(1926) 01 BOM CK 0021

Bombay High Court

Case No: O.C.J. Appeal No. 89 of 1925 and Suit No. 580 of 1922

The American Trading Company		APPELLANT
	Vs	
Bird and Company		RESPONDENT

Date of Decision: Jan. 27, 1926

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 35

Citation: (1926) 28 BOMLR 1283 : (1926) ILR (Bom) 430 : 97 Ind. Cas. 133

Hon'ble Judges: Norman Macleod, J; Coyajee, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Norman Macleod, C.J.
The plaintiffs, a Corporation organised under the laws of the State of Maine, in the United States of America, having its principal place of business at 25, Broad Street, Now York, filed a suit against the defendants, a mercantile firm in Bombay, on a contract, which is said in para. 3 of the plaint to be contained in certain correspondence which took place between the parties, whereby it was alleged that the plaintiffs agreed to sell the defendants, and that the defendants agreed to purchase from the plaintiffs, 190 tons haft an inch round steel bars September-October shipment ex-factory, ninety tons at 112 dollars and one hundred tons at 116 dollars per ton respectively o.i.f.c. Bombay, on the terms and conditions further and more particularly appearing in the said correspondence. A copy of the correspondence that had passed between the parties and of their solicitors is annexed to the plaint and marked D. The correspondence included no less than thirty-seven items beginning on June 8, 1920, and ending on April 21, 1921.

2. In their written statement the defendants alleged that a firm offer was made by them based on orders received by them from merchants in Bombay and Calcutta, and that the same was accepted by one A. F. Pringle on behalf of the plaintiffs, who represented to

the defendants that he had authority to accept offers on behalf of the plaintiffs. With reference to paragraph 1 of the plaint the defendants claimed that, as a result of the defendants" offer to A, F. Pringle on behalf of the plaintiffs, the plaintiffs were bound to supply to the defendants 190 tons of steel bars of July-August shipment and that the price of ninety out of the said 190 tons was to be calculated at the rate of 112 dollars per ton with half per cent, commission for the defendants, and that the price of the remaining one hundred tons was to be calculated at the rate of 116 dollars per ton less five per cent, commission for the defendants. The defendants contended that they had committed no breach of the contract set up by the plaintiffs.

3. I should have thought myself that the defendants before they filed their written statement ought to have applied to the . Judge in Chambers for better particulars of the plaintiffs" claim. It is quite impossible for any Court to be asked to spell out a contract out of thirty-seven items of correspondence which had passed between the parties, especially as no date is alleged on which the negotiations crystallised into a contract, although it is to be presumed that, as the plaintiffs alleged, the contract was to be for September-October shipment, it must have been entered into before September.

4. At the trial this issue was raised:-

Whether the correspondence referred to in para. 3 of the plaint disoloses any contract between the parties ?

5. That issue continued the embarrasments which originated in the plaint. It is difficult to see how any Court could be expected to decide an issue of that character. The learned Judge, however, dealt with certain items in the correspondence and came to the conclusion that, although during the negotiations it was true that the plaintiffs agreed to accept the rates for which the defendants had contended, on the vital question of shipment the parties never were ad idem.

6. When the case was argued before us, the appellants" counsel endeavoured to extract out of certain items of the correspondence the contract which was set up in para. 3 of the plaint, and we need say no more than that we are in entire agreement with the learned Judge that the plaintiffs failed to prove the contract on which their suit was based.

7. Then there arose a further question with regard to costs. There was a certain order made on June 7, 1922, whereby it was ordered that Arthur Smith, a witness for the defendants, should be examined de beneesse on June 9, 1922, before the Prothonotary or one of the Deputy Registrars of this Court with liberty to the plaintiffs if so advised to cross-examine the said witness, and that the evidence so to be taken should be admitted and used at the hearing of the suit saving all just exceptions. And it was ordered that the costs of and incidental to that order and of the examination should be costs in the cause,

8. Then, on October 24, 1923, another order was obtained whereby a commission was issued for the purpose of taking the examination, cross examination and re-examination

viva voce of Mr. A, F. Pringle in Bangoon, and it was ordered that the evidence taken under the commission together with Exhibits, if any, should be read and used in evidence in the suit saving all just exceptions, and that the costs of the parties therein of and incidental to the application and order, and of such examination should be costs in the cause.

