CIVIL RULE.

Before Mr. Justice Chitty and Mr. Justice Carnduff.

In re RAM PRASAD MALLA.*

1909
June 28.

Sanction for prosecution—Jurisdiction—High Court, jurisdiction of—District Judge—Criminal Procedure Code (Act V of 1898) ss. 195 (1) cl. (b), and 476—Revision—Civil Procedure Code (Act V of 1908) s. 115.

Neither the High Court nor the District Judge has power, under section 476 of the Criminal Procedure Code, to direct a prosecution for an offence committed before a Provincial Small Cause Court.

Begu Singh v. *Emperor* (1) referred to.

The High Court itself is precluded from granting sanction in such a case under section 195, sub-section (*1*), clause (*b*) of the Criminal Procedure Code, as a Provincial Small Cause Court is not subordinate to it within sub-section (7), clause (*c*), nor can it interfere under sub-section (*6*) with an order of a District Judge revoking a sanction granted by such Small Cause Court.

Hamijuddi Mondol v. *Damodar Ghose* (2), *Girija Sankar Roy* v. *Binode Sheikh* (3) and *Muthuswami Mudali* v. *Veeni Chetti* (4) referred to.

Where the District Judge revoked a sanction granted by a subordinate Court to a District Magistrate on the ground that 'a sanction could not be granted to a third party,' and initiated proceedings under section 476 of the Criminal Procedure Code :—

Held, that he acted illegally in the exercise of his jurisdiction, and that the High Court had power to set aside his order under section 115 of the Code of Civil Procedure (Act V of 1908).

Hamijuddi Mondol v. *Damodar Ghose* (2) distinguished.

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This was a Rule obtained by the petitioner, who was the plaintiff in the original suit, to show cause why the order of the District Judge sanctioning prosecution of the petitioner under section 476 of the Criminal Procedure Code should not be set aside.

The petitioner instituted a case against one Raghubar Malla, said to be residing at Budge-Budge, in the Small Cause

* Civil Rule No. 1800 of 1909, against the order of F. Roe, District Judge, 24-Pergunnahs, dated March 16, 1909.

(1) (1907) I. L. R. 34 Calc. 551.
(2) (1906) 10 C. W. N. 1026.
(3) (1906) 5 C. L. J. 222.
(4) (1907) I. L. R 30 Mad. 382.

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Court of Alipur for recovery of Rs. 45, alleged to be due on account of a loan. The summons was affixed to the outer door of the "ordinary dwelling house" of the defendant. An *ex parte* decree followed. Two applications for execution of the decree were unsuccessful, the first for want of prosecution and the second because the defendant was not found at his native village, Azamgarh, in the United Provinces. The third application was successful. The defendant appeared in the Small Cause Court at Alipur and applied to have the *ex parte* decree set aside and the suit reheard. He denied the loan and denied having ever lived at Budge-Budge. His application was granted and a date fixed for the rehearing of the case. He then applied for the examination on commission of eight witnesses living in the district of Azamgarh. This last application being granted, notwithstanding strenuous opposition on the part of the plaintiff, the plaintiff asked leave to withdraw the suit. Leave was granted and the suit withdrawn.

The District Magistrate then applied to the Judge of the Small Cause Court to grant him sanction under section 195, sub-section (1), clause (*b*) of the Criminal Procedure Code, to prosecute the plaintiff for an offence under section 209 of the Indian Penal Code. The sanction was granted. On appeal, the District Judge revoked the sanction solely on the ground that a sanction could not be granted to a third party. The District Judge, however, himself ordered, under section 476 of the Criminal Procedure Code, the plaintiff to be prosecuted, as in his opinion there was a strong *primâ facie* case that the petitioner had brought a false suit.

The plaintiff thereupon moved the High Court and obtained this Rule.

The Senior Government Pleader (*Babu Ram Charan Mitra*) (*Mr. G. Sircar* with him) showed cause. An inquiry is not absolutely necessary under section 476 of the Criminal Procedure Code. As an order under section 476, the District Judge had jurisdiction. The offence under section 209 of the Indian Penal Code was brought to the notice of the District Judge in the

course of a judicial proceeding, though it was in an appellate stage. Why should the privilege accorded to the humblest subject be denied to a Magistrate ? This Rule cannot affect the Small Cause Court Judge's order : *Baperam Surma* v. *Gouri Nath Dutt* (1), *Jadunath Mahta* v. *Jagadish Chandra Deb* (2), *Queen-Empress* v. *Seshadri Ayyangar* (3), and *Pampapati Sastri* v. *Subba Sastri* (4).

