Jamshedji Naoroji Gamadia Vs Sorabji Naoroji Gamadia

Court: Bombay High Court

Date of Decision: April 8, 1920

Acts Referred: Specific Relief Act, 1877 â€" Section 43

Citation: AIR 1921 Bom 414 : (1923) 25 BOMLR 1137

Hon'ble Judges: Marten, J; John Heaton, J

Bench: Division Bench

Judgement

Marten, J.
We have three applications before us, viz., (1) an application by respondent No. 1 to approve the draft minutes embodying the

consent and other terms alleged to have been arrived at on the hearing of this appeal on Friday September 19, 1919; (2) a notice of motion by the

second respondent dated October 7, 1919, asking for a declaration that the arrangement, if any, arrived at to take a consent decree, is not binding

on him, and that the hearing of the appeal be proceeded with, and that if necessary he, the applicant, be made a party appellant; and (3) a notice of

motion by the appellants dated October 9, 1919, asking that their consent may be excluded from the proposed decree, and that the said decree be

not certified to be for the benefit of the minor respondent No. 10. [After stating the facts his Lordship proceeded:]

2. It is certainly curious to find an appeal presented on the ground that the trial Judge has given the appellants too much, viz., absolute interests, and

that he ought to have given them less, viz., protected and determinate life interests. But it was stated by their counsel that this was due partly to filial

piety and partly to family disputes over the rights of residence.

3. The procedure adopted in the memorandum of appeal was also curious; and must be mentioned having regard to what subsequently happened.

It describes the appellants as two of the beneficiaries, so presumably the appeal was presented by them in their personal capacity and not as

executors. That being so, respondent No. 2 should have been made a respondent in his representative as well as in his personal capacity. The

course actually taken of joining the executors as respondents Nos. 2, 3 and 4 and of joining respondent No. 2 over again as respondent No. 5 in

his own right was in my judgment incorrect procedure. As was said by Sir Lawrence Jenkins in Rustomji v. Sheth Purshotamdas I.L.R (1901)

Bom. 606 : 3 Bom. L.R. 227:

This doctrine in founded on the elementary rule of procedure, too often disregarded in this country, that the same individual, even in different

capacities, cannot be both a plaintiff and a defendant to one and the same action. While, however, at Common Law this rule led to the result we

have indicated, the Courts of Equity surmounted this difficulty. Though they observed strictly the rule that a man cannot be both plaintiff and

defendant, they did not allow it to stand in the way of doing justice between the parties; for provided all interested were before the Court either as

plaintiffs or as defendants, they adjusted and determined their rights. This is aptly exemplified in Luke v. South Kensington Hotel Company (1879)

11 Ch. D. 121.

So here the same persons (viz., the appellants) could not be both appellants and respondents. Nor could the same person (viz., respondent No. 2)

appear as two persons, viz., respondents Nos. 2 and 5. Nor could the same person appear by two different sets of counsel, the one may be to

argue white and the other to argue black. It is true that in the trial Court the Advocate General, according to the learned Judge''s notes, appeared

for defendants Nos. 1, 2 and 3 as executors and Mr. Weldon appeared for the same three defendants as individuals, This, however, could easily

have been rectified by letting one of these defendants represent the executors, and leaving the other two defendants to argue for their individual

rights. In that case the Advocate General could have appeared for the former, and Mr. Weldon for the two latter defendants. That, I think, would

have been the correct procedure, and I do not think that what actually took place can be reconciled with what Sir Lawrence Jenkins has said. In

ordinary cases, there is often one independent executor, and in that event it is best to leave him to represent the executors before the Court, and to

allow the beneficiary executors to argue for their individual rights, unless perhaps there are many others in the same interest. The great point is to

see that there is some one to represent all possible conflicting interests. I may refer to Marcy''s Forms of Originating Summons as illustrating what I

mean. In Forms 9 and 21 some trustees will be found as plaintiffs and the others as defendants.

4. I deal with this at some length because I have been often troubled in Bombay with this disregard of what Sir Law-rence Jenkins calls an

'''elementary rule of procedure.'''' One may perhaps be permitted to express the lope that if, as seems likely, this case should reach the Privy

Council, their Lordships would be pleased to lay down the correct practice to be followed here.

