APPELLATE CIVIL

Before Mr. Justice Bisheshwar Nath Srivastava, Chief Judge and Mr. Justice Ziaul Hasan

1937
August, 11

NAWAB MOHAMMAD ATA HUSAIN KHAN *alias* MUNNEY SAHIB AND OTHERS (PLAINTIFFS-APPELLANTS) *v.* NAWAB BAQIR MIRZA AND OTHERS (DEFENDANTS-RESPONDENTS)*

Pensions Act (XXIII of 1871), *section* 6—*Suit filed without Collector's certificate, if void* ab initio—*Certificate, if can be allowed to be filed later on—Civil Procedure Code (Act V of* 1908), *order VII, rule* 7—*Plaintiff in appeal seeking altogether a different relief from that claimed in plaint—Relief claimed against those defendants also against whom it was not sought before—Relief prayed for in appeal, if can be allowed under order VII, rule* 7—*Pleadings—Amendment of pleadings, if can be allowed by court in appeal.*

Held, that it would be taking a much too stringent view of the provisions of section 6 of the Pensions Act to hold that the civil court is debarred from taking cognizance of a claim under that Act even though the Collector's certificate has been produced subsequently, if it was not produced at the time of the institution of the suit. The Collector's certificate can be produced and may be accepted even on appeal. *Jijaji Pratapji Raje* v. *Balkrishna Mahadeo* (1), *Ihtisham Ali* v. *Sham Sunder* (2), *Ganpat Rao* v. *Anand Rao* (3), *Jagat Singh* v. *Mahan Bir Singh,* (4), *Vinayak Ganesh Hasabnis* v. *Narayan Shankar Hasabnis* (5), *and Ganpat Rao* v. *Anand Rao* (6), followed.

Where the relief claimed in appeal is wholly outside the claim as set forth in the plaint and relates to a specific sum of money which the defendants are alleged to have been holding in deposit on the date of the suit, whereas the relief in the plaint related to an unascertained amount which was to be ascertained after the taking of accounts and further while the relief in the plaint is confined to some defendants only but in appeal relief is claimed against other defendants too, order VII, rule 7, has no application to the case, and the appellate court is justified in refusing to entertain the claim set up before it. The provisions of the Code of Civil Pro-

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*First Civil Appeal No. 103 of 1935, against the decree of Babu Pratap Shankar, Additional Civil Judge of Lucknow, dated the 8th of April, 1935.

(1) (1892) I.L.R., 17 Bom., 169.
(2) (1902) I.L.R., 25 All., 73.
(3) (1910) I.L.R., 32 All., 148(P C.).
(4) (1928) A.I.R., Lah., 713.
(5) (1935) A.I.R., Bom., 227.
(6) (1905) I.L.R., 28 All., 104.

cedure however allow a wide discretion to the courts in the matter of amendment of pleadings. The main consideration to be borne in mind is the advancement of the interest of substantial justice. Where the circumstances of a case demand, an appellate court, in order to avoid multiplicity of litigation, can allow the plaintiff to amend the plaint so as to enable him to claim the new relief sought in the appeal.

Mr. *Zahur Ahmad*, for the appellants.

Messrs. *Makund Behari Lal, Akhtar Husain, Durga Dayal, Abid Husain, S. M. Hafeez* and *Habib Ali Khan*, for the respondents.

SRIVASTAVA, C. J. and ZIAUL HASAN, J.: This is a first appeal by the plaintiffs against the decree of the learned Additional Civil Judge of Lucknow dismissing the plaintiff's suit on the ground that it related to a political pension, and in the absence of a certificate as contemplated by section 6 of the Pensions Act (XXIII of 1871) was, therefore, not maintainable. In view of the conclusion reached by us we do not think it necessary to state the facts of the case in detail. It would be enough to say that according to the plaintiff's case Mohammad Ali Shah, one of the late Kings of Oudh, had created a trust, and that one of the beneficiaries under the trust was Nawab Munawwaruddaulah Bahadur Ahmad Ali Khan who was to receive Rs.300 per mensem for generation after generation. Munawwaruddaula died in 1858 leaving a widow, Afzal Mahal, one son, Amjad Ali Khan, and four daughters. On his death Amjad Ali Khan received the sum of Rs.300 to the exclusion of his sisters and Afzal Mahal. After his death this sum of Rs.300 was realized by his two sons' Baqar Ali Khan and Jafar Ali Khan. Baqar Ali Khan died in 1921 and Jafar Ali Khan in 1924. Till their death both of them continued to receive this amount. On the death of Baqar Ali Khan his share of this sum of Rs.300 was realized by his brother, Jafar Ali Khan, and after the latter's death one of his sons, Raza Ali Khan, realized a part of the amount for some time.