Babu Sarat Chandra Roy Chowdhury (*Babu Satya Charan Chandra* with him), in support of the Rule. If the Munsif (Small Cause Court Judge) has granted sanction, the District Judge cannot again do so. He may confirm or revoke, but not modify : see section 195 (7) of the Criminal Precedure Code. His order, therefore, cannot come under section 476 of the Criminal Procedure Code. Section 476 must be read with section 195 (*1*) (*b*).

[CHITTY J. What do you understand by the words "brought under its notice" in section 476 of the Criminal Procedure Code ?]

"Brought under its notice" applies only to the Appellate Court and not the first Court. *Jadunath Mahta* v. *Jagadish Chandra Deb* (2) does not decide this point clearly. To give the District Judge jurisdiction in such matters, the judicial proceeding itself, in which the offence was said to be committed, must be before him by way of appeal or motion. No subsequent proceeding can give him the jurisdiction contemplated in section 476. [CHITTY J. It was a judicial proceeding from beginning to end.] That, I submit, is not the intention of the Legislature. The cases cited by the other side are distinguishable. The District Judge had no jurisdiction to order a prosecution under section 476 : see the Full Bench case of *Begu Singh* v. *Emperor* (5). He also could not make a "complaint." [*Senior Government Pleader*. The Full Bench case refers only to section 476, but this order is really under section 195, the procedure only being under section 476.] [CHITTY J. But can we not ourselves direct a prosecution?]

(1) (1892) I. L. R. 20 Calc. 474.
(2) (1902) 7 C. W. N. 423.
(3) (1896) I. L. R. 20 Mad. 383.
(4) (1899) I. L. R. 23 Mad. 210.
(5) (1907) I. L. R. 34 Calc. 551.

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The Full Bench case is against that course. Besides that the Small Cause Court is not subordinate to the High Court within the meaning of section 195.

[CHITTY J. But can we not restore the sanction granted by the Small Cause Court Judge ?] As there is no appeal or motion against the order of revocation before this Court, your Lordships cannot interfere with that order. The main question before the Court is whether the order of the District Judge under section 476 was legal: *Hamijuddi Mondol* v. *Damodar Ghose* (1) and *Girija Sankar Roy* v. *Binode Sheikh* (2). Section 537 of the Criminal Procedure Code has no application to a Civil Bench. But the Criminal Bench may interfere under section 439, if the Government moves it. [CARNDUFF J. But we can call for the record ourselves and consider the whole matter.] Taking the case on the merits, the order of the Small Cause Court was unjust. It was also illegal, and the order of the District Judge setting aside the same was proper. Sanction to a stranger to the direct proceedings cannot be given: *In the matter of the Petition of Khepu Nath Sikdar* v. *Grish Chunder Mukerji* (3), *Habibur Rahman* v. *Munshi Khodabux* (4) and *Kali Charan Lal* v. *Basudeo Narain Singh* (5).

[CHITTY J. The last quoted case refers to gratification of a private grudge of an individual.] But sanction is required to prevent that as well. [CHITTY J. But each case must be considered on its own facts. We can at any rate take action under section 115 of the Civil Procedure Code.] But your Lordships cannot go behind the order moved against: *In re Gopal Siddeshwar Despande* (6), *Amir Hassan Khan* v. *Sheo Baksh Singh* (7), *Durga Das Rukhit* v. *Queen Empress* (8), *Mulfat Ali Shaikh* v. *The Emperor* (9) and *In re Chundra Kant Ghose* (10).

Cur. adv. vult.

(1) (1906) 10 C. W. N. 1026.
(2) (1906) 5 C. L. J. 222.
(3) (1889) I. L. R. 16 Calc. 730.
(4) (1906) 11 C. W. N. 195.
(5) (1907) 12 C. W. N. 3.
(6) (1908) I. L. R. 32 Bom. 203.
(7) (1884) I. L. R. 11 Calc. 6; L. R. 11 I. A. 237.
(8) (1900) I. L. R. 27 Calc. 820.
(9) (1905) 10 C. W. N. 222.
(10) (1888) 3 C. W. N. 3.

