APPELLATE CIVIL.

Before Mr. Justice Lentaigne

1923

Dec. 14.

K. E. A. K. A. SAHIB & Co.

v.

K. M. ADAMSA.*

Civil Procedure Code (V of 1908), Order 23, rule 1—Order 2, rule 2—Application to withdraw with leave to file a fresh suit—What is a "formal defect"—Reasonable apprehension that the suit must fail sufficient—Where amendment admissible, Plaintiff may be permitted to withdraw with leave to file a fresh suit.

Held, that the expression "formal defect" must be given a very wide and liberal meaning and as connoting defects of various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties.

Held, that it is sufficient for the Court to be satisfied that there is a *reasonable apprehension* that the suit must fail if the permission to withdraw is not granted.

Where two suits, instead of one were brought by the plaintiff against the defendant for the recovery of price of goods alleged to have been sold and delivered, one being for goods alleged to have been supplied during the period between the 9th December and 20th December 1921, and the other for those alleged to have been supplied during the period between the 11th January and 2nd May 1922, *held*, that the error being due to a *bonâ fide* mistake, the Plaintiff should be permitted to withdraw the suits with liberty to institute a fresh single suit covering both claims.

Held also, that amendments of pleadings should be allowed in suitable cases in order to overcome the effects of *bonâ fide* mistake whether of law or of fact, and that it is immaterial whether the assertions or omissions caused by such mistakes were deliberately made or not.

Held also, that where a plaintiff might be allowed to amend his plaint in his first suit so as to include the claim in his second suit, he should be permitted to withdraw the two suits with leave to bring a fresh suit.

Held further, that decisions to the effect that an Appellate Court had not legally granted the permission on a particular ground would not amount to an authority to the effect that such ground would not have been a proper ground for the granting of such relief if it had been applied for at an early stage of the suit in the trial Court.

K.E.A.K. Ahmed Sahib & Co. v. *M.E. Pakir Mahomed Rowther*, (1923) 1 Ran., 694 ; *Kali Prasanna Sil v. Panchanan Nandi*, (1916) 44 Cal., 367 ; *Mahipali Valad Shamla* v. *Nathu Valad Vithoba*, (1909) 33 Bom., 722 ; *Jhunku Lal* v. *Bisheshar Das*, (1918) 40 All.,612— *referred to.*

*Civil Revision Nos. 91 and 92 of 1923 from the Civil Regular Suits 5744 and 5858 of 1922 of the Rangoon Small Cause Court.

Behari Lal Pal v. *Srimati Baran Mai Dasi*, (1894) 17 All., 53 ; *Ilahi Baksh* v. *Iman Baksh*, (1876) 1 All., 324 ; *Mulchand* v. *Bhikari Das*, (1885) 7 All., 624 ; *Venkata Shetti* v. *Ranga Nayak*, (1887) 10 Mad., 160—*followed*.

Parduman Chand v. *Ganga Ram*, (1921), 66 I.C., 285—*distinguished*.

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LENTAIGNE, J.—These are two applications for revision of two orders passed by the Chief Judge of the Court of Small Causes, Rangoon, rejecting two applications filed under Order 23, rule 1, sub-rule (2) of the Code of Civil Procedure seeking permission to withdraw from two suits instituted in that Court with liberty to institute a fresh suit in respect of the subject-matter of such two suits. The order rejecting the applications recognises the fact that the object of the plaintiff was to consolidate the two claims in a single suit which would avoid any danger of the second suit being held to be barred under the provisions of Order 2, rule 2 of the Code.

Both these suits are for the recovery of the price of goods alleged to have been sold and delivered by the plaintiff firm to the defendant, the earlier suit No. 5744 having been instituted on the 5th Sepetember 1922 claiming Rs. 1,200-8-3 in respect of goods alleged to have been delivered between the 9th December and the 20th December 1921, and the later suit No. 5858 been having instituted only three days later on the 8th September 1922, claiming Rs. 969-14-6 in respect of goods alleged to have been delivered between the 11th January and the 2nd May 1922. In each plaint there was an allegation that the original bills had been stolen from the Pleader's Office on the 19th August 1922 ; and I notice also that the Court-fee stamps in both the cases bear entries showing that they had been supplied under two consecutive numbers on the same date, the 19th August 1923. The diaries in the two suits show that they were both fixed for the same date for first appearance of defendant, and

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for practical purposes it may be taken that both suits were instituted together or almost together.

