

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

1933
May 30.

C.T.K.M.S.R.M. CHETTYAR FIRM

v.

O.A.O.K.C.T. CHETTYAR FIRM.*

Negotiable instrument—Summary procedure—Civil Procedure Code (Act V of 1908, Order 37—Leave to defend not applied for—Defendant's application to pay by instalments—Court's jurisdiction to hear defendant on question of instalments—Order 20, rule 11 (I).

At the time of passing a decree under Order 37, rule 2 of the Civil Procedure Code the Court has jurisdiction to hear the defendant on the question whether or not the amount held to be due from him should be made payable by instalments, although the defendant has not obtained leave to defend the suit. Order 20, rule 11 (I) forms part of the procedure by which the Original Side of this Court is regulated, and there is nothing in the provisions of Order 37 to limit or restrict the jurisdiction of the Court to pass an order for payment of the decree by instalments under Order 20, rule 11 (I).

P. S. Narishwalla v. J. N. Gamadia, I.L.R. 50 Bom. 262—dissented from.

Doctor for the appellants. Order 37 of the Civil Procedure Code does not debar a defendant from appearing in the case, before any decree is passed against him, in order to ask that the decretal amount may be made payable in instalments. Rule 3 does not use the words "leave to appear and to defend the suit" disjunctively; it contemplates that leave of the Court is necessary if a defence is sought to be raised on the merits, the reason being to avoid vexatious and frivolous defences. It could not have been intended by the Legislature that the leave of the Court should be necessary for an appearance to confess judgment and to apply for instalments.

Order 37 of the Code may be compared with Order 14, rules 4, 5 and 6 of the Supreme Court's Rules and Orders in England where the language

* Civil Misc. Appeal No. 191 of 1932 from the order of this Court on the Original Side in Civil Regular No. 408 of 1932.

clearly indicates that leave is necessary only for *defending* the suit.

No doubt Order 20, rule 11 permits applications for instalments to be made after the passing of a decree, though Rule 233 of the Rangoon High Court Rules and Orders subjects such a right to the consent of the decree-holder.* There is no express provision anywhere, either in the Code or in the High Court Rules, making Order 20, rule 11 inapplicable to summary suits. The decision of the appellate Court in *Pestonji Shapurji Narielwalla v. Jamsedji Nowroji Gamadia* (1) is not correct; and it is submitted that Mirza J.'s decision on the Original Side ought to have been upheld as being in consonance with justice.

[PAGE, C.J. Rule 2 of Order 37 states that the summons shall be in Form No. 4 in Appendix B; and the Form seems to contemplate that leave is necessary even for a mere "appearance."]

The words in Form No. 4 "or that it is reasonable that (you) should be allowed to appear in the suit" are probably mere surplusage. In any case the Form must be governed by the provisions of the Code itself, and nowhere is the operation of Order 20, rule 11 curtailed in respect of suits under Order 37.

A refusal to give leave to the defendant to appear and ask for instalments is appealable since it finally disposes of the rights of the parties.

P. B. Sen for the respondents. Though the memorandum of appeal is couched in very wide

* The rule has since been amended and the Court may, after notice to the decree-holder, order payment by instalments.—*Ed.*

(1) I.L.R. 50 Bom. 262.

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terms the appeal is merely from an order refusing leave to the defendant to apply for instalments and such an order is not appealable.

Order 37 is self-contained: rule 2 details the complete procedure for summary suits, and no right is given to the defendant to appear without the leave of the Court for any purpose before the passing of a decree. The object of Order 37 is to enable the holder of a negotiable instrument to obtain speedy judgment and speedy realization of his debt; rule 2 (3), in fact, states that the decrees may be executed forthwith. Order 20, rule 11 will always apply after a decree is passed, and it cannot therefore be contended that any harm is caused to the defendant by precluding him from appearing before the passing of the decree.

Moreover, a plaintiff may have to forego a portion of his relief if he chooses to claim the benefit of the procedure under Order 37; see rule 2 (2); and it is therefore not reasonable to allow a defendant to appear before the passing of the decree unless he has a defence on the merits.

PAGE, C.J.—This appeal raises an interesting question relating to procedure.

A suit was filed under Order XXXVII of the Civil Procedure Code, and a summons in the prescribed form was duly served upon the defendant. The defendant applied for leave to appear and defend the suit upon the ground that, although the amount claimed admittedly was due, the Court ought to make an order that the sum for which it passed a decree should be paid by instalments. Mya Bu J. being of opinion that the defendant, who did not pretend that he had any defence on the merits, was not entitled at

the trial to make an application that the decretal amount should be paid by instalments, refused to grant the defendant leave to appear and defend the suit. From that order the appellant has preferred an appeal to this Court.

Now, it will be found that the real question that falls for determination is whether at the time of passing a decree under Order XXXVII, rule 2, the Court has jurisdiction to hear the defendant on the question whether or not the amount held to be due from him should be made payable by instalments.

Under Order XX, rule 11 (1), it is provided that :

“Where, and in so far as, a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable.”

Under s. 122 of the Code of Civil Procedure the High Court is entitled to make rules regulating its own procedure as therein provided, “and may by such rules annul, alter or add to all or any of the rules in the First Schedule.”

