

(1965) 08 CAL CK 0023
In the Calcutta High Court
Case No : C.R. No. 429 of 1962

Everest Cine Corporation (P) Ltd. and Another APPELLANT
Vs
Khuku and Another RESPONDENT

Date of Decision : 14-08-1965

Acts Referred:

Contract Act, 1872 — Section 39, 40
Presidency Small Cause Courts Act, 1882 — Section 38

Citation : AIR 1965 Cal 446

Hon'ble Judges : P.B. Mukharji, J

Bench : Single Bench

Advocate : Krishna Binod Roy, for the Appellant; Amarnath Roy Choudhury, for the Respondent

Judgement

P.B. Mukharji, J.—This is an application u/s 115 of the Code of Civil Procedure. The two petitioners are the Everest Cine Corporation (Private) Ltd. and its Director B. Chandak. These petitioners were the defendants in a suit before the Small Cause Court, Calcutta. The plaintiff in that suit was one Anil Banerjee who died during the pendency of the Rule in this Court. The Rule here was issued on the 12th February, 1962 and was directed against the judgment of the Presidency Small Cause Court u/s 38 of the Presidency Small Cause Courts Act which set aside the judgment and decree passed by the learned Trial Judge of the Small Cause Court.

2. The facts of the case giving rise to this application may be stated briefly at the outset. The plaintiff, a Cine-Cameraman sued the two defendants for recovery of the sum of Rs. 2,000. The plaintiff's case is that on the 9th March, 1955 he was appointed as the Director of Photography for a film called "Chalachal", under a written contract contained in a letter which is marked Ex. 2c and bearing the same date as the 9th March, 1955. The terms of the contract were that the plaintiff's engagement was to last for a period of six months commencing from the first shooting day of that picture and that in consideration of the services

rendered to the satisfaction of the petitioners they agreed to pay the plaintiff a consolidated sum of Rs. 2,000 according to certain terms. The defence of the petitioners in the Small Cause Court was that the plaintiff failed to perform that contract and the contract had to be perforated otherwise by other persons. The teamed Trial Judge dismissed the suit and accepted the defence. On an application u/s 88 of the Presidency Small Cause Courts Act a Bench of two Judges of the Small Cause Court set aside the decree and judgment of the learned Trial Judge and granted a decree to the plaintiff as prayed for. It is against that judgment that this Rule was directed.

3. Mr. Roy on behalf of the petitioners first raised the troublesome question about the jurisdiction u/s 38 of the Presidency Small Cause Courts Act. His point is that the Bench of the Small Cause Court has no jurisdiction to decide questions of fact and upset findings of fact u/s 38 of the Presidency Small Cause Courts Act. This point has been a controversial point in India and the controversy does not seem to have abated with the passage of time. Different High Courts had different views on the subject and in some cases even the same High Court has different views in different judgments. An appeal to the section may be a good way of beginning the discussion. Section 38 of the Presidency Small Cause Courts Act reads as follows:

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 u/s 522 of the Code of Civil Procedure) (XIV of 1892), 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."

There is an explanation to this section which is not relevant for the present application.

4. The language of the section expressly provides for ordering "a new trial" to be held. It also expressly empowers the Bench of the Small Cause Court under that section to alter, set aside or reverse the decree or order of the trial Court. Much learning has been used to explore, define, label and analyse the nature and type of this jurisdiction u/s 38 of the Presidency Small Cause Courts Act. The debate continues on the question whether the jurisdiction is appellate or revisional. The debate also continues on the question whether facts could be revised or only points of law alone are the subject-matter u/s 38 of this Act. This elaboration and consequent complexity arise not on the language of the section to-day but on the diversity of judicial decisions and the variety of interpretations put upon it. The language of Section 38 of the Act does not limit the proceeding only to points of law. On plain interpretation, therefore, one would not think that such a proceeding u/s 38 of the Act would exclude questions of fact. What, however, is said is that the language of Section 38 is not the language of the jurisdiction of an appeal Court. Therefore, a Bench u/s 38 of the Act is really not an appeal Bench is understood in the usual sense. Therefore, some limitation is sought to

be imposed upon the otherwise wide and unqualified language of the section. On this point some reference to some cases is inevitable.

