(1925) 06 CAL CK 0009

Calcutta High Court

Case No: None

Chattu Lal Misser and Others		APPELLANT
	Vs	
Marwari Commercial Bank Ltd. and Others		RESPONDENT

Date of Decision: June 8, 1925

Citation: 96 Ind. Cas. 839

Hon'ble Judges: Lancelot Sanderson, C.J; Buckland, J

Bench: Division Bench

Judgement

Lancelot Sanderson, C.J.
This is an appeal by Chattu Lal Misser against two orders of the 8th and the 27th of August, 1924. The order of the 27th of August, 1924 is the material order. It runs as follows:

It is ordered in supersession of the order made in this suit and dated the eighth day of August instant that the defendants do pursuant to the said order on or before the twelfth, day of September next furnish security to the extent of eight lacs to the satisfaction of the Registrar of this Court in unencumbered Immovable property in Calcutta or in the town of Howrah; And it is further ordered that on such security being given within the time aforesaid the defendants shall have leave: to defend this suit; And it is further ordered that the said Registrar be at liberty to extend the time for furnishing such security as aforesaid on good cause being shown therefor: And it is further ordered that in default of the defendants furnishing security as aforesaid within the time aforesaid or within such, further time as may be allowed by the said Registrar as aforesaid a decree shall be drawn up in this suit against the defendants for the sum of rupees sixty-four lacs ninety thousand and nine hundred annas seven and pies eleven with the costs of this suit.

2. The suit was brought by the Marwari Commercial Bank, Ltd., which was in liquidation (the Liquidator being one Ranjit Roy who was appointed in April, 1923, against Chattu Lal Misser, Bisseswar Lal Halwasiya, Luchmi Narain Shroff and

Onkarmull Shroff, who were alleged to be members of a firm called Binayek Misser & Co. It wag based upon three promissory-notes, dated the 23rd of May, 1922, the 20th of July, 1922 and the 5th of September, 1922, alleged to have been executed by the defendant firm in favour of the plaintiff Bank. The total amount claimed for principal and interest up to June, 1924, was Rs. 61,90.900.

3. It was alleged that the defendant firm had deposited 3,08,581 shares in the Calcutta Industrial Bank, Ltd., as security for the amount due on the promissory-notes. The plaint was filed on the, 18th of June, 1921. On the 22nd of July, 1924, a summons was issued in accordance with the provisions of Chap. XXIIIA of the Rules of the High Court. Rule 3 of that Chapter provides: "Where the defendant in any suit which is within the terms of Rule 1 has entered appearance the plaintiff may, as regards any claim which is within the terms of Rule 1, on affidavit made by himself or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed, if any, and stating that in his belief there is no defence to the claim, apply to the Judge for final judgment for the amount claimed, together with interest if any, or for the recovery of the land (with, or without rent or mesne profits) as the case may be and costs:

Provided that as against any defendant who has filed a written statement such application shall not be permissible unless the summons is taken out as in Rule 4 mentioned within ten days after the entering of appearance.

4. The first point, which was taken on the hearing of this appeal, was that appearance was entered by the defendant, Chattu Lal Misser in person on the 11th of July, 1924, and the written statement was filed on the 21st of July, 1924; and, that, as the summons was not issued until the 22nd of July, 1924, the summons was out of time as it had not been issued within ten days of the appearance as provided by Rule 3.

5. It appears, however, that on the 9th of July Messrs, Manuel, Agarwalla & Co., who were acting on behalf of Chattu Lal Misser wrote to the attorney''s for the plaintiff'' Bank as follows:

We understand that you have filed this suit against Pandit Chattu Lal Misser and others. If so, please supply us with a copy of the plaint on the usual terms. We have received instructions from Pandit Chattu Lal Misser to enter appearance on his behalf.