9. The Judge said :-

When the case came on for hearing, no issue of that nature was raised by the defendants and they contented themselves with disputing the allegation that there was a contract as set out in paragraph 3 of the plaint which was an entirely different matter. It seems to me, therefore, that it is correct to say that these costs have been thrown away, and the question is whether they should be excepted from the general order as to the costs of the suit.

The matter appears to me to fall within the principles laid down in the case of Badische Ani in Und Soda Fabrik v. Levinssein (1885) 29 Ch.D. 366 and in the case of Reid, Hewitt and Company v. Joseph [1918] A. C. 717. The coats were incurred because the defendants raised a defence which they practically abandoned at the hearing and it would seem fair that the Court in its discretion should make them pay the costs go incurred. But it has been argued by Mr. Binning on the strength of the decision in the case of Koosen v Rose (1897) 45 W. R. 337 that as the parties consented to the costs being made costs in the cause, the Court is bound to saddle the plaintiffs with those costs. The argument is that the meaning of the words ''costs costs in the cause'' is that the costs shall follow the event, and that no doubt is true : but the real question is : What is meant by the words ''The costs shall follow the event,'' and, as is explained in the two cases I have cited, by ''costs shall follow the event'' is meant the event as regards the particular matter with reference to which those costs are incurred : and here the decision upon this point has not been arrived at because the defendants never pressed the defence so taken. It seems to me, therefore, fair to order that the costs incurred with reference to the de bene case examination of Captain A. Smith and the commission issued for the examination of Mr. A.F. Pringle shall be borne by the defendants.

10. Section 35 of the CPC says:-

(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purpose a aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such powers.

(2) Where the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing.

11. That section lays down a general rule as to the powers of the court in awarding costs, and, as it is provided that, if the Court directs that any costs shall not follow the event, the Court shall state its reasons in writing, effect was thereby given to the general rule of practice that costs shall follow the event, unless the Court decides that for some good reason the successful party shall be deprived of the whole or part of his costs.

12. Reference has been made to the decision of the House of Lords in Reid, Hewitt and Company v. Joseph[1918] A. C. 717 where it was held that " the expression " the costs shall follow the event" in the second proviso to Order LXV, Rule 1, which regulates the costs in jury actions, means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues, whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. An issue, in this sence, need not go to the whole cause of action, but includes any issue which has a direct and definite event in defeating the claim to judgment in whole or in part."

13. It has never been disputed in this Court that the Court which decides in favour of one party or the other may direct that the costs of certain issues shall be paid by the party who loses on those issues, although he may have won the action by reason of the findings on the remaining issues. The general rule of practice, that costs should follow the event, is not connected in any way with the proper construction to be put on the words " costs costs in the cause," when appearing in an order of the Court.

14. In Templeton v. Laurie ILR (1900) 26 Bom. 230 a question arose before Mr. Justice Russell with regard to the meaning of the words " costs costs in the cause " in an order which had been made before trial. His Lordship said (p. 237):-

I am of opinion that these words do not mean that these costs will follow the event, but that those coats remain to be dealt with by the Court at the hearing. In the Court of Chancery, as is well known, coats have always been in the discretion of the Court, and as a general rule costs will follow the result: see Barittell v. Wood (1861) 20 L. J. Ch. 614 Ferguson v. Wilson (4) (1866) L.R. 2Ch. 77 In Hodges v. Hodges (1877) 25 W. R. 162 Jessel, M. R. says :-" The dismissal of an action with costs ought to include all costs reserved. I will give instructions to the registrars always to insert, without any special directions, in all orders made in this branch of the court, the words, " Including costs of all applications ordered to stand over until trial, and all coats reserved to be disposed of at the trial." So that it will be for the other side to show why they should not be pub in.

