Gunnaji Bhavaji Vs Makanji Khushalchand

Court: Bombay High Court

Date of Decision: Aug. 21, 1908

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 50

Citation: (1908) 10 BOMLR 969

Hon'ble Judges: Russell, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

Russell, J.
This case raises an important point of practice.

2. The suit was filed by the plaintiff"s firm against the defendants for a sum of over Rs. 6,000 on the usual commission agency account in respect of

spices and grain and the suit was admitted on the 15th October, 1907. Para 4 of the plaint relies upon an adjustment dated the 18th September

1899, (obviously, therefore, the plaintiff is barred) whereupon a sum of over Rs. 8,000 was found due to the plaintiff. The para goes on:

Thereafter plaintiffs received from time to time various sums aggregating to Rs. 4,101 from the defendants. The last of such payments was made on

or about Magsar Vad 13th Samvat 1961, Marwari, (5th December 1895). Copy of the writing passed on making this payment is hereto annexed

and marked B.

3. Now I have read Ex. B to the plaint; and that runs as follows:-

Release 1 one to Sha Gunnaji Bhawaji of Bombay written by Bhai Bamchand Khooshal of Goregaum I give this in writing that I had a share in

your shop of annas 2, in word annas two, from Samvat 1956 Ashad Sud 8th up to Samvat 1958 Kartak Vad 30th according to the Marwari

Calendar. That share I am taking from you in a lump sum, viz. Bs. 601 (six hundred and one) and that I admit and consent to. I have now no

interest in your shop. I am now releasing this my share of my own freewill. This release is given by me of my freewill and pleasure and when in

sound understanding and it is agreed to by me. Dated Samvat 1961, Magasar Vad 13th, Marwari Date.

4. Whether that document Ex. B could under any circumstances be held to be evidence of part-payment on account of this debt, it is not necessary

for me to decide, because as the plaint stand''s it obviously is beyond the period which is necessary to take the case out of the Statute.

5. At the hearing of the case when it came on as a Short Cause, a written statement was put in raising several defences, but the only one relied

upon was that of limitation; and upon that being done Mr. Jardine applied for leave to amend the plaint, because he sought to rely upon another

document, namely one of the 20th of March 1902, a translation of which has been supplied to me. I may mention that in the list of documents upon

which the plaintiff relies, which I have referred to, no mention whatever of this document is to be found. Certain, correspondence took place after

the discovery or the alleged discovery of this document, a portion of which only has been put in as Exts. Nos. 1, 2 and 3. It is not necessary for me

to refer to that correspondence in extenso. Suffice it to say that the view of the defendant''s attorney was that assuming this document of 1902 to

be a genuine document, it would be neces. sary to have the plaint amended. But this suggestion was rejected in a very summary manner by the

plaintiff''s attorneys; and the question that I have to decide is whether I can allow this plaint, which is bad on the face of it, to be amended in the

way suggested.

6. By Section 50 of the Civil Procedure Code, last clause, it is expressly provided: ""If the cause of action arose beyond the period ordinarily

allowed by any law for instituting the suit, the plaint must show the ground upon which exemption from such law is claimed."" So that makes it

imperative upon the plaintiff to set out in his plaint the ground upon which exemption from such law is claimed. In the plaint (as I have pointed out),

as it is now drawn, the plaintiff relies or wishes to rely upon a part payment which is beyond the period of three years from the original adjustment.

In the letter of 1902 he would attempt to rely upon an acknowledgment which would take the case out of the Statute. Now one thing is perfectly

clear that amendments cannot be allowed if they convert a suit of one character into a suitof another, and I confess that I cannot imagine any

amendment more inconsistent than one which makes a plaint, which is admittedly bad on the face of it, a good one in law.

7. Now, the principles, which have been laid down in several cases, are to be found in Steward v. North Metropolitan Tramways Company

(1886) 16 Q.B.D. 556 and in Weldon v. Neal (1887) 19 Q.B.D. 394; and in Clarapede and Co. v. Commercial Union Association (1884) 32

W.R. 262 ; and the facts of the two cases in Steward v. North Metropolitan'' Tramways Company and Weldon v. Neal certainly bear upon the

present case. In all those three cases the principle may be stated to be that all amendments will be allowed which do not (2) cause an injustice to

the other side.. But if the amendment willput the other side into such a position that they must be injured it ought not to be made.

8. In this case it appears to me it would be a gross injustice to the defendants, who are entitled to rely on the Statute of Limitation if I were by this

amendment to convert what is as I have said admittedly a bad plaint into what may be a good one. I have not been able to find any case (and such

must have occurred) in. which an amendment such as the present one has been allowed.

9. I should like to remark that in this case the plaintiffs cannot be said to be without any remedy, because it will be open to them to file a suit

against the attorney who drew this plaint, if they are so advised, for negligence, and to seek from him the sum of over Rs. 6,000 the amount of

damages which they may have sustained.

10. Another thing I should like to remark is that I learnt during the progress of this case from Mr. Kirkpatrick that there is a rule in the Taxing

Master''s Office that where plaints in Short Causes are drawn by counsel, the counsel''s fees are not ailowed on taxation. All I can say is that to my

mind I consider that practice one very much to be deprecated. I think I may fairly assume that it the plaint in this case had been drawn by counsel

Section 50 of the CPC would have been borne in mind. Therefore, it appears to me, a certain amount of discretion should be allowed to the

Taxing Master, to allow counsel''s fees, on taxation, if he is of opinion it was not unreasonable to submit it to counsel to be drafted or settled.

11. The result of my judgment is that I find on the issue that the suit is barred by limitation, and the natural result must follow that it is dismissed with

costs.