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The plaintiffs instituted the present suit on 31st May, 1934, against defendants nos. 1 to 3 alleging them to be the present mutawallis of the trust. They claimed to be the legal heirs of Nawab Afzal Mahal, the widow of Nawab Munawwaruddaulah and of his four daughters. They further alleged that on their making a claim for their share of the aforesaid sum of Rs.300 as heirs of the widow and daughters of Nawab Munawwaruddaulah, the defendants nos. 1 to 3 on 5th October, 1933, passed a resolution refusing to give them their share in the allowance, whether past or present, unless they obtained a decree from court. Accordingly basing their cause of action on the aforesaid resolution passed by the defendants-trustees on 5th October, 1933, they prayed for the following reliefs:

"(*a*) That after the death of Nawab Munawwaruddaulah Bahadur, deceased, according to, the aforesaid *wadiyatnama* an account be taken from defendants nos. 1 to 3 of everything in respect of the share of the fixed monthly wasiqa which fell to his widow, Nawab Afzal Mahal Sahiba and her four aforesaid daughters and after them to their legal heirs and after the death of Nawab Amjad Ali Khan, son of Munawwaruddaulah, deceased, to his daughters Nawab Sajjadi Begam and Nawab Akhtar Jahan Begam and after them to their legal heirs and decree of the amount which may be found due to the plaintiffs with interest at Rs.6 per cent. per annum from the date it became due up to today's date during the pendency of the suit and after passing of the decree till the payment of the decree money be passed in favour of the plaintiffs, along with the specification of the share of each plaintiff against the defendants nos. 1 to 3 jointly as trustees of Husainabad.

(*b*) Costs of suit be awarded from defendants nos. 1 to 3 trustees of Husainabad.

(c) Any or further relief to which the plaintiffs, jointly or severally, be entitled be granted."

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The defendants nos. 1 to 3 in their written statement pleaded, *inter alia,* that the real dispute in the case was between the plaintiffs on the one hand and the heirs of Nawab Baqar Ali Khan and Nawab Jafar Ali Khan on the other and that their own position was merely that of an stake-holder. They contended that the heirs of Nawab Baqar Ali Khan and Nawab Jafar Ali Khan were necessary parties and that the suit as framed was bad for non-joinder of parties.

On the pleadings of the parties the lower court framed a number of issues of which issue no. 6 dealt with the question of non-joinder. The court tried this as a preliminary issue and recorded a finding that the heirs of Nawab Baqar Ali Khan and Nawab Jafar Ali Khan were necessary parties and must be impleaded in the suit. Defendants nos. 4 to 16 were accordingly added as defendants. When this was done the plaintiffs amended the plaint by adding a sentence at the end of paragraph 10 as follows:

"The rest of the defendants (i.e. defendants nos. 4 to 16) have been made *pro forma* defendants simply in compliance with the court's order, dated the 8th September, 1934, although the plaintiffs do not seek any relief from them."

The trial of the case then proceeded and at the end the learned Additional Civil Judge recorded his findings on the various issues. He found *inter alia* that the *wasiqa* allowance in suit was a political pension and that the suit was not maintainable under section 6 of the Pensions Act. In this connection he remarked as follows: "The case has been hanging on for a pretty long time and in the course of argument it was brought to my notice that the plaintiffs had applied for a certificate to the Deputy Commissioner. Sufficient time was allowed to them to produce it but no such certificate was forthcoming. The result is that

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the plaintiff's suit is without any certificate and as such is not maintainable under section 6 of the Pensions Act." Eventually he dismissed the suit on the finding that it was not maintainable.

Dissatisfied with the decree of the lower court, the plaintiffs instituted an appeal against it in this Court on 5th September, 1935. It may be noted that whereas the plaintiffs had valued the reliefs sought in the plaint at Rs.12,000 and paid a court fee of Rs.682-8 on this amount according to section 7, clause 24(*d*) of the Court Fees Act, they while valuing the appeal at the same amount of Rs.12,000 paid a court fee of Rs.10 only on the memorandum of appeal under Article 17(iii) of the Second Schedule of the Court Fees Act. They justified this on the prayer made in the memorandum of appeal in the following words: "The plaintiffs-appellants pray that the decree appealed from be varied and the plaintiffs' suit decreed for a declaration that they are entitled to receive Rs.195-11-8 per month out of the allowance of Rs.300 per mensem provided for Nawab Munawwaruddaulah and his heirs by the deed of trust dated the 23rd November, 1839, as his legal heirs *pro tanto* in the undistributed amount in deposit with defendants 1 to 3 having withdrawn their claim in regard to the amount which the Husainabad Trust has already distributed to some of his heirs who had claimed it." The appellants during the pendency of the appeal produced also a certificate of the Deputy Commissioner, Lucknow, dated the 7th of February, 1936, which runs as follows:

