

(1913) 07 CAL CK 0038
In the Calcutta High Court

Shew Prosad Bungshidhur, Kalooram Sitaram

APPELLANT

Vs

Ram Chunder Haribux

RESPONDENT

Date of Decision : 18-07-1913

Acts Referred:

Charter Act, 1861 — Section 13
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : AIR 1914 Cal 888(2) : (1914) ILR (Cal) 323

Hon'ble Judges : Jenkins, C.J;Woodroffe, J

Bench : Division Bench

Judgement

Jenkins, C.J.—This is an appeal under Clause 15 of the Letters Patent from a decision of Mr. Justice Fletcher. By that decision the learned Judge set aside an order of Mr. Dobbin, one of the Judges of the Presidency Small Cause Court, dismissing an application under Chapter VII of the Presidency Small Cause Courts Act. The learned Judge also purported to pass what is described as a decree. It is objected at the outset that no appeal lies. It is not said that Mr. Justice Fletcher's pronouncement was not a judgment, but it is said that it is not a judgment within the meaning of Clause 15 of the Letters Patent. By that clause it is (among other things) ordained that an appeal shall lie to the High Court from the judgment of one Judge of the High Court or of one Judge of any Division Court pursuant to Section 13 of the Charter Act. By Section 13 of the Charter Act, it is provided that "subject to any laws or regulations which may be made by the Governor-General in Council, the High Court established in any Presidency under this Act may, by its own rules, provide for the exercise, by one or more Judges or by Division Courts constituted by two or more Judges of the said High Court, of the Original and Appellate jurisdiction vested in such Court, in such manner as may appear to such Court to be convenient for the due administration of justice." This section and also the scheme of the Act and of the Letters Patent issued under the Act show that there is one principal division recognised in the jurisdiction of the High Court, its Original jurisdiction and its Appellate jurisdiction. Section 13 which must, from the very nature of things and

from the subject with which it deals, have been intended to have exhaustive operation, recognises this division and no other. It is argued before us in support of the objection on behalf of the respondent that inasmuch as the jurisdiction exercised by Mr. Justice Fletcher was one u/s 115 of the CPC it was a jurisdiction by way of revision and not of appeal and so not within the scope of Clause 15 of the Letters Patent. Section 115 of the CPC which reproduces Section 622 of the former CPC provides that "The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears--(a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit." The High Court's revisional powers over decrees and orders of the Presidency Small Cause Court are sanctioned by Section 6 of the Presidency Small Cause Courts Act which provides that "The Small Cause Court shall be deemed to be a Court subject to the superintendence of the High Court of Judicature at Fort William within the meaning of the Letters Patent, dated the 28th day of December, 1865, and within the meaning of the Code of Civil Procedure; and the High Court shall have, in respect of the Small Cause Court, the same powers as it has under the twenty-fourth and twenty-fifth Victoria, Chapter 104, Section 15, in respect of Courts subject to its appellate jurisdiction." For these powers then a Presidency Small Cause Court is placed in the same position as a Court subject to the High Court's appellate jurisdiction. I think the fair reading of the Charter Act, the Letters Patent, and the Presidency Small Cause Courts Act leads to the result that the High Court has a right to interfere by way of revision, and if that interference takes the form of a judgment by a single Judge, then the High Court has the power to deal by way of an appeal with that judgment. In this connection reference may usefully be made to Clause 39 of the Letters Patent which provides for appeals to the Privy Council, and ordains that any person or persons may appeal to His Majesty in Council from any final judgment, decree or order of the High Court of Judicature at Fort William in Bengal made on appeal. There is no express reference to an order made on revision and yet it has been decided as far back as 1874 in *Girdharee Singh v. Hurday Narain Sahoo* (1874) 21 W.R. 263 that orders made in revision u/s 15 of the Charter Act are subject to appeal to His Majesty in Council under Clause 39. The same view has been expressed in *Secretary of State for India in Council v. British India Steam Navigation Company* (1911) 13 C.L.J. 90 in reference to an order u/s 115 of the Civil Procedure Code. Thus we have two instances in which the expression "judgments, decree, and orders in appeal" has been held to include judgments, decrees or orders made in revision. But the matter does not rest there: for there is an express decision on the point, with which we are now concerned, in *Chappan v. Moidin Kutti* ILR (1898) Mad. 68 where it was decided by a Full Bench of the Madras High Court that an appeal will lie under Clause 15 of the Letters Patent from an order u/s 622 of the old Code, when such an order is a judgment within the meaning of Clause 15 of the Letters

