APPELLATE CIVIL.

Before Mitter and Patterson JJ.

1931

Mar. 24 ;
April 1 ;
May 25.

RAJKUMAR PAL

v.

JANABALI MIA.*

Pleader—Appearance for purpose of pleading only by memorandum of appearance, when permissible—Code of Civil Procedure (Act V of 1908), as amended by Act XXII of 1926, O. III, r. 4, cl. (5)*—Letters Patent (Calcutta), 1865, cl. 37.*

A pleader can be engaged only to plead in a suit or appeal under rule 4, clause (*5*) of Order III of the Civil Procedure Code without a document in writing signed by the party, but an advocate cannot plead in the High Court by merely putting in a memorandum of appearance unless there has been an appearance by the party in person or by an advocate appointed to act for him. In the latter case, if the advocate, appointed to act for the party, has engaged the advocate merely to plead for the said party the memorandum need not be filed.

Order III, rule 4 of the Civil Procedure Code, does not lay down an absolute rule, but it is subject to the rules of the High Court framed under clause 37 of the Letters Patent regulating procedure.

Gobindo Chunder Dutt v. *Hendry* (1) distinguished.

Veerappa Chettiar v. *Sundaresa Sastrigal* (2) referred to.

SECOND APPEAL by the defendant in which an advocate applied to plead for the plaintiffs respondents without putting in a *vakâlâtnâmâ*.

The facts have been set out fully in the judgment.

Ramdayal De in support of the application.

Amarendranath Mitra for the appellant.

Nurul Huq and *Hamidul Huq* for other respondents.

Atulchandra Gupta for the Bar Association.

Cur. adv. vult.

MITTER J. In this appeal, Mr. Ramdayal De, advocate, applies to plead for the plaintiffs

*Application in Appeal from Appellate Decree, No. 1091 of 1930.

(1) (1875) 14 B. L. R. App. 12. (2) (1925) I. L. R. 48 Mad. 676.

respondents without putting in a *vakâlatnâmâ* for his appearance. He wants only to plead on behalf of the plaintiffs and he contends that, under Act XXII of 1926, by which the provisions of the Civil Procedure Code, 1908, have been amended, he is entitled to plead, provided he puts in a memorandum of appearance in the form provided for by Order III, rule 4 of the Code of Civil Procedure. He has put in such a memorandum without any court-fees on it. Since the amendment of the Code in 1926, that this is the first application of this kind will appear from the report of the office, which we called for, and as it raises a very important question of procedure, we have heard not only Mr. Ramdayal De but also the Bar Association of the High Court, which has been represented before us by Mr. Atulchandra Gupta. The Bar Association support Mr. Ramdayal De and contend that, under the amended provisions of the Civil Procedure Code, an advocate not entitled to practise on the Original Side of the High Court is entitled to plead, provided he puts in a memorandum of appearance under Order III, rule 4, clause (5).

In order to consider whether the view maintained by the Bar Association is right, it is necessary to consider carefully the provisions of Order III of the Code.

Order III, rule 1, suggests that any appearance, application or act in or to any court, required or authorised to be done by a party in such court, may .....be done by the party in person or by his recognised agent or by a pleader appearing, applying or acting on his behalf.

Order III, rule 2, enacts who the recognised agents are.

Order III, rule 4, deals with the manner in which a pleader, who is appointed to act, is to be engaged.

And Order III, rule 4, clause (5), states that a pleader can be engaged for the purpose of pleading

if he puts in a memorandum of appearance signed by himself, stating (*a*) the names of the parties to the suit, (*b*) the name of the party for whom he appears and (*c*) the name of the person by whom he is authorised to appear. The proviso to rule 5 states that it won't be necessary to file this memorandum of appearance by the pleader engaged to plead if he has been engaged to plead by any other pleader who has been engaged to act in court on behalf of such a party.

The whole scheme of this Order seems to suggest that a pleader can be engaged to plead only under rule 4 (*5*) of Order III without a document in writing signed by the party provided there is either an appearance in the suit or appeal either by the party in person or an appearance by a pleader appointed to act. The proviso meets the case, where the pleader appointed to act has engaged the pleader engaged to plead only. It is difficult to understand that it could have been intended that a pleader can be engaged to plead only under rule 4 (*5*), where there has been no appearance either by the party which includes his recognised agent or by a pleader appointed to act. The memorandum of appearance contemplated by rule 4, clause (*5*), is dispensed with if the pleader appointed to act has engaged the pleader engaged to plead. In every suit or appeal, apart from pleading, certain acts have to be done. Rule 1 of Order III clearly suggests that there must be appearance either by the *party* or his *pleader* for the purposes of appearance, application or act. This would seem to be the intention of the legislature. But, I am free to confess that a difficulty arises from the wide language of Order III, rule 4, clause (*5*) and it may be contended, on the plain reading of the language, that a person may be engaged to plead by putting in a memorandum of appearance, even if there is no appearance at previous stages, either by the party in person or by a pleader appointed to act. And it