[After discussing matters not pertinent to this report his Lordship proceeded:]

5. I may now come to the applications themselves. The main application is the notice of motion of October 7. It is based on the grounds: (1) that

respondent No. 2 instructed his solicitors to fight the case out, and that he was not present in Court and never consented to the terms; (2) that

counsel for respondent No. 2 was not informed of these instructions, and gave his consent under the impression that the appellants whom he

personally consulted had authority to act for the second respondent; (3) that respondent No. 8 was not represented by counsel at all and never

gave her consent; and (4) that the interests of unborn issue; if not of the minor, were not adequately represented before the Court, and that the

terms ought not to be sanctioned by the Court.

6. Now, in considering this matter, it must be borne in mind that no decree has yet been passed and entered. We have not even yet approved the

draft minutes of the proposed decree, and therefore the position is a very different one from what would be the case if the decree had been passed

and entered. If a decree has once been passed and entered, a fresh action is usually necessary to have the compromise set aside : see Ainsworth

Wilding [1896] 1 Ch. 673. On the other hand, before that is done, there is, I think, power for the Court to refuse to put its seal on what has been

done under some misapprehension as to the true state of affairs, I am not attempting to define the Court''s powers in this respect, but I may refer to

Holt v. Jesse (1876) 3 Ch. D. 177 as an illustration of what a Court may do in certain cases. There, Vice Chancellor Malins says (p. 184):

Where there has been a misapprehension on the part of counsel, where the case has been complicated or difficult, where either the materials have

not been sufficiently before the counsel, or being before him, he does not fully comprehend them, or may be excused for not having comprehended

them, and consent has been given prejudicial to the client, I should entirely agree with the observation of the Master of the Rolls : If the counsel

says, I made a concession under a misapprehension, it never has been, and I trust it never will be, the course of the Court to bind the counsel to

that mistake.'' I say precisely the same thing in precisely the same terms, that if consent has been given under a misapprehension, or from a

misstatement, or want of materials, and if all the information which counsel ought to have when he gives a consent is not before him, it never has

been the role of this Court, and I also trust it never will be the rule of this Court, that the unfortunate client should be bound by such

misapprehension.

7. The above passages were cited with approval by the Court of Appeal in Hickman v Berens [1895] 2 Ch. 638 and the principle followed (see

pp. 646 and 648). So, too, in Harvey v. Croydon Union Rural Sanitary Authority [1902] A.C. 465, Lord Justice Cotton says (p. 255):

If a consent is given through error or mistake, there can be no doubt that the Court will allow it to be withdrawn if the order has not been drawn

up.

8. Then in Neale v. Gordon Lennox (1889) 26 Ch. D. 249. Lord Lindley said at p. 478:

Before that order is drawn up one of the patties interested discovers that it is made without her consent at all, and not only without her consent, but

in spite of her express instruction. Now, I venture to say that if that had happened in the Chancery Division, with the practice of which I am

familiar, it would have been a matter of course for the learned judge who made the order to stay the drawing of it up if he had been informed that

the Court had inadvertently made the order upon the assumption that the parties were consenting when in fact they did not consent. I cannot

imagine that it would cross his mind for a moment that anything ought to be done except to stay the drawing up of that order.

9. Now, here, speaking for myself, I was prepared to approve the consent terms on the basis that in effect it was a family arrangement agreed to

by all the adult parties, and acquiesced in by counsel for the minor. But it has now turned out that respondents No. 3 and No. 8 do not give their

consent. Further, Mr. Coltman has stated in effect that he agreed to these terms under a misapprehension of fact, viz., that the appellants had the

authority of respondent No. 2 to agree to the terms on his behalf. He says: ""All I did was with the express authority of the solicitors and of the two

appellants, my impression being that the two appellants had authority of respondent No. 2 to come to any settlement they thought advisible. I

expressly consulted appellants Nos. 1 and 2 in person."" I entirely accept that statement of counsel, and I distinctly recollect that Mr. Coltman was

particularly careful to consult his professional and lay clients at different stages of the proceedings, though of course I did not know whether all the

lay clients were then in Court. Further, the evidence of respondent No. 2 and his solicitor is that the last instructions given were to fight the case

out. It may be that this is somewhat at variance with the fact that no counsel was originally briefed for respondent No. 2 in his personal capacity.

Counsel was only briefed for him in his representative capacity. But that may have something to do with costs, for in the latter capacity he would

be almost sure of his costs whereas if in his private capacity he supported the appellants and failed, he might be left to bear his own costs.