5. I shall mostly confine myself to the decisions of this Court in this regard. A Division Bench of this Court of Mookerjee and Rankin, JJ. in *M.L. Chakrabarty Vs. Olof Borin*, , elaborately discussed the scope of Section 38 of the Act. It also noticed the change introduced in the heading of Chapter VI "New Trials and Appeals" by Section 13 of Act I of 1895, after reference to the Madras Full Bench decision in *Sikandar v. Ghouse Mohidin*, ILR 40 Mad 355: (AIR 1917 Mad 135(2)) overruling the decision in *Ramasami v. Madras Times Printing and Publishing Co. Ltd.*, 30 Mad LJ 207: (AIR 1917 Mad 485), and came to the conclusion that the Presidency Small Cause Court u/s 38 had no jurisdiction to decide questions of fact, whether they were raised generally or in consequence of its finding on another question of fact or law. This Calcutta Division Bench expressed the view that it accords with the view taken by the Calcutta High Court in *Sassoon v. Hurry Das*, ILR 24 Cal 455 and *Johan Smidt v. Ramprasad*, ILR 38 Cal 425. This Calcutta Division Bench at p. 887 finally expressed the view as follows:-

"We are of opinion that although Section 38 provides for a more extended jurisdiction than what would be technically called a new trial, a jurisdiction analogous to an appeal, yet there is no appeal on facts."

A mere recent decision of the learned Single Judge Lort Williams, J. in *Buldeo Das Lohita Vs. Balmukund Brijmohan*, , appears to express the same view after noticing some of the cases already quoted above in this judgment. Lort Williams, J. after reference to Sections 37 and 38 of the English County Courts Act and also after referring to the decisions cited in the case of *M.L. Chakrabarty Vs. Olof Borin*, , expresses the view that though the wording of Section 38 of the Presidency Small Cause Courts Act was wide enough to cover appellate jurisdiction both on fact and on law it is settled law in India for many years that the Court u/s 38 is limited to points of law only and cannot entertain questions of fact or of mixed fact and law. But even then there was at least one exception which Lort Williams, J. made in favour of the view that the Court could order a new trial u/s 38 of the Act where the judgment was manifestly against the weight of evidence. His Lordship described that to be an exception to the principal of law which was described as settled. In explaining this exception the learned Judge says that it means no more than this that the Court would order a new trial only where the judgment is such that no reasonable man ought to have come to that decision and not merely because it takes a different view of the evidence. In support of this the judgments in *Behram v. Ardeshir*, ILR 27 Bom 563 and ILR 38 Cal 425, were cited.

6. The present case comes within that exception and the Bench of the Small Cause Court u/s 38 of the Act set aside the judgment and decreed the suit on the ground that the judgment was manifestly against the weight of evidence and could not be supported by evidence on record. For that reason the petitioner's argument that the Bench of the Small Cause Court in this case u/s 38 of the Act

exercised a jurisdiction not vested in law or exorcised it with material irregularity cannot succeed. On this point I shall analyse further the position later on when I come to deal with the merits of the case.

7. It will be desirable to conclude by reference to some more cases cited at the Bar. The recent Division Bench decision of this Court in *S. K. Banerjee v. Ambika Prosad Singh*, 68 Cal WN 251 made a passing reference to this question by only saying at page 253:

"The decisions on this point are somewhat conflicting but the preponderance of view seems to be in favour of the petitioner to the effect that, on a question of fact, the Full Bench, u/s 38, has no jurisdiction to differ from the learned trial Judge."

This Division Bench, however, does not refer to any cases on the point. Chakravartti, J. sitting singly in *Mrs. E.W. Evans Vs. Miss. Stella Benjamin*, expressed the opinion as follows:

"I do not consider it necessary to go into the question as to the extent of the powers of a Full Bench of the Small Cause Court at a new trial, for assuming that the powers are only revisional, the Bench certainly has jurisdiction to alter a finding if it was arrived at on a clear misunderstanding of the evidence. I do not say that misappreciation of evidence would entitle a revisional Court to interfere with findings of fact, but a misunderstanding of evidence certainly will."

8. Again a learned Single Judge Fletcher, J. in *Shamul Kissore v. Girindra Nath* 18 Cal LJ 594 lays down the proposition that where an application was made to the Full Court of the Small Cause Court for a new trial on a question of fact, it was competent for the Full Court to decide it and that the Full Court was not precluded from reviewing the findings of fact of the original court, Harington, J. sitting singly in this court in ILR 38 Cal 425 already cited came to the very distinct conclusion at page 428 as follows:

".....that a new trial may be ordered where the judgment is manifestly against the weight of the evidence."