6. The plaintiffs attorneys, having received that letter, were entitled to expect that they would receive notice of the entering of appearance when it was effected by Messrs. Manuel, Agarwalla & Co., for it is provided by Ch. VIII, Rule 18, that "The attorney of a defendant, or a defendant appearing in person shall forthwith give notice of his having entered appearance to the plaintiff''s attorney, or if the plaintiff sues in person, to the plaintiff himself."

7. In fact, the plaintiffs'' attorneys asked Messrs. Manuel, Agarwalla & Co., if they had entered appearance, but it is alleged that they received no reply; and, on the 11th of July, as I have already said, Chattu Lal Misser entered appearance in person, but he did not give any notice to the plaintiffs or to their attorneys of his having entered appearance.

8. On the 21st of July Messrs. G.C. Chunder & Co. acting as attorneys for Chattu Lal Misser wrote to the plaintiffs'' attorneys as follows:

Please note that we have this day entered appearance to this suit on behalf of the defendant Chattu Lal Misser who, we understand, appeared in person some time ago

9. In point of fact, Messrs. G.G. Chunder & Co. did enter appearance on that day for the defendant Chattu Lal Misser and they filed the defendant''s written statement on the same day.

10. I am not in a position to say whether the course, which was adopted in this case, was taken deliberately with the object of preventing the plaintiffs taking proceedings under Ch. XIIIA for summary judgment within time; but if that was the object, in my judgment, it failed.

11. No doubt, if the entering of appearance is to be taken as having been made on the 11th of July, 1924, the plaintiffs were out of time with their summons which was issued on the 22nd of July. But, in my, judgment, the defendant''s attorneys'' by entering appearance again on behalf of the defendant on the 21st of July, 1924, provided another opportunity for the plaintiffs to take proceedings under Ch. XIII A.

12. It was argued by the learned Counsel on behalf of the appellant that the course adopted by Messrs. G.C. Chunder & Co. on the 21st of July was not an entering of appearance but was merely a request to the Court''s officer to record Messrs. G.C. Chunder & Co. as attorneys for the defendant Chattu Lal Misser. In my judgment this cannot be so regarded. The endorsement on the warrant was in these terms:

Please enter an appearance in our name on behalf of the defendant Chattu Lal Misser in this suit, Sd. G.C. Chunder, Attorneys-at-law.

13. If the only object of Messrs. G.C. Chunder & Co., had been to file the warrant of attorney on behalf of the defendant firm, the proper way of doing it would have been to file the warrant and endorse it in the following terms:

To the Registrar. Sir, please file this warrant of attorney on behalf of the defendant firm.

14. Instead of that course being adopted, as I have already pointed out, Messrs. G.C. Chunder & Co., purported to enter appearance on behalf of the defendant.

15. Messrs. G.C. Chunder A Co., haying entered appearance on the 21st of July, 1924, I am of opinion that the summons which, was taken out on the 22nd of July was not out of time even though the written statement of the defendant had been filed and the terms of the proviso in Ch. XIIIA, Rule 3 were complied with.

16. The next point urged on behalf of the appellant was that the affidavit in support of the summons was not sufficient. It appears from the rule, which I have already read, that the affidavit in support of the summons should be made out by the plain till or by any other person who can swear positively to the facts verifying the cause of action and the amount claimed.

17. I am not prepared to hold that the affidavit of the liquidator, affirmed on the 22nd of July, 1924, by itself was sufficient to comply with the rule. But in my judgment, the defendant Chattu Lal Misser himself supplied the materials which were necessary to make the case for the plaintiffs complete.

18. By the written statement, which was filed, he admitted that the promissory-notes were executed by the defendant firm. The written statement contained a further admission that Chattu Lal Misser was a member of the firm.

19. It is true that in, the written statement there was a denial that any consideration for the promissory-notes was received by the firm or any member of it, but certain correspondence was exhibited to the affidavit of the Liquidator, dated the 22nd of July, 1924. This correspondence was between the Liquidator and Messrs. Manuel, Agarwalla & Co", who were then acting on behalf of the defendant firm and it took place in April, June, July and November 1923. The Liquidator on behalf of the plaintiff Bank was demanding payment of the promissory-notes and, in reply to such demands Messrs. Manuel, Agarwalla and Co., wrote two letters, dated the 3rd of July, 1923, and the 9th of November, 1923.