If the two suits had been consolidated into a single suit, the total claim would have been for Rs. 2,170-6-9 which is roughly Rs. 171 in excess of the jurisdiction of the Court of Small Causes, and the plaintiff would have been obliged to institute the combined suit in the late Chief Court but by doing so he would have effected a saving of about Rs. 27 on his Court-fees. If the plaintiff had thought that there was any legal objection to his filing the two suits separately and that it was necessary to consolidate the two claims in a single suit, it was also open to him to institute the combined suit in the Court of Small Causes by foregoing Rs. 171 of his total claim and as against that small loss there would have been a reduction of about Rs. 37 in Court-fees when compared with the Court-fees of two suits. From these figures it is obvious that the plaintiff would have been taking a very great risk in the hope of a comparatively small gain, if he had separated the claims into two suits with knowledge that there was any legal objection to his doing so.

I refer to the above facts, because great stress has been laid on the contention that plaintiff *deliberately* instituted two suits instead of instituting a single suit for the combined claim. That term "deliberately" also occurs in the same contention in the order rejecting the applications. At the hearing I pointed out that it is very unlikely that the plaintiff would have done so *mala fide* with a view to any trickery or otherwise with knowledge that he was imperilling his second claim, but no argument was addressed to me to the effect that such imputation should be made against him. The contention based on the use of the word "deliberately" can therefore only mean at most that

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the defendant wishes to rely on the maxim *ignorantia legis non excusat.* I am satisfied however that the above maxim could not help the defendant, because in my opinion the provisions of Order 23, rule 1 (2), are intended to authorise the granting of relief *inter alia* in cases in which the formal defects rendering the relief desirable are defects of legal formalities prescribed by the Code or other such legal defects, and that in suitable case relief should be granted whether the defects arise from a mistake of law or from a mistake of fact. I may also add that even if the plaintiff did in fact realise that there was a doubt as to his legal right to institute two suits instead of one, I do not think that it would be any ground for refusing to allow him to correct a *bonâ fide* mistake.

The above incorrect reliance on the word "deliberately" is probably due to a decision reported in 17 Weekly Reporter (1874), p. 208, in which the word "deliberately" appears to have been inaccurately used in a misleading passage with reference to applications to amend a plaint; but the inaccuracy becomes apparent on a close examination of the earlier decision reported in 9 Bombay High Court Reports (1872), p. 1, which is cited as the authority for the passage in question. The misleading passage was apparently intended to be read in an ill-expressed contrast to other passages, and it becomes still more misleading when it is relied on as an independent proposition ignoring the context. Both these decisions had reference to cases in which a plaintiff claiming to be a landlord had sued on a forged lease or on a lease which had not been executed by the alleged tenant, and when the plaintiff failed on the merits in each case, he wished to change the claim into a different claim based on title and one for damages use and occupation, and in each case he was refused that request

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and was told to enforce the new claim, if the law of limitation allowed, in a separate suit on a distinct cause of action. The *deliberate* omission to join distinct causes of action in one suit might be a point arising on the facts of those two cases, but these decisions obviously cannot be a precedent affecting applications to amend claims on a *single* cause of action. I may add that I am likewise satisfied that amendments of pleadings should equally be allowed in suitable cases in order to overcome the effects of *bonâ fide* mistakes whether of law or of fact, and that it does not matter whether the assertions or omissions caused by such mistakes were deliberately made or not.