CHITTY AND CARNDUFF JJ. This is a Rule calling upon the District Magistrate of the 24-Pergunnahs to show cause why an order of the District Judge, dated the 16th March last, directing the prosecution under section 209 of the Indian Penal Code of the petitioner, Ram Prasad Malla, should not be set aside. The facts, out of which the case has arisen, are these:

In June 1904, the petitioner, a resident of Budge-Budge, brought a suit for the recovery of Rs. 45 alleged to be due for principal and interest on account of a loan made in January 1902 to one Raghubar Malla, who was described in the plaint as then residing also at Budge-Budge. Summons was issued in due course, and, according to the process-server's report and the petitioner's own affidavit of the 18th July 1904, it was, in the absence of Raghubar Malla himself, affixed to the outer-door of his "ordinary dwelling-house" at Budge-Budge, as pointed out by the petitioner himself. On the following day the case was heard *ex parte* by the Munsif of Alipur, sitting in the Small Cause Court, and was decreed after a cursory examination on oath of the petitioner.

The first application for execution was made on the 17th September 1904, and this was apparently struck off for want of prosecution on the 9th January 1905. A second application is dated the 6th December 1905, and on it a certificate under section 224 of the Civil Procedure Code of 1882 seems to have been sent to Raghubar Malla's native district, Azamgarh, in the United Provinces, but returned unserved. A third attempt to execute the decree was made in the latter part of 1907 with better effect; for the notice required by section 248 of the Code of 1882 was duly served upon the judgment-debtor Raghubar Malla, in Azamgarh, with the result that he appeared in the Small Cause Court at Alipur and applied, on the 21st March 1908, to have the *ex-parte* decree against him set aside and the suit reheard. What purports to be his application was first submitted to the Court in the United Provinces, and is in the Persian character. It is not in the form of, or supported by, an affidavit; but, for the purposes of this proceeding and in

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view of the fact that he was assisted in making it by the District Magistrate through the Government Pleader, there is clearly no reason why it should not be referred to. It declared categorically that Raghubar Malla had not received any summons, that he had never been in Calcutta before, that he had never borrowed any money from the petitioner, that the petitioner's suit was false and had been brought maliciously, and that the first that he (Raghubar Malla) had heard of it was after the transfer of the decree for execution to Azamgarh. Raghubar Malla was, moreover, examined on oath by the Small Cause Court Judge on the 18th July 1908, and he then swore that he had never been to Budge-Budge, that there had been no service on him and that he had first come to know of the existence of the *ex-parte* decree in the preceding month of March. Much stress has been laid on the fact that his deposition stops short here and contains no express denial of the debt, the learned vakil for the petitioner arguing that, whereas his client has sworn to the truth of his case against Raghubar Malla, there is so far on record no assertion on oath to the contrary by Raghubar Malla, and that consequently there is no sure foundation for the prosecution of his client for the offence under section 209 of the Indian Penal Code of making a false claim in Court. The argument is ingenious, but it is nothing more, and it would be ridiculous to allow it to prevail. The sworn statement of Raghubar Malla in examination in chief was naturally confined to the only point that had for the purposes of section 108 of the former Code of Civil Procedure to be established; it might have been, but was not, extended beyond that point in the cross-examination to which Raghubar Malla was actually subjected; and, as it stands, apart even from the petition already referred to, the inference to be drawn from it and from the circumstances is that Raghubar Malla intended to deny everything. It may, moreover, be taken for granted that the District Magistrate has not tried to launch this prosecution without making sure that that person is prepared to be a witness, and there is at this stage, at all events, no need for entertaining a doubt on the point.

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Raghubar Malla having deposed that there had been no service upon him, the petitioner was also examined. He then went back on the statement contained in his affidavit of the 18th July 1904, and affirmed that he had not himself accompanied the process-server, but had deputed another person to identify the defendant. We may observe in passing that it is difficult to reconcile these two sworn statements. The application under section 108 of the former Code was then granted, and it was ordered that the suit should be proceeded with, the 24th August 1908 being fixed for the hearing. The defendant next applied for the examination on commission of eight witnesses in the district of Azamgarh. This application, which was strenuously opposed by the petitioner, was granted, and the petitioner thereupon asked for leave to withdraw. Leave was given and the suit was accordingly withdrawn on the 5th August 1908.

