(1913) 15 BOMLR 126 : 19 Ind. Cas. 95

Bombay High Court

Case No: O.C.J. Suit No. 830 of 1912

Jayantilal Ramdas		APPELLANT
	Vs	
Nagnath Shambhuappa Kathley		RESPONDENT

Date of Decision: Dec. 12, 1912

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 8 Rule 10

Citation: (1913) 15 BOMLR 126 : 19 Ind. Cas. 95

Hon'ble Judges: Beaman, J

Bench: Single Bench

Judgement

Beaman, J.

The plaintiff sues to recover a sum of money alleged to have been paid to the defendants by mistake. The plaintiff, who is the grandson of the deceased Chunilal, is a minor suing by his guardian ad litem. The defendants are the heirs and representatives of Shambhuappa who was a partner of the deceased Chunilal. The accounts were made up from time to time and finally the amount found due to Shambhuappa was settled in December 1911 and mutual releases given and taken. A sum of some Rs. 4,000 was then paid by cross cheques by the plaintiff to the defendants. In April 1912, on going over the accounts, the guardian''s son pointed out to him that a sum of Rs. 11,000 odd, for which the defendants were liable in proportion to their interest in the partnership, had been omitted; and it is to recover the defendant''s four anna share in that liability by mistake overpaid to them that the plaintiff has filed this suit.

2. The suit was filed in July 1912 and the summons was made returnable on the nth of November. No written statement was put in, but the plaintiff did not move under Rule 106 of the High Court Rules to have the suit set down for an ex parte decree. It, therefore, came on in the usual course late in the afternoon of Tuesday. Mr. Bhandarkar was instructed to apply for an adjournment. Mr. Desai for the plaintiff opposed. The Court saw

no reason whatever to grant any further adjournment in the matter. In the ordinary course, Mr. Bhandarkar would then have withdrawn from the suit and the case would have proceeded ex parte. But I suppose with the idea of tiding over the short time remaining at the Court''s disposal that day and so getting the benefit of the intervening Wednesday, the defendants'' attorneys instructed a senior counsel Mr. Wadia, to join Mr. Bhandarkar in defending the suit. Mr. Wadia, accordingly, raised issues for trial. Mr. Desai objected, saying that under the circumstances the defendants were not entitled to defend the suit. After carefully considering High Court Rules 105 and 106, it seemed to me very difficult to say that a defendant, situated as these defendants were, was precluded by anything in these Rules from defending the suit so to speak ex tempore. It is true that but for the lateness of the hour and the fact of the next day being a dies non so far as this Court is concerned, those tactics would not have been adopted. The result was that the plaintiff, according to what I am told is the Bar etiquette, also had to hurriedly brief another counsel Mr. Kanga. Thus all parties were put to quite unnecessary additional expense for no other purpose, that I can discover, than a factious opposition in the hope of gaining time which the Court had just formally refused the defendants. It is curious to read, in connection with Rules 105 and 106, Order VIII, Rule 10, of the Civil Procedure Code, which provides that where a written statement has not been put in, the Court may pronounce judgments (presumably summarily) against the , defendant. Taking the Rule as it stands, it appears to absolve the plaintiff from the necessity of proving his case at all. Judgment is to go against the defendant by way of a penalty , for not having put in his written statement. I have never had occasion in my experience to make use of that order and I doubt very much whether it is or ever has been the practice on the Original Side of this Court to decree the plaintiff''s suit, or in other words to pronounce judgment against the defendant, without in the first place insisting upon the plaintiff formally proving his claim. But if the plaintiff is allowed to prove his claim, that must be done by examining witnesses, and I do not see how the defendant in those circumstances can be forbidden the right of cross-examination. It appears to me that it would be very desirable that some addition should be made to Rule 105 corresponding with the marginal note which is always made upon the defendant''s summons. I confess that I can see no reason whatever in principle, nor can I discern any practical utility in support of Rule 106. I cannot conceive why the Prothonotary should not suo motu set down all cases falling within the scope and intention of Rule 105 for ex parte decrees on the returnable date of the summons without putting the plaintiffs to the great additional expense of instructing counsel to formally move to have that done. That means one more additional hearing and an entirely unnecessary delay and expense to attain no useful object whatever that I can discover.

3. In the present case it appears to me that the defendants, if left to themselves, would have been perfectly reasonabls, and have in their letter, Ex. F in the case, evinced a correct and honest attitude. Unfortunately, however, instead of acting up to that letter, they appear to have consulted attorneys in Bombay with the almost inevitable result that they were advised to defend the suit. A perusal of the correspondence shows that the

defendants had never contemplated, at any rate up to Tuesday evening, repudiating liability for the items said to have been omitted by mistake from the accounts. But between the rising of the Court on Tuesday and its sitting this morning I suppose counsel consulted, and as a forelorn hope embarked on cross-examination, the object of which seems to be to show that the deceased Shambhuappa had in or thereabouts disclaimed all responsibility for the expenditure which formed almost the whole of the present claim. In the circumstances of the case-I do not attach any great importance to that suggestion. The guardian, who has no interest of his own to serve, and appears to be a perfectly straightforward and honest person, has sworn that the items afterwards unfortunately omitted were shown in the first account, submitted to Shambhuappa, and that no exception whatever was taken to any one of them. In the second account unfortunately these items were omitted by mistake. There is no evidence available to support the defence fore-shadowed in the belated cross-examination of the guardian. Indeed but for the unusual course adopted by the defendants" attorneys late on Tuesday evening the case would have undoubtedly been disposed of ex parte in less than half an hour. The same result is now reached at an additional outlay of time and money to all parties concerned ; and I must own that I prefer the usual procedure that which, with very rare exceptions of which this is a typical one, has always been followed since I presided over this Court. I have not the slightest doubt of the truth and bona fides of the plaintiffs claim, and I must, therefore, now decree the suit in full, with one modification only, viz., that I see no reason to allow him 9 per cent, interest on the amount.

4. There must be a decree for the plaintiff for Rs. 2,996-2-6 with nterest at 6 per cent, per annum from the 2nd of May 1912 to judgment.

5. Costs and interest on judgment at 6 per cent, per annum.