A Division Bench of the Bombay High Court in *Sonoo Narayan Vs. Dinkar Jagannath Marathe*, holds that the powers conferred u/s 38 of the Presidency Small Cause Courts Act, were not restricted to interference on questions of law only. Bachelor, Acting Chief Justice at page 85 of the report (ILR Bom): (at p. 54 of AIR) observed as follows:

"All that the legislature has ordained is that the Small Cause Court shall have power to order a new trial, or to alter, set aside or reverse the decree or order, upon such terms as it thinks reasonable, and no limit is placed by the legislature upon the Small Cause Court's powers in the exercise of this power. There is nothing in the wording of the section, so far as I can see, which suggests that the Legislature intended to confine the powers thus generally granted to particular cases where questions of law are involved, nor can it, I think, be

accurately said that the powers of interference are only to be used where the original judgment is manifestly against the weight of the evidence. To set up a limit of this kind is in my view to impose a restriction for which the words of the Legislature afford no countenance."

9. It is essential to point out that the facts found by the trial court have not been upset by the Full Bench of the Small Cause Court in this case now before me. The facts found are that the plaintiff did some work but not all because he fell ill and had to be hospitalised. The second fact found is that one Ajay Mitra at plaintiff's request did the work of the plaintiff and the petitioners accepted that method of discharge of the plaintiff's promise to do the work. The third fact found is that the plaintiffs consolidated remuneration of Rs. 2000/- was neither claimed nor paid to Ajay Mitra who really was not paid that consolidated amount but a small sum of Rs. 230/- was paid to him. The fourth fact found is that even in the Distributors' printed brochure marked Exhibit A the petitioners themselves showed the plaintiff as well as Ajay Mitra as the photographers. The fifth fact found is that there was no written agreement between Ajay Mitra and the petitioner Corporation and both Ajay Mitra and the Director of the Film admitted in evidence that Ajay Mitra had been working on behalf of the plaintiff as a friend.

10. The trial court found these facts. The Full Bench admitted those facts but drew the inference that the plaintiff had performed his contract with the petitioners although not personally but through an agent like Ajay Mitra, but then that method of performance by an agent was accepted by the petitioners. This, I consider, the Full Bench of the Small Cause Court certainly could do. This is a question of law. This is a question of drawing legal inference from admitted facts. This also comes within the doctrine established even by the Calcutta Authorities cited above that if the judgment is against the weight of evidence and based on an entire misinterpretation of the evidence then in that case the Full Bench can upset the conclusion of the TRIAL JUDGE of the Small Cause Court.

11. Again this really is a question of law. Section 39 of the Indian Contract Act provides that when a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified by words or conduct, his acquiescence in its continuance. Now the Full Bench of the Small Cause Court in this case applied the law contained in Section 39 of the Contract Act. They came to the conclusion that although the plaintiff was ill and in that sense disabled yet the performance of the contract was not prevented because he partially did it and for the balance he did it through an agent Ajay Mitra and that the promisee in this case, namely, the petitioners did not put an end to the contract either orally or in writing but on the other hand signified their consent and acquiescence by their conduct in accepting Ajay Mitra's performance and in not entering into a separate contract for payment with him for the very same work the plaintiff was expected to do and for performing it in the name of the plaintiff along with Ajay Mitra. Indeed by Section 40 of the Contract Act it is recognised

that if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases the promisor or his representatives may employ a competent person to perform it. Now in this case it is not suggested that the contract with the plaintiff was purely a personal contract and that taking of the photographs was peculiarly personal to the plaintiff. It was not a case like a personal contract to draw a picture by a particular painter or artist. Here it, therefore, is a question of law and applicability of Sections 39 and 40 of the Contract Act. On the application of that law the Full Bench came to the conclusion that the decision of the trial Judge was wrong. This, therefore, was not a case of setting aside and disturbing the findings of fact. Facts found are accepted--but the inference drawn is different. Therefore, even on the basis of the Calcutta decisions the petitioners cannot succeed in this Rule.