20. The letter of the 3rd of July was as follows:

"R.S. V. Aiyar, Esq.,

R. Ray, Esq.,

Joint Liquidators,

Clts. Messrs. Binayek Misser & Co. Dear Sirs,

21. Your letter, dated the 19th June last, to our clients has been handed over to us with instructions to state in reply, as follows:

As we had been meeting you in person from time to time we did not reply to you in Writing about the adjustment of the over-draft account with the Bank. You know the actual position and you know v-that our clients have got to receive a much larger amount than their over-draft from the Calcutta Industrial Bank, Ltd., in respect of the shares which you hold as security against such over-draft. The Liquidators of the

said Bank requested you and as a matter of fact according to*your desire agreed to authorise you to set off the dividend that our clients have to receive in respect of the said Calcutta Industrial Bank, Ltd., shares against the said overdraft. Our clients are still willing to authorise you to receive payment of all monies that will be paid from time to time by the Liquidators appointed by the Court in the matter of the Calcutta Industrial Bank, Ltd. You know if certain untoward events had not happened there would not have been any difficulty in payment of the over-draft and you would perhaps by now have got payment, but circumstances made, it otherwise and we are afraid it may take some time to get the dividend on our clients holding in the Calcutta Industrial Bank shares and consequently there will be delay in paying you. Under the circumstances we are sure that you will consider the position and will not rush through anything.

22. The Official Liquidator has been appointed of the Calcutta Industrial Bank and as soon as he has ascertained the position our client may, if necessary, make an application to Court for permission to settle the accounts either by payment of dividends direct to you by Official Liquidator or by making some other arrangement in respect of the said shares held by you as security.

Yours faithfully,

Manuel, Agarwalla & Co.

23. And, the letter of the 9th of November was as follows:

The Liquidator, Marwari Commerical Bank, Limited (in liquidation).

Dear Sir,

24. Your notice No. 587 has been handed over to us by Messrs. Binayek Misser and Company with instructions to state in reply as follows:

Our clients have pointed out to you from time to time the scheme by which you can realise the amount due from them to the Bank. The scheme was put forward in; reply to your demand in June and July for settlement of accounts and a copy thereof was sent to your Solicitors Messrs. Leslie & Hinds in reply to their letter of the 3rd of July, 1923, as an enclosure to our letter of the 4th, Our clients state that they are willing to authorise you to receive payment direct from the Official Liquidator of all dividends and other payments that may be made by him in respect of our clients holding of the Calcutta Industrial Bank shares which are held by you as security. By that process your money can be realized without any difficulty and our clients also will be relieved of great anxiety.

25. As Rai Bahadur Halswsiya is away from town, our clients would request you to get the meeting adjourned for the present for about a fortnight.

26. If there be any bar to the course suggested you can make an application to that effect in Court or our clients can request the Liquidator to the Calcutta Industrial

Bank, Ltd., to make, the necessary application, or if you so desire our clients themselves can make an application to get the necessary order from Court. Under the circumstances our clients hope you will consider this proposal before you pass any other resolution.

Yours faithfully,

Manuel, Agarwalla & Co."

27. In view of the terms of these letters the conclusion is inevitable, in, my judgment, that the plea that there was no consideration for the promissory-notes is without any foundation and that it was merely inserted in the written statement for the purpose of delay. It, therefore, appears that the firm executed the promissory-notes; the defendant, Chattu Lal, Misser was, a member of the firm, the plaintiff Bank made advance to the firm, as stated in the plaint, and as the defendants'' attorneys admitted in the letters to which I have referred, the promissory-notes Were held by the plaintiff Bank and were exhibited to the plaint. It, therefore, seems to me that, so far as the evidence was concerned, the plaintiffs'' case was complete.

