DESIKACHARI v. MAHANT PRAYAG DASJI VARU.

LEACH C.J.

which is entirely opposed to public policy. It seems to me that it had in view the principle stated in the cases to which I have just referred and this principle does not apply to the present case. The contract between Koneti Desikachari and the respondent was a contract which was opposed to public policy, and, in these circumstances, we consider that the appellants are not entitled to ask the Court to enforce the return of money paid with full knowledge of the enormity of the agreement. The Calcutta High Court gave expression to the same opinion in *Ledu Coachman* v. *Hiralal Bose*(1).

For these reasons the appeal fails and must be dismissed with costs. As the appeal has been filed in *forma pauperis* the appellant will be required to pay the requisite court-fee to Government.

G.R.

APPELLATE CIVIL.

Before Mr. Madhavan Nair, Officiating Chief Justice, and Mr. Justice Krishnaswami Ayyangar.

1938, August 10.

H. M. EBRAHIM SAIT (DEFENDANT), APPELLANT,

v.

THE SOUTH INDIA INDUSTRIALS, LIMITED (PLAINTIFF), RESPONDENT.*

Original Side Rules, Madras, O. VII, r. 7 (2)—Unconditional leave to defend under—When defendant is entitled to—Discretion of Court to put defendant on terms—When to be exercised.

Under Order VII, rule 7 (2), of the Original Side Rules the Court has discretion to decide whether leave to defend should

(1) (1915) I.L.R. 43 Cal. 115.

* Original Side Appeal No. 50 of 1938.

be given unconditionally or subject to terms. In order to entitle a defendant to ask for unconditional leave to defend, his case should be a *bona fide* one and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defence raised shows that there is a fair issue to be tried by a competent tribunal.

Sundaram Chettiar v. *Valli Ammal*(1) referred to and explained.

Periya Miyana Marakayar v. *Subramania Aiyar*(2) discussed.

Blaiberg v. *Abrams*(3) and *Saw* v. *Hakim*(4) referred to.

APPEAL from the order of GENTLE J., dated 29th April 1938 and made in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Application No. 439 of 1938 in Application No. 2317 of 1937 in Civil Suit No. 167 of 1937.

V. Ramaswami Ayyar and *S. Narasinga Rao* for appellant.

V. Rajagopalachariar and *K. P. Raman Menon* for respondent.

Cur. adv. vult.

The JUDGMENT of the Court was delivered by MADHAVAN NAIR Offg. C.J.—This is an appeal against the order of GENTLE J. confirming the order of the Master giving the appellant (defendant in Civil Suit No. 167 of 1937) leave to defend on his furnishing security for a sum of Rs. 25,000 within a period of two months from the date of his order. The security has not been furnished. The appellant contends that leave to defend the suit should have been given to him unconditionally.

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(1) (1934) I.L.R. 58 Mad. 116.
(2) (1923) 46 M.L.J. 255.
(3) (1884) 77 L.T.Jo. 255 (C.A.).
(4) (1888) 5 T.L. Rep. 72.

EBRAHIM SAIT v. SOUTH INDIA INDUSTRIALS, LTD.

MADHAVAN NAIR OFFG. C.J.

The circumstances are these. The respondent (plaintiff) is the South India Industrials, Ltd. The suit has been filed by its managing director. The appellant is another managing director. The claim against the appellant is for a sum of Rs. 2,83,878–6–11, the amount overdrawn by him from the company previous to the year 1928. There is no contest regarding this amount owing by the appellant to the company. In defence the appellant raised various contentions, the most important of which is that the suit has not been filed with proper authority, inasmuch as the plaint purports to be signed by the managing director. His case on this point is that there is nothing to show that he has been properly authorized to file the suit on behalf of the company. So far as the merits of the claim are concerned the defences are twofold. The appellant seeks to set off against the amount claimed a considerable sum of money, we are told that it would amount to a little over a lakh of rupees, owing to him by the company in respect of unpaid bonus declared some years ago. He claims also to set off another amount, namely, the amount which he as a shareholder might receive upon the winding up of the company. The third point raised is that the suit is barred by limitation.