12. It is unnecessary for me to decide or proceed to define the exact nature and jurisdiction of a Bench of the Small Cause Court u/s 38 of the Presidency Small Cause Courts Act. Perhaps some day on an appropriate case on appropriate facts the Supreme Court will resolve the existing conflict of views of different High Courts and the decisions of even of the same High Court on this vexed question of the nature of jurisdiction u/s 38 of the Presidency Small Cause Courts Act. The Bombay High Court apparently has taken the view that Section 38 does not limit the power only to question of law as pointed out in ILR 42 Bom 80: (AIR 1917 Bom 53). The Calcutta High Court apparently has taken a different view at least in some of the cases *M.L. Chakrabarty Vs. Olof Borin*, and *Buldeo Das Lohita Vs. Balmukund Brijmohan*, already cited. The view of the Madras High Court and specially of its Full Bench has already been noticed above. All that I need say for the purpose of this present application is that the language of Section 38 of the Presidency Small Cause Courts Act does not limit the proceeding to only questions of law. At the same time it is true that the language of section 38 of the Act is not the language of regular appeal. But even taking it as a limited appeal or even taking the view as a kind of revisional application there does not appear to be any warrant to confine this provision of Section 38 of the Act only to technical points of law. The basis of ordering a new trial is often the basis of facts either being irrelevantly introduced or wrongly kept out. It is unwise in my view to import ideas of English statutes like the English County Courts Act when the language is not exactly similar with the language of Section 38 of the Presidency Small Cause Courts Act. It is equally unwise in my view to proceed on the tacit or implicit assumption that because the Small Cause Court is not a court of record or a court from whose judgment there is no system of regular appeal, Section 38 must only be construed as limited to points of law. The significant fact of what is known as Full Bench Reference u/s 38 of the Act is that under Chapter XXXIX on the heading of "New Trial and Appeals", and Rule 4 of Rules of Practice of the Calcutta Small Cause Court framed u/s 9 of the Presidency Small Cause Courts Act it is expressly provided:

"Every application for a new trial shall be heard before two or more Judges, of whom one shall be the Chief Judge and another shall be the Judge who heard the matter in respect of which the application is made."

That clearly indicates that the trial Judge himself forms part of this Full Bench or revisional Bench u/s 38 of the Act although it is his judgment which is intended to be set aside, altered or reversed and that can only be with the idea that he is on the Bench to inform the other members of the Bench u/s 38 of the Act as to what had happened in the court below even though the Court of Small Causes may not be regarded as a court of record or a court from whose judgments there is no system of regular appeals. No doubt even under Rule 4 there is a proviso which says that in any particular case the Chief Judge may direct that any Judges other than those specified may hear the application. But that is more an exception than the Rule because the mandatory word "shall" is used in the Rule 4 quoted above making it almost obligatory to have the trial Judge as a part of the Bench u/s 38 of the Presidency Small Cause Courts Act.

13. But as I have said before that even the Calcutta decisions which take the view that Section 38 of the Presidency Small Cause Courts Act is limited only to questions of law have expressly said that where the decision is against the weight of evidence and is not justified by the facts found then Section 38 of the Act empowers the Bench concerned to upset the finding even though it may relate to facts. It is well known that law and facts are not congenitally and irreconcilably separate and they are sometimes so close that a view of the fact may always wear the garb of law and a view of the law may always wear the garb of fact.

14. Although this Rule must for these reasons fail on this main point, yet there is, however, another point on which this Rule must succeed. The learned trial Judge tried an issue : If the defendant Chandak was personally liable for the contract made between the plaintiff and the defendant Corporation. His finding on the issue was that the defendant Chandak was not personally liable because the contract was entered into between the plaintiff and the defendant Corporation and the defendant Chandak only signed the letter of contract because he was the Director. It is true that the letter itself is not signed per pro by the Company or as the Director, but the tenor of the letter and the use of the word "We" clearly indicate that defendant Chandak was only signing this letter of contract in his capacity as a Director of the Corporation and no more. Therefore, the learned trial Judge rightly came to the conclusion that the suit against the second defendant Chandak was not maintainable. Curiously enough the Full Bench of the Small Cause Court did not seem to deal with this point specifically although it was a particular issue. The form of the decree that the Full Bench ordered was to decree the suit against both the defendants, i.e. against both the petitioners, i.e. not only against the defendant Corporation with whom the contract was, but also against the defendant Chandak who signed the letter of contract. On the facts of this case when the photograph was in connection with

the defendant Corporation's film "Chalachal" there cannot be personal decree against the petitioner Chandak. That part of the judgment of the Small Cause Court Full Bench must therefore be set aside.

15. For the reasons stated above I make the Rule absolute so far as the petitioner No. 2B. Chandak is concerned and the judgment and decree passed with costs against him by the Full Bench are set aside. So far as petitioner No. 1, the Corporation, is concerned, I discharge the Rule with costs assessed at one gold mohur.