28. One other matter remains to be considered. The written statement alleged that the plaintiff Bank was a mere benamidar of the Calcutta Industrial Bank, But this was never suggested at the time the correspondence took place in 1923; and it, therefore, appears as if it were a mere afterthought and was ingested for the purpose of delay. In short, in my judgment, there seems, to be no really triable issue in this case, and I am, therefore, of opinion that the learned Judge''s order should be upheld. He gave the defendants leave to defend on the conditions named in the order and, in default of the conditions being performed, directed that a decree should be made for the amount claimed.

29. The learned Counsel who appeared for the plaintiff Bank took a preliminary point that no appeal would lie from the order of my learned brother Mr. Justice C.C. Ghose. My learned brother and I decided that an appeal would lie, but we postponed giving our reasons. The learned Counsel referred to the case of Sukhlal Chundermull v. Eastern Bank, Ltd. 31 Ind. Cas. 238 : 42 C. 735 : 22 C.L.J. 41. In my judgment that is no authority for the proposition which the learned Counsel was urging in this appeal. In the first place it is to be noticed that the suit was brought under Order XXXVII of the C.P.C. and that the decision was dealing with the provisions of the Code and not with the rules of the Court, upon which this matter depends. In the second place, it should be noticed that the matter which Mr. Justice Chitty was dealing with was an application by the defendant under Order XXXVII of the Code for leave to appear and defend the suit, and the order which the learned Judge made was as follows:

Upon the defendant within a fortnight from the date hereof giving security to the satisfaction of the Registrar of this Court to the extent of the plaintiff Bank''s claim in

this suit, he be at liberty to appear in and defend this suit.

30. It was held that there was no appeal from such an order.

31. I have already read the order which the learned Judge made in this case. It is obvious that the terms of it are materially different from the terms of the order which was made by Mr. Justice Chitty. The order in this case, was that upon security for a certain amount being given within a certain time, the defendants should have leave to defend, but the order proceeded that in default of the defendants giving security as aforesaid within, the time aforesaid, a decree was to be drawn up.

32. The effect of that order was that if the security was not given, as directed, a decree would be drawn up as a matter of course without any further application to the learned Judge: In my opinion, it was a judgment finally deciding that the defendant was not to be allowed to defend the suit unless he complied with the conditions contained in the order. It further decided that, if he did not comply with the condition, a decree should be drawn up. For these reasons, in my opinion, the decision of the learned Judge was a "judgment" within the meaning of Clause 15 of the Letters Patent and that an appeal did lie from his judgment to this Court. For the above-mentioned reasons I am of opinion that this appeal should be dismissed with costs (one set) payable to the plaintiff Bank.

APPEAL NO. 161.

33. The appellant Bisseswar Lal Halwasiya desires to withdraw the appeal. The appeal is allowed to be withdrawn. He must pay the costs of the appeal (one set) to the plaintiff Bank.

34. It was agreed upon terms settled by the learned Counsel representing the plaintiff and Onkarmull Shroff that Onkarmull Shroff, who appeared in both appeals, having denied that he was a member of the firm of Binayek Misser & Co., should have, unconditional leave to defend. There will, therefore, be an order that Onkarmull Shroff do have unconditional leave to defend the suit.

Buckland, J.

35. This is an appeal from orders made on an application under Ch. XIII A of the Rules of this Court for summary judgment.

36. The suit was to recover Rs. 64,90,900 7-11 on promissory-notes executed by Binayek Misser & Co., in favour of the plaintiff Bank.

37. The defendants are alleged to be partners in that firm.

38. The appellant entered appearance in person on the 11th of July, 1924.

39. On the 21st of July, 1924, his present attorneys also entered appearance and filed a written statement on his behalf.