We next find the District Magistrate moving the Munsif under section 195, sub-section (*1*), clause (*b*) of the Criminal Procedure Code, to sanction the petitioner's prosecution for the offence of making a false claim, and the Munsif, in a considered order, dated the 8th February 1909, granting the sanction prayed for. The learned District Judge, however, on being appealed to under sub-section (*6*) of the section, revoked the grant solely on the ground that "sanction could not be given to a third party to take up a prosecution;" but, having at the same time arrived at and recorded the opinion that "there was a strong *primâ facie* case that the petitioner had brought a false suit in the Small Cause Court;" he evidently endeavoured to avoid a miscarriage of justice by himself directing the petitioner's prosecution. And this, it is manifest, he intended to do, and did, under section 476 of the Code, although the section itself is not mentioned in his order of the 16th March last.

This is the order which the petitioner moved us to set aside as having been made without jurisdiction; and, in view of the recent Full Bench decision in *Begu Singh* v. *Emperor* (1), we felt bound, not only to grant a Rule in the first instance,

(1) (1907) I. L. R. 34 Calc. 551.

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but also to concede, when the Rule came on for hearing, that the District Judge's order could not stand. At the same time we are at a loss to appreciate the necessity for the learned District Judge's interference with the sanction granted by the Small Cause Court Judge, and we intimated that we would examine the record in order to ascertain and decide, after hearing the petitioner again on the whole case, whether on the merits and in the interest of justice, further orders in the direction of the petitioner's prosecution should not be passed.

The entire case has been reargued before us at great length and with much ability by the learned vakil for the petitioner, but nothing that he has been able to urge on the merits has influenced the opinion to which, as already indicated, we were inclined at the last hearing. The reported cases on the subject, which are very numerous, need not, we think, be discussed; for they are really all distinguishable, and the provisions of the law itself, as well as the principles underlying them, are simple, intelligible and reasonable. In the first place, a charge such as that we are now considering, depending as it does on intention and knowledge and involving the proof of a negative, is easily preferred, but by no means easily established; and, as prosecutions ending in failure are to be deprecated as being calculated to do harm rather than good, they ought not to be undertaken without considerable circumspection and care. Secondly, it is manifestly unfair to put a plaintiff or complainant, so to speak, out of the witness-box into the dock without giving him a full opportunity for proving his own case or showing that he had grounds for proceeding. Thirdly, offences of this kind are essentially—and they are so classified in the Penal Code—offences against public justice; whence it follows that they ought to be pressed primarily in the interests of public justice, and never as a means of satisfying a private grudge. For these reasons, the Legislature has interposed the safeguards provided by sections 195 and 476 of the Criminal Procedure Code, and with what has been laid down as to the expediency of insisting upon those safeguards being given full effect to and not evaded, we are in cordial agreement.

But, having said so much, we doubt if there is really anything more to be said: in other words, it seems to us that cases such as this should be dealt with mainly, if not entirely, on the broad lines indicated above, and that, if the conditions there suggested are observed, mere technicalities should not be permitted to interfere with the course of justice.

In this instance the undisputed and indisputable facts speak for themselves. On them, and no doubt, also on further information received, a responsible officer of the Government, who presumably had some grounds for his action, and whose motives must be assumed to be above suspicion, sought to prosecute the petitioner; on them again, the Small Cause Court Judge has, after obviously careful consideration, come to the conclusion that the case was a proper one for sanction. And on them also the District Judge has arrived at the opinion that there is "a strong *primâ facie* case against the petitioner." Add to all this the circumstance—to which it would be mere affectation to close one's eyes—that there is certainly nothing improbable in the suggestion that an *ex parte* decree on a false, though trifling, claim may, without much difficulty and with a fair prospect of success, be obtained and executed against a stranger hailing from a distant part of the country, and the simple questions arise—why should the petitioner not stand his trial, and why should the efforts of the District Magistrate towards vindicating public justice and checking abuse of the processes of the Civil Courts be summarily interfered with? To this, there can, we think, be only one answer.