Moreover I am also satisfied that any mistake on the application of the bar in Order 2, rule 2 of the Code to a case like that now before me would not be a mere mistake of law but would be a mistake on a question of fact or of mixed law and fact. At the hearing I pointed out that shortly after the orders now under review, the question of the application of the bar in Order 2, rule 2, to this class of case was considered by a Bench consisting of my brother Heald and myself on an appeal from a decree of the Rangoon Court of Small Causes in the case of *K. E. A. K. Ahmed Sahib & Co.* v. *M. E. Pakir Mahomed Rowther* (1), and that we had come to the conclusion that *primâ facie* each separate order and delivery of goods is a separate contract and a separate cause of action, but that in some cases it may be a question of successive claims under a single obligation within the terms of the "Explanation" to the rule, that is, for example, when the successive claims arise under the same contract. We also pointed that it had been held in Calcutta that it was open to the parties

(1) (1923) 1 Ran, 694.

even in the latter case of a single contract to agree that successive claims for separate deliveries thereunder should be treated as separate contracts and therefore as separate causes of action ; and we pointed out that in the case of successive transactions under distinct orders there might be either a contract or a course of dealing from which an implied contract might be inferred, that the entire series for a specific period etc., should be treated as a single cause of action, but as such had not been established in that case, the bar under Order 2, rule 2, had not been shown to arise. From this it is obvious that the question is mainly a question of fact or of mixed fact and law in each case. Although I take the above view of the law, I may here add that I am also of opinion that the more prudent lawyer should usually, as a wise precaution as far as possible, take the course of greater safety by including all transactions up to date of suit in a single plaint.

Both Mr. Clifton and Mr. Cowasjee, who appeared before me on this application, appeared to be unaware of that decision, and when I suggested that it was a matter for their consideration whether the above decision might possibly render it unnecessary to proceed with the application for withdrawal, it was contended by the advocate for the Respondent-Defendant that as the application for withdrawal had been made on the basis of the existence of the bar, this application must proceed on that basis.

The main contention advanced against the granting of the application is based on the technical construction of Order 23, rule 1 (2), which prescribes as a condition precedent to the granting of the permission thereunder, the requirement that the Court must be satisfied:—

(*a*) that the suit must fail by reason of some formal defect, or

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(*b*) that there are other sufficient grounds for allowing the Plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.

The Respondent relies also on the decision of the High Court of Calcutta on the similar wording of section 373 of the Code of 1882 in *Kali Prasanna Sil* v. *Panchanan Nandi* (2) in which the learned Chief Justice cited with approval a previous decision of Mr. Justice Mookerjee and expressed the opinion "that clauses (*a*) and (*b*) of sub-rule (2) have to be read together and that the intention is that a ground included in clause (*b*) must be of the same nature as the ground specified in clause (*a*), that is to say, it must be something of the same nature as *formal defect*, and, inasmuch as in that case the ground for allowing the suit to be started afresh was not because there was a formal defect but for some other reason the order was illegal," and where he also cited another decision in which the learned Chief Justice Sir Lawrence Jenkins also approved of the same rule of construction.

It may be here noted, however, that beyond holding that the specific ground relied on in each particular case was not a formal defect entitling the plaintiff to the relief for the purposes of that case, these decisions do not supply any express indication as to what is a formal defect. But if the rule of construction so laid down is kept in view when considering the various instances in which the High Courts have held that permission was legally granted, it becomes obvious that this rule of construction in fact emphasises the point that the expression "*formal defect*" must be given a very wide and liberal meaning and presumably as connoting defects of

(2) (1916) 44 Cal., 367.

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various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties. The expression, as used in this rule, appears to be capable of such a wide meaning, and it is difficult to fix on any more restricted meaning which could have been reasonably intended by the Legislature. If a wide and liberal meaning should be given to the expression "*formal defect*" in this rule I can find nothing in the rule which prohibits the granting of relief before the framing of issues or before the actual trial in a case like that now before me, and I am not aware of any decision in which it has been held that a wide and liberal construction of that expression should not be adopted. I notice, however, that Scott, C.J., of the Bombay High Court expressed the view that it is impossible to lay down any exhaustive definition of what are sufficient grounds within the meaning of section 373 of the Code of 1888. See *Mahipati Valad Shamla* v. *Nathu Valad Vithoba* (3). It appears to me that the real difficulty and source of confusion in construing the rule arises from the changed situation which may develop in the course of the case and especially after a decree has been passed in the trial Court by reason of new rights or equities arising in favour of the defendant, and that in consequence defects which would be formal defects entitling the plaintiff to the relief at the early stages of the suit may cease to be a ground for the relief after the decree in the trial Court or even at an earlier stage. It is unnecessary to come to a conclusion whether in theory such defects have ceased to be "formal defects," or whether they have ceased to be the ground or sole ground why the suit or part of the

(3) (1909) 33 Bom., 722.