"Certified that N. Mohammad Ata Husain Khan and others the plaintiffs-appellants in the First Civil Appeal No. 103 of 1935, pending in the Hon'ble Chief Court of Oudh at Lucknow, who claim to be heirs of Nawab Munawwaruddaulah are hereby empowered, under section 6 of the Pensions Act (XXIII of 1871), to establish, in the aforesaid appeal, their claim to receive in future any legal share to which they consider themselves entitled in the

> wasiqa allowance of Rs.300 fixed for Nawab Munawwar-uddaulah and his heirs and to their legal shares, if any in the undisbursed amount of the said wasiqa which is at present actually held in deposit by the Trustees of the Husainabad Trust."

Mr. Zahur Ahmad, the learned counsel for the plaintiffs-appellants, categorically denied the correctness of the statement contained in the judgment of the lower court which we have quoted above about the plaintiffs being allowed time by that court to produce a certificate of the Deputy Commissioner. He further stated that he did not question the lower court's finding about the *wasiqa* money in suit being a political pension within the meaning of Act XXIII of 1871. He contended that subsequent to the decision of the lower court the plaintiffs having obtained the necessary certificate it should be accepted by us in appeal and the defect of non-production of the certificate should be deemed to be cured.

In *Jijaji Pratapji Raje and others* v. *Balkrishna Mahadeo and others* (1) it was held by a Bench of the Bombay High Court that a suit under the Pensions Act (XXIII of 1871) was not bad *ab initio* by reason of its being filed without a Collector's certificate and that where at the hearing of such a suit the necessary certificate was not produced, the Judge ought to have granted the plaintiffs' application for an adjournment, in order that the certificate might be obtained and produced. In this case the certificate was allowed to be produced in second appeal and the case was remanded to the trial Judge for a fresh trial on the ground that all that had hitherto been done without the certificate was done without jurisdiction. In *Ihtisham Ali* v. *Sham Sundar and others* (2), a Bench of the Allahabad High Court granted the appellant time for obtaining the certificate, though, the Collector having refused to grant the certificate, the appeal was

(1) (1892) I.L.R., 17 Bom., 169. (2) (1902) I.L.R., 25 All., 73.

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ultimately dismissed. In *Ganpat Rao* v. *Anand Rao* (1) the court adjourned the hearing of the appeal in order to enable the respondent to produce a certificate and a certificate having been produced the defect was held to have been cured. This case went in appeal to Their Lordships of the Privy Council whose judgment is reported in *Ganpat Rao* v. *Anand Rao* (2). The validity of the High Court's order granting time does not appear to have been challenged before Their Lordships of the Privy Council. In *Jagat Singh* v. *Mahan Bir Singh* (3) also it was held that it was a sufficient compliance of law as the certificate was produced within the time fixed by the court. In *Vinayak Ganesh Hasabnis and others* v. *Narayan Shankar Hasabnis and others* (4), it was held that the certificate of the Collector could be produced and might be accepted on appeal.

It has been argued on behalf of the respondents that a civil court is, under the provisions of section 6 of the Pensions Act, debarred from taking cognizance of any such claim unless the plaintiff produces the necessary certificate, or in other words that the production of the certificate contemplated by section 6 is a condition precedent to the civil court taking cognizance of any such claim. The non-production of the certificate is a defect of a technical character. It would be taking a much too stringent view of the provisions of section 6 to hold that the civil court is debarred from taking cognizance of such a claim even though the certificate has been produced subsequently, if it was not produced at the time of the institution of the suit. We think that the view taken by the various High Courts in the cases referred to above is substantially just and may well be accepted without any violence to the terms of the section. We would, therefore, accept the certificate which has been produced in this Court.

(1) (1905) I.L.R., 28 All., 104.
(2) (1910) I.L.R., 32 All., 148(P.C.).
(3) (1928) A.I.R., Lah., 718.
(4) (1935) A.I.R., Bom., 227.