Patent. And then again, there is a decision of this Court in *Kali Charan Sirdar v. Sarat Chunder Chowdhry* ILR (1903) Cal 397 where the same view was involved though it was not made the subject of express decision. One of the counsel in that case was Mr. Sinha who appears in the present case and he assures us that he argued this very point. A reference to the Court note makes it clear to my mind that he is not mistaken in this because there is a reference in that note to *Chappan v. Moidin Kutti* ILR (1898) Mad. 68 which could only have been advance of for the purpose of an argument concerning appealability under Clause 15 from an order passed u/s 622. My confidence in the correctness of Mr. Sinha's recollection is not shaken by the fact that the authorised report unfortunately does not contain any reference to the citation of that authority. It is true that in *Hira Lal v. Bai Asi* ILR (1897) 22 Bom. 891 there is a decision which appears to run counter to those with which I have already dealt, but the judgment of Mr. Justice Ranade is guarded. If I may say so with great respect, the result at which the learned Judges arrived in that case appears to be correct, but I should have preferred to base the conclusion on the fact that there was no judgment from which to appeal. The jurisdiction exercised by Mr. Justice Fletcher in this case is one he was only authorised to exercise by virtue of a rule purporting to be made u/s 13 of the Charter Act which authorises the High Court to provide by rules for the exercise by one or more Judges of the Original and Appellate jurisdiction vested in the Court. And Clause 16 of the Letters Patent provides that the High Court; of Judicature at Fort William in Bengal shall be a Court of Appeal from the Civil Courts of the Bengal Division of the Presidency of Fort William, and from all other Courts subject to its superintendence, and shall exercise appellate jurisdiction in such cases as are subject to appeal to the said High Court by virtue of any laws or regulations now in force." It appears to me therefore that it may justly be said that the Presidency Small Cause Court is subject to this Court's appellate jurisdiction, and were we to place on the Charter Act and the Letters Patent the narrower construction for which the respondent contends this predicament would ensue that there would be no such power as that contained in Section 13 of the Charter Act, in relation to cases that come before the Court by way of revision. But it is the long-established practice of this High Court--a practice that has obtained, I believe, from its establishment to treat these revisional matters as properly allocated in accordance with rules made u/s 13. This view is further borne out by the decision of the Madras High Court in *Venkata Reddi v. Taylor* ILR (1893) Mad. 100. where Mr. Justice Muttusami Ayyar and Mr. Justice Best came to a similar conclusion in relation to cases under the Provincial Small Cause Courts Act.

2. In my opinion, therefore, we have here a judgment within the meaning of Clause 15 of the Letters Patent and it is a judgment from which an appeal lies, as provided in that clause.

3. The next question is whether the judgment of Mr. Justice Fletcher was right or not.

4. The application was one under Chapter VII of the Presidency Small Cause Court, which entitles a person to apply for an order addressed to a bailiff of the Court directing him to give possession of the property to the applicant. What was determined by Mr. Dobbin to whom the application was made was that the plaintiff had failed to establish the relationship of landlord and tenant, and he had no right to eject the defendants. So far as he decided that the relationship of landlord and tenant had not been established he made a pronouncement on a question of substantive law, and it cannot be said that in that there was any error of procedure within the meaning of Section 115 of the Code of Civil Procedure. The particular events which justify interference are first, where the Court has exercised a jurisdiction not vested in it by law; secondly, where the Court has failed to exercise a jurisdiction which is vested in it by law; and, thirdly, where the Court has acted in the exercise of its jurisdiction illegally or with material irregularity.

5. The affidavit on which the application to Mr. Justice Fletcher was made suggests that the error, if error there was, came under either the second or the third of these two heads, for it is alleged that the Court failed to exercise a jurisdiction vested in it by law, or that the Court acted in the exercise of its jurisdiction with material irregularity. Those are the only two grounds on which the application was made. I assume the Rule was issued on those grounds and the opposite party was not called upon to answer any other.

6. But how can it be fairly said that the Court failed to exercise a jurisdiction vested in it by law? It dealt with the matter; it was prepared to exercise its jurisdiction, but the learned Judge considered as a matter of law that there was no relationship of landlord and tenant. The Court was entitled to come to that conclusion even if it was erroneous, and if it did come to that conclusion it cannot be said that the Court has failed to exercise a jurisdiction vested in it by Jaw.

7. In so far as it is suggested that the Court acted in the exercise of its jurisdiction with material irregularity, I confess I am unable to follow the argument.

8. It was suggested before us in the course of argument that the Court acted in the exercise of its jurisdiction illegally, in so far as it came to an erroneous conclusion of law. That, however, is a contention which is not made in the application. But even if it had been made it could not have succeeded and I am unable to see any kind of ground on which It can be said that Mr. Dobbin acted in the exercise of his jurisdiction illegally or with material irregularity within the meaning of Section 115. It appears to me that Section 115 can only be called In aid when the failure of justice (if any) has been due to one or other of the faults of procedure indicated in that section. If there was an error committed by Mr. Dobbin, it was an error of law and not of procedure, and in my opinion Mr. Justice Fletcher had no power to interfere. This view appears to me to be in accordance with the provisions of the section and the decision of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh* I.L.R 1884 . Cal 6. ; L.R. 11 IndAp 237.

