purpose Sir John Stanley was then considering, *viz.*, the powers of the District Magistrate, but for this purpose it is material, and in my opinion the application under sub-section 6 of section 195 is not an appeal properly so-called, and therefore the power of revision is not excluded. It may be that eventually, when the application has been heard and decided, it will be open to the parties to make

(1) (1902) 7 C. W. N. 112.
(2) (1903) 8 C. W. N. 73.
(3) (1902) I. L. R. 26 Mad. 98.
(4) (1903) I. L. R. 26 All. 249.
(5) 6 O. C. 216.
(6) (1903) I. L. R. 26 All. 244, 247.

1910

RAMADHIN BANIA v. SEWBALAK SINGH.

PUGH J.

an application under section 195, sub-section 6 to the High Court, but the matter has not advanced to the stage when any question whether such an application should be made has arisen.

With regard to the point that the Small Cause Court is not bound to go beyond its records, I would only observe that the records have nothing to do with the application. The plaint is before the Court, and the Court will have to ascertain whether the case made on the plaint was a true or false case, and if a false case, whether sanction should be granted or not. It may be that to decide whether the case is a false case will involve an enquiry equivalent to trying the case *de novo* : if the Judge finds that necessary, he must discharge the duty the law imposes on him.

I do not wish in any way to interfere with the discretion of the learned Judge when he hears the application when he will apply the principles which are well known and appear in the reported cases, but I only observe, if the number of false cases brought in his Court is, as he seems to consider, excessive, which view is confirmed by the fact that the public authorities have thought fit to take steps in reference to it, this is a reason for granting, not for refusing the application : for how is his Court to be purged of such cases if the Judge himself is an obstructionist to any efforts in that direction. ?

I, therefore, direct that the record be returned to the Small Cause Court with a direction to the 5th Judge, now officiating 4th Judge, to hear and determine the application.

Application allowed.

J. C.

Attorney for the petitioner : *J. T. Hume* (*Public Prosecutor*).