The next question is about the right of the plaintiffs to claim the declaration sought in the appeal. It is clear beyond all doubt that the relief claimed in the plaint was the rendition of accounts by defendants nos. 1 to 3 and a money decree for the amount found due to the plaintiffs. It is equally clear from the relief claimed in the memorandum of appeal and it has also been admitted before us by the counsel for the appellants that they have now abandoned their claim for rendition of accounts. They also do not any longer seek a decree for any money which may be found due to them as a result of the accounting. What they seek for now is a declaration that they are entitled to a specific portion out of a certain sum of money which they say is admittedly in deposit with the defendants nos. 1 to 3 being the amount of the *wasiqa* in question which has remained undistributed. It is to be noted further that while in their amendment made to paragraph 10 of the plaint they expressly stated that the plaintiffs did not seek any relief against the defendants nos. 4 to 16, the position taken up by the plaintiffs' counsel before us is that he wants that the declaration sought by him in appeal should be made against the defendants nos. 4 to 16 also so as to make it binding on them. Reference has been made to order VII, rule 7 of the Code of Civil Procedure, and it has been argued that the declaratory relief which the plaintiffs seek in appeal is one which can be granted by the court under this rule without any specific prayer for it. We regret we cannot accede to the argument. The declaratory relief in question appears to us to be wholly outside the claim as set forth in the plaint. It relates to a specific sum of money which the defendants nos. 1 to 3 are alleged to have been holding in deposit on the date of the suit, whereas the relief in the plaint related to an unascertained amount which was to be ascertained after the taking of accounts. Further, more while the relief in the plaint was confined to the

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defendants nos. 1 to 3, the relief now claimed is claimed substantially against the defendants nos. 4 to 16, the position of defendants nos. 1 to 3 being merely that of a stake-holder. In such circumstances order VII, rule 7, has, in our opinion, no application to the case, and we could be justified in refusing to entertain the claim set up. But we cannot lose sight of the fact that admittedly there is a sum of the wasiqa money in deposit with the defendants nos. 1 to 3 which has accumulated in their hands since the time that they refused to distribute it until the plaintiffs obtained a decree from court. It is also a fact that the defendants nos. 1 to 3 lay no claim to the money and are prepared to pay it to such of the parties as succeed in establishing their title to it. The provisions of the Code of Civil Procedure allow a wide discretion to the courts in the matter of amendment of pleadings. The main consideration to be borne in mind is the advancement of the interest of substantial justice. Taking all the circumstances of this case into consideration, we think that we should avoid multiplicity of litigation, and allow the plaintiffs to amend their plaint so as to enable them to claim the declaratory relief sought in the appeal. This would also give the defendants full opportunity to raise all necessary defences to the said claim. Further we think that any hardship which the defendants might suffer by reason of the fresh trial which the amendment would necessitate would be sufficiently compensated by the order for costs which we propose to pass.

We would also note that it was contended on behalf of the defendants-respondents that the certificate of the Deputy Commissioner, dated the 7th of February, 1936, relates only to the appeal, and would not avail the plaintiffs in the trial court. We do not think it necessary to express any opinion on this question. It would be open to the plaintiffs to get a fresh certificate and the matter can be dealt with by the trial court.

For the above reasons we allow the appeal, set aside the decree of the lower court, and send the case back to the court below for being tried *de novo* after the plaintiffs have been allowed to amend their plaint and the defendants have been allowed opportunity to file fresh written statements. The plaintiffs-appellants will pay the costs of the defendants-respondents in this court as well as their costs incurred hitherto in the lower court.

Appeal allowed.

REVISIONAL CIVIL

Before Mr. Justice G. H. Thomas and Mr. Justice Ziaul Hasan

SARDAR NIHAL SINGH (APPLICANT) *v.* CAPTAIN RAJA DURGA NARAIN SINGH (OPPOSITE-PARTY)*

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United Provinces Agriculturists' Relief Act (XXVII of 1934), sections 5 and 30—Civil Procedure Code (Act V of 1908), sections 47 and 96—Preliminary decree for sale—Application for decree absolute under order XXXIV, rule 5, Civil Procedure Code—Judgment-debtor's application that he intended to apply under United Provinces Agriculturists' Relief Act and praying for dismissal of application under order XXXIV, rule 5 dismissed—Appeal against order of dismissal of application, if lies.

Where the holder of a preliminary decree for sale applies under order XXXIV, rule 5, Civil Procedure Code, for the decree being made absolute and the judgment-debtor files an application stating that on account of bad harvests and agricultural difficulties, he could not collect the decretal amount and stating that "he was about to present an application to the Local Government that his property and debts be managed according to the new Acts" and praying that the decree-holder's application for the decree being made absolute be dismissed, but the application is disallowed by the court and the decree is ordered to be made absolute, then no appeal lies against the order rejecting the application of the judgment-debtor under the Agriculturists' Relief Act. No doubt under

*Section 115 Application No. 56 of 1937, against the order of Babu Bhagwati Prasad, Civil Judge of Lucknow, dated the 9th of May, 1935.