9. In my opinion, therefore, we ought to allow the appeal and set aside the judgment of Mr. Justice Fletcher. The result of that will be that Mr. Dobbin's order will be restored.

10. The appellants will have their costs of the proceedings in the High Court.

Woodroffe, J.

11. I agree in the conclusion that an appeal lies, for I think that the revisional is a form of the appellate jurisdiction.

12. Upon the second point the grounds suggested in the petition, for interference u/s 115 are, first, that the Court failed to exercise a jurisdiction vested in it in refusing to eject the defendants; and secondly, that the Court acted with material irregularity in the exercise of a jurisdiction which it did possess. The irregularity is alleged to be this that the Court held that it could not eject the defendants." It appears to me to be very clear that the order passed on revision cannot be supported on either of these grounds, and we have had a third ground of illegality placed before us to which I will later refer.

13. As regards the first ground there is no doubt that there is some variance of opinion as to the meaning of the term "jurisdiction" in Section 115. According to one view the term "jurisdiction" is here used in the ordinary sense that is a jurisdiction local, pecuniary, personal or with reference to the subject matter of the suit. According to another view, the term may mean the legal authority of a Court to do certain things namely to make a particular order in a case over which it has jurisdiction in the sense stated. According to my own view the former construction is the preferable one But it is clear that in neither view does the present case fall within the terms of the section. The Small Cause Court had jurisdiction to make the order complained of. What in fact the applicant complains of is that the decree is not that which he wanted. Then as regards the alleged irregularity, this according to the general trend of the cases applies to the commission of an error of procedure. There is none here, as the only irregularity alleged in the petition is that the Small Cause Court did not give the applicant the decree which he asked for. Neither of these grounds therefore in my opinion apply. It has therefore been suggested that there has been illegality which, it has been held, is something more than the material irregularity referred to in the section. It is to be observed here that there has been nothing in the conduct of the suit which can be said to have led the Court to that which is alleged to be a wrong conclusion, for the allegation that the Court framed and determined a wrong issue is not made out. The issue which was determined was not an improper one, namely, whether the relationship of landlord and tenant existed. What in effect is said in the argument is that the learned Judge's grounds did not support his conclusion that such relationship did not exist. The learned Judge of the Small Cause Court thought that no privity was created because there was no agreement in the lease entitling the plaintiff to eject. In so holding the learned Judge may have been right or wrong, but whatever may be the meaning

which we should attach to the term "illegality" the Privy Council decision establishes that we cannot interfere on grounds of alleged error in law or fact: *Amir Hassan Khan v. Sheo Baksh Singh* ILR (1884) Cal 6. In my opinion such cases as decided that the Court may interfere, provided the error is gross or palpable run counter to this Privy Council decision.

14. It has been argued, however, that there is another decision of the Judicial Committee, *Birj Mohun Thakur v. Rai Uma Nath Chowdhry* ILR (1892) Cal 8. L.R. 11 IndAp 237 which, it is said, goes the other way. But on an examination of that decision it is clear that is not so. This was a case in which the Court declined as the Privy Council expressly says to exercise a jurisdiction which it had, namely, to confirm the sale of a property which had been already put up to sale, and in which the Judge exercised a jurisdiction which did not belong to him, namely, the setting aside of the sale by a summary order, which having regard to the inapplicability of Sections 311-313 of the Code he was admittedly not entitled to do. There was no alternative course open to the Court but to confirm the sale, which he did not do. He did not do so because he (as was held erroneously) thought that he had an inherent power to make the order he did which in fact he had not.

15. Reference has also been made on this point to a decision: *The Maharajah of Burdwan v. Apurba Krishna Roy* 15 C.W.N. 872. This also was a case of refusal to exercise jurisdiction and all that the Court held was that it was immaterial that such refusal was made upon a misapprehension of the true effect of the statutory provision on the subject. This appears to me to be obvious. The decision rests on the well-known principle that a judge cannot assume as a matter of law that which in fact has no existence in law, and so give himself jurisdiction. He cannot by wrongly determining a question give himself jurisdiction and in the same way he cannot by a wrong determination of the meaning of the statute deprive himself of the jurisdiction which properly belongs to him, and if he refuses jurisdiction in such a case, the High Court may interfere, whether the question has been rightly or wrongly decided by him. I therefore agree in the order which has been passed.