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claim must fail or to be "other sufficient grounds." On either view, the plaintiff would not be entitled to relief under the rule after such change in the situation.

Sir Henry Richards in the case of *Jhunku Lal* v. *Bisheshar Das* (4) correctly points out that "a Court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits, and probably an appellate Court ought seldom or never to do so except where an application has been made to the first Court and the appellate Court thinks the first Court should have granted the application. I do not think that it ever was intended that a plaintiff should have the power of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time." Though these remarks were *obiter* in that case, they appear to set out a well recognised rule, though opinions may differ as to the stage in the suit when it should be held to be too late to apply for the relief, and the answers to that question may depend on other circumstances varying in different cases.

I am, therefore, of opinion that decisions to the effect that an appellate Court had not legally granted the permission on a particular ground would not amount to an authority to the effect that such ground would not have been a proper ground for the granting of such relief if applied for at an early stage of the suit in the trial Court. This explanation is a sufficient answer to the contention of the Respondent that the decision of a single Judge of the High Court at Lahore in *Parduman Chand* v.

(4) (1918) 40 All., 612.

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Ganga Ram (5) is a precedent in support of the opposition to the applications now in question. In that case a suit for interest only due on an alleged mortgage had been dismissed in the first appellate Court on the ground that the alleged mortgage had not been proved ; and the Plaintiff sought to attack the dismissal of the suit in a second appeal, with an alternative prayer for revision if a second appeal did not lie. In the course of such application for relief by way of second appeal or revision, an application was also made for leave to withdraw the suit under Order 23, rule 1 (2) of the Code on the ground that the Plaintiff was afraid that a second suit for principal, if brought thereafter, might be held to be barred by Order 2, rule 2 of the Code. The Judge is recorded as holding that—" this, however, is not a sufficient cause for allowing the present suit to be withdrawn. The plaintiffs having brought the present suit for interest only, the defendants have a very good defence to a subsequent suit for principal, namely, that it would be barred by Order 2, rule 2 of the Civil Procedure Code, and to allow the plaintiffs *at this stage* to withdraw the suit would be to deprive the defendant of that ground of defence." The headnote to that case is obviously couched in too wide terms and the real gist of the decision lay in the words " *at this stage,*" which I have italicised. The defendant had won the case on the merits in the lower appellate Court, and the High Court was being asked to deprive the defendant of the fruits of that victory by means of the belated application in a second appeal which did not lie or in the alternative in an application for revision. The more recent annotated editions of the Code do not contain

(5) (1921) 66 I.C., 285.

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references to any case deciding the converse to this decision as regards the bar in Order 2, rule 2, but on referring to an old annotated edition of the Code of 1882, I have discovered references to cases in which the converse was decided. In *Venkata Shetti* v. *Ranga Nayak* (6), the plaintiff had been allowed to withdraw a suit for interest only under a mortgage, and the question was raised whether his subsequent suit for principal and interest was not barred by reason of the previous suit under section 43 of the Code of 1882, and the High Court at Madras held that—" the obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest, instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by section 43 of the Code ; and if the contention now raised were allowed to pervail, the anomaly would be presented of an order made by a competent Court as to a matter within its discretion to which order no legal effect could be given. Section 373 was presumably intended to allow of mistakes or omissions being corrected, within the discretion of the courts concerned, and we do not think it necessary to hold that section 43 is a bar to the entertainment of the present suit."

That decision had reference to a case in which the " Explanation " to rule 2 of Order 2 would be applicable. The decision of the High Court at Allahabed in *Ilahi Baksh* v. *Imam Baksh* (7) relates to another instance of a case in which permission had been given to withdraw a suit in order to institute a later suit containing a claim on the same cause of

(6) (1887) 10 Mad., 160.

(7) (1876) 1 All , 324.