40. On the 22nd of July a summons under Chap. XIIIA was taken out by the plaintiff Bank supported by the affidavit of. the Liquidator to which certain correspondence between him and the attorneys for Binayek Misser & Co. was annexed. The appellant and his co-defendants filed counter-affidavits and the Liquidator filed an affidavit in reply and these with the written statement of the appellants were the materials before the learned Judge who on the 8th of August, 1924, ordered that the defendants should furnish security to an amount to be fixed by the Registrar of this Court within fourteen days from the date when the Registrar fixed such amount. The learned Judge further made provision for the subsequent proceedings in the suit and ordered that in default of the defendants furnishing security within the time required the Liquidator should be at liberty to mention the matter before the Court for further directions.

41. On the 27th of August the matter was mentioned and the amount of the security fixed by the Registrar was modified, and the learned Judge made the second of the two orders appealed against requiring the defendants to give security to the satisfaction of the Registrar to the extent of 8 lacs of rupees on or before the 12th of September and on such security being given they would have leave to defend the suit, and in default of the security it was provided that a decree should be drawn up against the defendants for the sum claimed with costs on scale No. 1.

42. It is against this order that Chattu Lal Misser and Bisseswar Lal Halwasiya appealed. The latter has abandoned his appeal and as regards the respondent Onkarmull Shroff who has appeared on both appeals, it has been agreed that he, who denies having been a member of the firm of Binayek Misser, shall have unconditional leave to defend. Hence there remains only Chattu Lal Missex''s appeal to deal with.

43. For the respondent Company it is argued that the order is not appealable and reference is made to Sukhlal Ckundermull v. Eastern Batik Ltd. 31 Ind. Cas. 238 : 42 C. 735 : 22 C.L.J. 41. That was an appeal against an order giving the defendant leave to defend a suit filed under Order XXXVII of the C.P.C. conditionally upon his giving security. It was held that it was not a "judgment"--there was no adjudication, on the claim--and, according to the well known practice of the Court such suits filed under that order of the Code,, whether or not leave to defend is granted, are set down for hearing on a subsequent date.

44. It has been argued that this order is similar though made under Chap. XIIIA, rule 91. But, that is not so. An order cannot be taken as having been made under one rate and therefore, necessarily excluding reference to others. The conditional leave to defend is referable to Rule 9, the judgment in default to Rule 3. The latter involves an adjudication on the claim and makes the order a final judgment within the meaning of Clause 15 of the Letters Patent. Without this, were such an order made under Chap. XIIIA, I do not know that I should take the same view, but as it is, nothing further remained to be done and in default of security a decree would be

drawn up as a matter of course.

45. For the appellant two points have been argued: First, that the application of ends against the proviso to Rule 3, and is out of time, and next that the application is not in the form required by Rule 3. The proviso to Rule 3 lays it down in effect that once a defendant has entered appearance the plaintiff may take out a summons, (a) without any limit of time if no written statement has been filed, (b), within 10 days of appearance being entered if a written statement has been filed.

46. If the 11th July is taken as the date from which the 10 days ran the summons was out of time. But the appellant''s attorneys gave the plaintiff another opportunity by again entering appearance on the 21st July. It was quite unnecessary and filing a warrant of attorney would have sufficed, but having adopted such a course, the appellant cannot fairly be heard to say that time ran from the 11th July and not from the date of the later appearance. The fact remains that appearance was entered on the 21st July and the respondents are entitled to rest their case upon it.

47. As regards the 2nd point argued, I am not prepared to say that the application as presented to the Court in the first instance complied with the rules as to the form of affidavit required. But at that time the appellant had not the courage of his later convictions. He might have declined to answer the affidavit and argued that the summons should be dismissed in limine, and very likely would have done so successfully. He and his co-defendants, however, made ample amends for the defects of the Liquidator''s affidavit and all lacunae were fully supplied, and lest more should be required the appellant has succeeded in establishing his own want of bona fides by an affidavit more conspicuous for concealment than for revelation of facts. The learned Judge had ample materials before him on which to found his order, and to allow this appeal on the ground that the Liquidator''s affidavit in support of the summons does not confirm to the rules would be to subordinate substance and justice to form and technicality.

48. I concur in the order to be made.