On behalf of the company it is alleged that the proceedings of the board of directors will show that the managing director who has signed the plaint is authorised to institute suits on behalf of the company, that there is no substance in the two claims to set off made by the appellant, for he has waived his right to claim the bonus, and that a shareholder cannot claim to set off what he might eventually receive on a winding up of the company against the amount which he

owes to the company. It is also urged by the respondent that the plea that the suit is barred by limitation cannot stand, having regard to the letter written by the appellant acknowledging his liability to pay the amount claimed.

Both the Master and the learned Judge were not impressed with the defences raised, but, as they did not desire to shut out altogether an opportunity for defending the suit, the appellant was given permission to defend it provided he furnished security for the sum of Rs. 25,000. As already stated, it is urged before us that in the circumstances of the case the Court is bound to grant the appellant permission to defend unconditionally.

Order VII, rule 7 (2), of the Original Side Rules says:

> "Leave to appear and defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues, or otherwise as the Master thinks fit . . . "

Order XIV, rule 6, of the Rules of the Supreme Court says:

> "Leave to defend may be given unconditionally, or subject to such terms as to giving security or time or mode of trial or otherwise as the Judge may think fit."

According to both the rules the Court has discretion to decide whether leave to defend should be given unconditionally or subject to terms. The important English decisions bearing on the question are referred to in the note to Order XIV, rule 6, in the Annual Practice. According to these decisions it may be stated that

> "as a general rule where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence or even a fair probability that he has a *bona fide* defence, he ought to have leave to defend."

EBRAHIM SAIT v. SOUTH INDIA INDUSTRIALS, LTD.

MADHAVAN NAIR OFFG. C.J.

See *Saw* v. *Hakim*(1) and the other cases referred to in the note. In *Jacobs* v. *Booth's Distillery Company*(2) it is laid down that where there is a triable issue, though it may appear that the defence is not likely to succeed, the defendant should not be shut out from laying his defence before the Court either by having judgment entered against him, or by being put on terms to pay money into Court as a condition of obtaining leave to defend. From this, one is apt to understand, as has been argued before us, that all that is required to entitle the defendant to claim the privilege of being allowed to defend without any condition is a mere allegation of facts which might amount to a defence; but that it is not so is clear from the following observations of the Lord Chancellor (Lord HALSBURY):

> "There are some things too plain for argument, and where there were pleas put in simply for the purpose of delay which only added to the expense, and where it was not in aid of justice that such things should continue, Order XIV was intended to put an end to that state of things and to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights."

In other words, triable issues must be such as would show that the defendant has a *bona fide* defence. This aspect of the question is sometimes apt to be forgotten. Further it must be remembered that

> " in deciding whether the defence set up is a real defence or not, all the circumstances must be looked at ";

per BOWEN L.J. in *Blaiberg* v. *Abrams*(3). The decision in *Jacobs* v. *Booth's Distillery Company*(2) is followed in the decision in *Sundaram Chettiar* v. *Valli Ammal*(4) strongly relied upon by the appellant but it

(1) (1888) 5 T.L. Rep. 72.
(2) (1901) 85 L.T. Rep. 262.
(3) (1884) 77 L.T.Jo. 255 (C.A.)
(4) (1934) I.L.R. 58 Mad. 116.

appears to us that in stating the rule the learned Judges, if we may say so respectfully, have not sufficiently emphasized the qualification that, in order to bring the defendant within the rule which entitles him to ask for leave to defend without any condition, the defence should be a *bona fide* one and not a mere attempt to prolong or delay the case, although it may be said that this aspect cannot be said to have been altogether overlooked, because reliance has been placed by them on the decision of this Court in *Periya Miyana Marakayar* v. *Subramania Aiyar*(1) where the following observations occur:

> "By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must as a rule bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend."

We do not understand the decision in *Sundaram Chettiar* v. *Valli Ammal*(2) as laying down the broad proposition that the mere setting up of a defence, with the possibility of the defendant proving it, would by itself and without regard to other considerations be enough to entitle the defendant to claim that leave should be given to him to defend the suit unconditionally. As we have pointed out the decision in *Jacobs* v. *Booth's Distillery Company*(3) itself makes this point clear. All the cases cited before us indicate that the defendant's case should be a *bona fide* one and should raise a triable issue which would show that he has a fair defence to put forward against the plaintiff's claim. It is not necessary that the Court should enter fully into the merits of the case and decide, but it should be satisfied that the defences raised show that there is a fair issue to be tried by a competent

(1) (1923) 46 M.L.J. 255. (2) (1934) I.L.R. 58 Mad. 116.
(3) (1901) 85 L.T. Rep. 262.