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action which had been omitted in the previous suit. Again in the case of *Mulchand* v. *Bhikari Das* (8), a plaintiff who had sued for a share of profits arising out of land for three years had omitted to include the share of profits for a fourth year and the case was struck off under a Rent Act with leave to institute a fresh suit. It was contended that the second suit was barred under section 43 of the Code of 1882 as regards the profits for the fourth year, and Straight, J., when rejecting the contention, remarked—"I do not see anything in the law to prevent the plaintiff from bringing the present suit. At any rate before the case was struck off he could have so amended his plaint as to have included the present claim. If he could do so, *a fortiori* I do not see any reason why he should not do the same in a fresh suit." In the case of *Behari Lal Pal* v. *Srimati Baran Mai Dasi* (9) the plaintiff had instituted a suit claiming rent for certain years but had omitted to include a claim for rent for another year, and that suit was withdrawn and liberty was granted to institute a fresh suit. It was held that the claim in the subsequent suit for the omitted year's rent was not barred under section 43 of the Code of 1882, and the High Court at Allahabad followed the decision of the Madras Court in *Venkata Shetti* v. *Ranga Nayak* (6) on that point.

The cases, which I have cited above, appear to be good authorities for permitting the plaintiff to withdraw from the two suits now in question with liberty to bring a fresh suit, and no ground has been urged before me which would make it inequitable that plaintiff should be granted such relief. I can see no reason why the plaintiff should not be allowed to amend his plaint in the first suit so as

(8) (1885) 7 All., 624.

(9) (1894) 17 All., 53.

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to include the claim in the second suit, though it would be necessary for him to forego a portion of that claim to keep it within the jurisdiction of the Court of Small Causes. That being so, I can see no reason why the plaintiff should not be allowed to withdraw the suit and effect the amendment to the wider extent in the new suit, and in this view I am fortified by the decision of Straight, J., in one of the cases cited above.

It has been strongly urged that though the second suit might fail by reason of a formal defect under Order 2, rule 2, the same formal defect does not apply to the first suit which could be decreed in full notwithstanding any defect alleged in the case. So far as clause (*a*) of Order 23, rule 1 (2), is concerned, that might appear to be correct as regards the claim as originally framed in such suit ; but I think that the case would come within clause (*b*), when it is admitted or contended by the defendant that the cause of action of the first suit includes the claim of the second suit and that such portion of the claim on such cause of action must fail if the plaintiff is not given relief under Order 23, rule 1 (2). An amendment of the plaint might save a portion of that wider claim but it would not save it all.

I likewise do not think that it is necessary for the Court to go into the question under clause (*b*) as to whether the suit or portion of the claim must *necessarily* fail if the permission to withdraw is not granted so long as the Court is satisfied that there is a reasonable apprehension that the suit must fail if the permission to withdraw is not granted. Moreover, the assertion by the plaintiff that the suit or portion of the claim must fail by reason of such formal defect would in most cases

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amount to an admission which would necessarily cause that result.

For the above reasons, I am satisfied that the plaintiff in the two cases now before me had good ground for his applications to be allowed to withdraw the suits with liberty to bring a fresh suit, that such applications were wrongly rejected owing to a misunderstanding of the law and that the lower Court has acted with material irregularity which would result in heavy loss to the plaintiff merely because he or his pleader has made a *bonâ fide* mistake on a question of fact or of law and fact on which the Judges of the Court of Small Causes and a Bench of the High Court have held divergent opinions.

For the above reasons I set aside the orders of the lower Court refusing the leave to withdraw in both the cases; and in both the cases I grant the plaintiff leave to withdraw the suits with leave to institute a fresh suit.

As regards costs the defendant is entitled to be compensated in costs, and the usual practice is to allow a defendant his full costs as the condition of allowing the withdrawal, but as there is a cross sum arising in respect of the costs of this revision, it is not advisable that a previous jugdment should be made a condition of withdrawal, but that instead the cross amounts be readjusted and set off *pro tanto*. I therefore allow the defendant his costs in both suits in the lower Court. The plaintiff-petitioner is, however, entitled to his costs in this Court and I allow him the costs of the revision in both cases, fixing a pleader's fee of three gold mohurs in each case, making six gold mohurs in all as pleader's fee.