10. It was further stated or suggested that respondent No. 2''s solicitors (who were also the appellants'' solicitors) misunderstood the effect of the

striking out of the names of respondents Nos. 3, 4 and 5, and that they did not appreciate that respondent No. 2 would thenceforth appear in his

representative capacity, as well as in his personal capacity. It was accordingly suggested that there was no one before the Court to represent the

executors and trustees as such, and that accordingly unborn issue, whose interests u/s 43 of the Specific Relief Act would normally be represented

by the trustees, were not represented before the Court. So, too, under the English practice the trustees would represent the interest of unborn issue

in a case like the present: see In re Whiting''s Settlement: Whiting v. Be Rutzen [1905] 1 Ch. 96. As to this latter argument, the interests of the

unborn issue were the same as those of the minor respondent No. 10, and one would expect the argument, if any, to come from respondent No.

10. In an ordinary case it would be simple to get over the difficulty by certifying the decree to be for the benefit of unborn issue as well as the

minors, provided we were satisfied that the trustees were before the Court and that there were independent counsel to put forward the rival

contentions. Similarly, as regards the difficulty that respondent No. 8 was not originally represented by counsel, that of course could have been got

over by producing a consent brief on her behalf.

11. But as the facts are so very different from what we imagined them to be at the hearing of the appeal, I feel this is a case where it would not be

proper for us to certify the terms as being for the benefit of the minors and unborn issue. Further, as all the parties are standing on their strict legal

rights, it seems to me that the fact that respondent No. 8 was not represented by counsel is a further objection. Only counsel or the party in person

had a right of audience before us, and as neither of those facts happened, the consent terms would appear to be defective. It is true that her

solicitors were the same solicitors as appeared for her husband appellant No. 2, but I am not satisfied that they in fact gave their consent as such,

nor that the Court could take cognizance of that consent except by the party in person or counsel. I am not prepared to accept the position as

being that of an agreement arrived at out of Court, which is now being sought to be enforced by specific performance.

12. As regards the remaining question, which was much argued, viz., as to whether Mr. Coltman''s consent given on behalf of his client respondent

No. 2 is binding, I am disposed to think that, under all the circumstances, it was not binding. If he had realised that the appellants had not the

authority of their brother to come to any arrangement, I do not think he would have consented to the terms, nor do I think he would have done so

if his solicitor had informed him that respondent No. 2''s instructions were to fight the case out. In a case of that sort, I should be sorry to think that

a bona fide mistake of counsel due in no way to any fault of his own, should not be capable of rectification before the decree is finally passed. If,

for instance, counsel had come immediately after the midday adjournment on September 19, and had stated that the course he adopted as regards

stage No 1 was made under a mistake of fact, viz. as to the consent of all his clients, and that he asked leave to withdraw his consent and continue

the appeal, I can hardly believe that any Court would have refused that. I need not refer again to what Malins V.C. has said in the case above

cited.

13. Does it then really make any material difference that stages 2, 3 and 4 were subsequently reached? Even then the draft consent terms had to be

brought in for our approval, and until that was done, I doubt whether it could be said that we had finally disposed of the appeal.

14. In arriving at the above opinion, I wish to make it quite clear that I do not intend in any way to depart from the well settled principles which

govern counsel''s authority to bind his client. Cases such as Matthews v. Munster (1887) 20 Q.B.D. 141 show that where no limitation is imposed

on counsel''s authority, he may bind his client by agreeing to a compromise. Neale v. Gordon Lennox [1902] A.C. 465, on the other hand, shows

that if counsel is only empowered to compromise on certain terms, he is thereby impliedly prohibited from settling on other terms, and if

notwithstanding that prohibition, ho does effect a settlement on such other terms, then that settlement does not bind his client. We have carefully

considered all the authorities which have been cited to us, and on the facts of this particular case, I think respondent No. 2 is not bound by what

took place on September 19.

15. One further point remains. It was strongly contended by counsel for respondent No. 1 that although the consent terms arrived at stages 2, 3

and 4 might be bad, that stage No. 1 was merely an abandonment of the appeal pro tanto and not any consent terms, and that accordingly

respondent No. 2 could only take up the appeal as from the end of stage No. 1 and must accept that pro tanto abandonment of the appeal. I am

however unable to accede to that argument. On the facts above stated I think the only proper and satisfactory course is to rehear this appeal de

novo, and that if any liberty is necessary for counsel for the appellants and respondents Nos. 2 and 7 to withdraw any admission previously made,

that liberty should be given to them. [His Lordship then dealt with the question of coats].