15. It is perfectly clear that where no order has been made on an interlocutory application with regard to costs, or it is specially directed that the costs should be reserved, then the Judge who decides the case has complete power and discretion over the costs of such interlocutory applications. But it is different where the Judge who decides an interlocutory application makes an order as to costs, either directing that one of the parties should pay the costs, or that the costs should be costs in the cause.

16. In the case I am dealing with reference was made to the decision in Koosen v. Rose (1897) 45 W. R. 337. The action was brought to recover the sum of ï¿½150, the price of a motor carriage. The plaintiff having taken out a summons for judgment under Order XIV, Day J., at Chambers, gave the defendant leave to defend, and ordered that the costs of the application should be costs in the cause, and further directed that the case should be put into the Short Cause list, Wright J. at the trial gave judgment for the plaintiff with costs, less the amount of the costs of the proceedings under Order XIV, The Judge said that in Ms opinion the case was not one fit to be tried under Order XIV, and that in all probability if the facts ï¿½had been fully known to Day J. he would have made the plaintiff pay his own costs. The plaintiff appealed from so much of the judgment as deprived him of his costs of the application at Chambers. Lord Esher M.R. said :-

Wright, J., at the trial assumed be himself the power of altering a decision which had been come to by Day, J., at chambers with regard to the costs of an application under Order 14. This appeal is brought on the ground that he had no jurisdiction to interfere with that order as to coats. The rule must be this, that a judge cannot interfere with an order of a judge of co-ordinate jurisdiction by way of appeal or otherwise, unless some statute has expressly given him the power to do so. In my opinion that part of the judgment which deprived the plaintiff of his costs of the application under Order 14 was without jurisdiction and void, and must be overruled.

17. It was clearly considered, then, by the Master of the Rolls that Mr. Justice Day in ordering costs to be costs in the cause had directed that those costs should follow the general costs of the action, and it was not open to the Judge who heard the case to make another order depriving the plaintiff, who was entitled to the general costs of the action, of the coats of the interlocutory application under Order XIV. Mr. Justice Russell distinguished that ease, considering that it was a special case, because Order XIV specially provides that the Judge in Chambers shall deal with costs. But it is perfectly clear that in all applications in Chambers the Judge has a discretion to deal with the costs of the application. The same rule applies to applications made in Court by way of motion, When the Judge either in Chambers or on motion makes an order that the costs of the application or motion shall be costs in the cause, he makes an order that those coats should be received by the party who gets the general costs of the action, and it is not open to the Judge who hears the case to interfere with that order. We think, therefore, that the decision of Mr. Justice Russell in the case I have cited must be averruled. Although the case went to the Appeal Court in appeal against the decision of the learned Judge on the preliminary issues raised at the trial, this particular decision on the question of costs does not appear to have been dealt with by the Judges in appeal, and, therefore, we are entitled to take it for granted that that particular question was not prosecuted before the Appeal Court. The decision still remained the decision of a single Judge,

18. We think that Mr. Justice Crump failed to realise the distinction between giving effect to the rule laid down in the CPC that costs shall follow the event, unless the Judge gives reasons to the contrary in writing, and the question of construing a particular order made

by a Judge with regard to costs. When in the orders for the examination of one witness de bene case and the examination of another witness on commission, it was ordered that the costs should be costs in the cause, the Judge who heard the case had no jurisdiction to interfere with those orders whereby those costs became part of the general costs of the action to which the successful defendants were held entitled. It would have been open to the learned Judge to have held that the defendants by their conduct were not entitled to the whole of the costs of the action, and, if he had dealt with the case in that manner, then there would have been no reason to interfere. But as the case stands at present, the costs which I am now dealing with must be taken to be part of the general costs of the action, and the defendants are entitled to them. To that extent the cross-objections must be upheld. The appeal is dismissed and the cross-objections are allowed with costs in both cases.

Coyajee, J.

19. I agree.