So much for the merits, in so far as they can, or ought to, be considered at this stage. But here we are confronted with a number of objections and difficulties. If they are insuperable, so much the worse; but it must surely be our first care to overcome them, if they can be overcome, and see, if possible, that justice is done.

The Full Bench case already cited prevents us—as it ought to have prevented the learned District Judge—from taking action under section 476 of the Criminal Procedure Code and directing the petitioner's prosecution. The High Court

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is not, for the purposes of section 195, the Court to which the Small Cause Court Judge of Alipur is subordinate, and, therefore, we are precluded from ourselves sanctioning the prosecution under clause (*b*) of sub-section (*1*) of that section. A Division Bench of this Court has [see *Hamijuddi Mondol* v. *Damodar Ghose* (1)] held that the High Court cannot, under sub-section (*6*) of the same section, interfere with an order of a District Judge revoking a sanction granted by a Munsif. We doubt whether this ruling is consistent with that in *Girija Sankar Roy* v. *Binode Sheikh* (2), in which the learned Judges—one of whom was a party to the earlier ruling of the same year—held that the High Court could, under the sub-section referred to, interfere with the order of a District Judge approving a Munsif's sanction, and a Full Bench of the Madras High Court has [see *Muthuswami Mudali* v. *Veeni Chetti* (3)] expressly dissented from *Hamijuddi Mondol* v. *Damodar Ghose* (1). But we cannot dissent from the last-mentioned case without referring the point to a Full Bench. There remains, therefore, only the power of revision vested in us by section 115 of the present Code of Civil Procedure (corresponding with section 622 of the Code of 1882); and the question is whether it is open to us to exercise it here. It has been strongly urged that it is not, and in this connection *Hamijuddi Mondol* v. *Damodar Ghose* (1) has again been cited. That case, however, is distinguishable; for in it the District Judge had dealt with the matter on the merits and revoked the sanction for reasons relating thereto, and the learned Judges came to the conclusion that he had not exercised a jurisdiction not vested in him by law, nor acted illegally or with material irregularity. Here the position is very different, and we think that we are not unduly straining the language of the section by holding that it applies. The meaning to be attached to it, although it has been the subject of many rulings, cannot be said to have been as yet settled by authority; but one thing is clear on the face of it, and that is that it cannot be limited to the case of a subordinate Court acting altogether

(1) (1906) 10 C. W. N. 1026. (2) (1906) 5 C. L. J. 222.
(3) (1907) I. L. R. 30 Mad. 382.

without jurisdiction. It expressly covers the case of a Court "acting in the exercise of its jurisdiction illegally or with material irregularity," and what we have to consider is whether this is not such a case. We have already observed that we do not understand the learned District Judge's reason for thinking that he was bound to overrule the Small Cause Court Judge. There is certainly nothing in the statute law to limit the grant of sanction to a party to the proceeding in connection with which the offence aimed at was committed, and the only authority that the learned vakil could cite in support of the rule suggested by the District Judge's order is *In re Chundra Kant Ghose* (1). In that case an application for sanction, unsigned and unverified, had been filed before a Munsif ostensibly on behalf of the defendant in a civil suit. The defendant repudiated it and declared that he had no desire to prosecute, and the Munsif found that it had emanated from a private person, who was not a party to the suit. The sanction was nevertheless granted, and we venture to say that we entirely agree with all that the Division Bench of this Court said in setting it aside. But "a case is only an authority for what it actually decides," and there is clearly nothing in the learned Judge's judgment to support what would, in our view, be the astounding proposition that sanction to prosecute for an offence against public justice should be withheld from a public officer as such. Surely there could be no better recipient of such sanction, and, in our opinion, the learned District Judge was acting illegally in the exercise of his jurisdiction, when he laid down and followed as binding a rule to the contrary.

The result is, that this Rule is made absolute, and that the whole of the District Judge's order of the 16th March last is set aside. The sanction originally granted by the Small Cause Court Judge and revoked by that order is thus restored; and it will now be open to the District Magistrate to proceed in accordance with law.

Rule absolute.

S. M.

(1) (1888) 3 C. W. N. 3.