EBRAHIM SAIT v. SOUTH INDIA INDUSTRIALS, LTD.

MADHAVAN NAIR OFFG. C.J.

tribunal before leave to defend is given unconditionally.

We will now examine whether with respect to the contentions put forward by the appellant he has a fair case to set up against the respondent. Having regard to the facts the only point which appears to be of some importance is whether the suit has been properly filed on behalf of the company.

[His Lordship discussed the evidence and proceeded:]

It follows that the two persons mentioned have power either *jointly or severally* to " manage the business of the company ". It appears to us that managing the business of the company would include institution of suits as well, when it becomes necessary in the course of management to recover moneys due to the company. The present one is a case of this kind. No authority has been quoted to show that institution of legal proceedings would not fall within the meaning of the expression " to manage the business of the company ". As such management as has been delegated to them by the directors can be conducted by either of them, the suit instituted by the respondent would certainly be a validly instituted suit. We are told that as a matter of fact in the past both the respondent and the appellant have instituted suits on behalf of the company each by himself and this practice is relied on as lending additional support to the respondent's contention. We have no doubt that the resolution read with clauses 69 (*k*) and 69 (*d*) of the Articles of Association enables the respondent to institute suits validly on behalf of the company. In this view it is not necessary to canvass the question whether the respondent can rely on the special resolution of the company, dated 30th July 1937, authorizing the company to file a suit against the appellant in support of

his argument. However, we may point out that in law a meeting of directors is not duly convened unless due notice has been given to all the directors; *see* Halsbury's Laws of England, Hails. Edn., Vol. 5, page 337. And if this is so, the resolution cannot be called in aid to support the respondent's position, as admittedly no notice of the meeting was given to the appellant. But, as we have stated, the other proceeding referred to gives sufficient power to the respondent to institute the suit validly.

On the merits, the contentions of the appellant have no force at all. He may have a claim for a portion of the undistributed bonus but this claim amounting at best only to Rs. 1,00,000 and odd has been given up by him by letter, dated 8th June 1927, wherein he says: " I find that there is absolutely no chance of recovering all or any portion of the bonus and dividends due to me and as such I hereby release my right to the same ". It is true that, owing to some legal formalities not having been complied with, it was resolved that the acceptance of this surrender might not be given effect to till the said legal formalities have been complied with, but we know nothing as to whether these have been complied with or not. The other directors also have surrendered their claims to bonuses and suitable entries have been made in the company's books in all cases. In the circumstances the appellant can have no right to set off his claim to bonus as against the claim made by the company. With regard to the other claim to set off, no authority has been shown that a shareholder is entitled to set off what he might receive on a winding up against moneys due by him. The contention appears to be a novel one. Surely, the company cannot be expected to await the winding up for the recovery of the moneys due to it from the shareholders.

EBRAHIM SAIT v. SOUTH INDIA INDUSTRIALS, LTD.

MADHAVAN NAIR OFFG. C.J.

The plea of the bar of limitation stands on an equally slender basis. The appellant has acknowledged his liability to pay the amount and the letter, Exhibit A, dated 18th November 1934, will save the suit from this plea.

It is not necessary for us to go into the merits of the appellant's case, but from the facts which appear from the affidavits and the papers filed before us it is clear that these pleas are vexatious and not *bona fide*. He admits the correctness of the amount due from him and acknowledges also his liability to pay it. He knows full well that as managing director he or the respondent can institute suits validly each by himself as they have done in the past. He also knows that he surrendered his right to claim the bonus. In the circumstances, the pleas urged by him in defence of the suit cannot be considered to be *bona fide* but must be considered as being urged simply to gain time. For these reasons we confirm the order passed by GENTLE J. and dismiss the appeal with costs.

Time for furnishing security is extended for three weeks from this day.

G.R.