may be said that we are to construe the statute not from what might have been the intention but what appears to be the intention from the language used. We would, therefore, rest our decision on this that this rule of the Code is inconsistent with the rules of the High Court framed under section 37 of the Letters Patent of 1865, and as these rules of the Civil Procedure Code are contrary to the rules of the High Court made under section 37 of the Letters Patent, the latter must prevail. Taking the present appeal, for instance, the rules of the High Court require that a deposit of Rs. 7-8 has to be made by every respondent appearing: see rule 29 (*a*) of the new rules. This can be done either by the party appearing in person or by some pleader appointed to act for him. In this case, up to the present moment, there has been no appearance of the parties either in person or through an advocate appointed to act for those for whom the memorandum of appearance has been put in by Mr. De. The rules of the High Court are framed under section 37 of the Letters Patent and they are to be, as far as possible, consistent with the provisions of the Civil Procedure Code of 1859, which was in force at the date when the Letters Patent were issued or with the provisions of the subsequent Civil Procedure Codes replacing the Act of 1859. Rule 29 (*a*), to which reference has been made, makes it obligatory on the respondent to pay the sum of Rs. 7-8 into Court. Who is to make this payment? Either the party who has appeared in person or some pleader who has been appointed to act can deposit the sum. Rule 55, chapter IX, of the Appellate Side Rules lays down this "In case of the "appellant failing to make the necessary deposit "under rule 29 (*2*), Chapter V, of this Chapter, the "Deputy Registrar shall lay the matter before "Registrar who may at once cause the appeal to be "set down before the Division Court to which "it belongs; and if the appellant does not satisfy the

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"Court as to his delay, his appeal may be dismissed "for want of prosecution, or the Court may pass "such other order as it may deem proper."

It would seem from this rule of the appellate side that, where there is no appearance for the respondent and no deposit of the sum of Rs. 7-8, the matter is to be dealt with as an *ex parte* matter. From this, an inference may be legitimately drawn that it was not intended by the rule that a respondent would be heard unless he has made the necessary deposit and this deposit can only be made by a person who is entitled to act, *i.e.*, either by the respondent in person or by a pleader appointed to act for him.

Take, for instance, the case of first appeals, where there are elaborate provisions regarding the filing of the list, the deposit of paper-book costs, the preparation of paper-book by the advocates appointed by the parties. It can hardly be argued that, in the absence of either the party appearing in person or through a pleader appointed to act, these acts could be done. These are stages of the appeal prior to the stage when the question of pleading arises.

Mr. Atulchandra Gupta, appearing for the Bar Association, has cited a case from the Bengal Law Reports to the effect that a barrister, who is entitled only to plead, was heard for the respondent without there being a pleader to instruct him. See *Gobindo Chunder Dutt* v. *Hendry* (1). An examination of that case shows that the party had appeared in person and it was in that state of facts that the barrister was allowed to plead for the respondent. Mr. Gupta pointed out that the practice is still followed, for this case is referred to in Mr. Hechle's rules of the Original Side. It is doubtful if there are any other cases of this kind since the case in the Bengal Law Reports. But the case is obviously distinguishable, as there the party has appeared in person. We sent for the records of

(1) (1875) 14 B. L. R. App. 12.

S. A. 1952 of 1874 *Gobindo Chunder Dutt* v. *Hendry* (1) and we find that the respondent had paid the paper-book costs which, under the rules prevalent in the appellate side in 1870, amounted to Rs. 5 and the respondent was given that sum in the decree. The respondent appeared in person and deposited the sum of Rs. 5 as will appear from some endorsement on the back of the memorandum of appeal. Conceding, therefore, that, on the language of Order III, rule 4, clause (*5*) it may apply to a case where there is no appearance for the respondent, this rule is inconsistent with the rules of the Appellate Side framed under section 37 of the Letters Patent, under which, unless the deposit of Rs. 7-8 is made by the respondent, the matter would be treated as *ex parte*.

After all, as has been pointed out by a recent decision of the Madras High Court, Order III, rule 4, does not lay down an absolute rule, but it is subject to the rules of the High Court regulating procedure [see *Veerappa Chettiar* v. *Sundaresa Sastrigal* (2)].

In this view, we are of opinion that a pleader, which under the definition given in section 2 (*15*) of the Code of Civil Procedure, includes an advocate of the High Court, cannot plead in the High Court by merely putting in memorandum of appearance, unless there has been an appearance by the party in person or by a pleader appointed to act for him. In the latter case, if the pleader appointed to act for a party has engaged the pleader merely to plead for the said party, then this memorandum of appearance need not be filed.

The rules of the Appellate Side provide for appearance of a party in person and when that is done he can appoint a pleader to plead.

It is not necessary to decide the question whether a memorandum of appearance should bear a court-fee stamp of Rs. 2 as it contains an authority

(1) (1875) 14 B. L. R. App. 12. (2) (1925) I. L. R. 48 Mad. 676.

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to plead although the authority is filed by the pleader himself [see *Abdul Ghaffur* v. *Downing* (1)]. It may be a question whether the memorandum of appearance is a *vakâlatnâmâ* within the meaning of Article 10, Schedule II. The question has not been debated before us and we express no opinion. We may point out, however, that in Madras, a memorandum of appearance, which is the nature of a document showing that the pleader has been retained for a party, has to bear a court-fee stamp as a *vakâlatnâmâ* by reason of the amendment of the Court-fees Act (Article 10) by Madras Act V of 1922.

The application of Mr. Ramdayal De must be rejected and the case proceeded with as if there had been no appearance for the plaintiffs respondents. His clients did not comply with the rules of the Appellate Side of the High Court regarding the necessity of the deposit of Rs. 7-8 by every respondent before the appeal can be regarded as a contested one. The case would proceed as if Mr. De's clients had not appeared.

PATTERSON J. I agree.

Application refused.

A. A.

(1) (1925) I. L. R. 5 Pat. 255.