In the Rules and Orders of this High Court no mention is made of Order XX, rule 11 (1), and unless the provisions of that rule are excluded from the rules of procedure by which the High Court is regulated the rule will apply to the High Court. Under Order XLIX, rule 3 (5), of the Civil Procedure Code it is provided that rules 1 to 8 of Order XX shall not apply to any Chartered High Court in the exercise of its ordinary or extraordinary Civil jurisdiction. It follows,

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therefore, that Order XX, rule 11 (1), forms part of the procedure by which the Original Side of this High Court is regulated.

It is common ground, and in my opinion there can be no doubt, that under Order XX, rule 11 (1) the Court, unless its jurisdiction in that behalf is limited or abrogated, is competent to pass an order for payment of the decretal amount by instalments in a suit based upon a promissory note and if the Court can pass an order for instalments at the time of passing the decree in such a suit I am of opinion that a party to the suit is entitled to be heard upon the question whether an order for instalments should be made or not. In my opinion a defendant is entitled to be heard on such a question, whether or not he entered appearance or defended the suit.

Now, having regard to the terms of Order XXXVII, is the Court bound to hold that the jurisdiction of the Court to pass an order for instalments under Order XX, rule 11 (1), has been abrogated? The object of the Legislature in enacting Order XXXVII was that in suits to which the order applied the plaintiff should not be compelled to waste his time and money in combating idle and frivolous defences, and, therefore, it was provided in Order XXXVII, rule 2, that a defendant should not be allowed to appear and raise a defence to the suit, whether such defence was founded upon the merits or otherwise, unless he had obtained leave to appear and defend the suit as provided in Order XXXVII. Under Order XXXVII, rule 2 (1), the summons in such a case must be "in Form No. 4 in Appendix B or in such other form as may from time to time be prescribed." In Form No. 4 the defendant is

required to obtain the leave of the Court within ten days of the service of the summons to appear and defend the suit, or in default the plaintiff will be entitled to a decree as provided in Order XXXVII, rule 2. In Form No. 4 it is prescribed that leave to appear for the purpose of raising a defence to the suit may be obtained on an application to the Court showing either a defence on the merits or a defence on some other ground. In my opinion the meaning and effect of Order XXXVII, rule 2, is that, unless a defendant obtains leave to appear and defend the suit in accordance with the provisions of the Order, he is not entitled to be heard at the trial by way of defence to the suit; the result being that the allegations in the plaint will be deemed to be admitted, and the plaintiff entitled to a decree in the form therein prescribed.

Now, it may be that by adopting this summary remedy the plaintiff will have to forego a portion of his claim which, if he had followed the ordinary procedure laid down in the Code, he might have recovered; but it is provided that a decree passed in favour of the plaintiff under rule 2 "may be executed forthwith" (rule 3) by which I take it is meant that a plaintiff having obtained a decree under rule 2 is entitled to apply for execution of the decree at once; although, of course, whether he will be granted leave to execute the decree at once or not must depend upon the circumstances in each case. No doubt, the Court in normal circumstances would assist the plaintiff to recover forthwith the amount to which he is entitled under a decree obtained through the summary procedure of Order XXXVII, but "may" does not mean "shall" in Order XXXVII, rule 3, and each case must turn on its own facts.

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Now, the question is whether, having regard to the language in which Order XXXVII is couched, it follows as a necessary implication from the terms of that Order that the jurisdiction which the Court otherwise would possess to hear the parties and determine whether the decree should be payable by instalments or not has been abrogated. I can see no reasonable ground for so holding. The question whether the Court is entitled to pass an order for instalments or not is neither mooted nor mentioned in Order XXXVII, and the effect of holding that the Court is not competent to pass an order for instalments at the time of passing a decree under Order XXXVII would be to limit its power of doing justice to the parties. The learned advocate for the respondent went the length of contending that, even if the plaintiff, who might have been compelled to bring a suit against the defendant on a negotiable instrument but having obtained his decree was anxious not to press him unduly for payment, asked the Court to pass an order for payment of the judgment debt by instalments, the Court at the time of passing the decree would have no jurisdiction to accede to his request. What useful purpose would or could be served by refusing to allow the Court to hear the parties at the time of passing the decree on the question whether an order for payment by instalments should be passed? Surely none. I find nothing in the provisions of Order XXXVII of the Code that limits or restricts the jurisdiction which otherwise the Court would possess to pass an order for instalments under Order XX, rule 11 (1).

Now, in the present case Mya Bu J. refused to hear the defendant at the trial when he applied that the Court should pass an order for payment

of the decretal amount by instalments, because he regarded himself as bound by the judgment that he had passed in *K.V.L. Chettyar Firm v. S.A.R.M. Chettyar, Firm* (1). The ground upon which he based his decision in that case was that, unless the defendant obtained leave to appear and defend the suit as provided by rule 3, "he is not to be allowed either to appear or to defend the suit. If he is not to be allowed either to appear or to defend the suit, he is deprived of an opportunity to put in appearance and consequently, of an opportunity of making an application for payment of the decretal amount in instalments which, in ordinary cases, he may make under Order XX, rule 11 (1)."
 I confess, with great respect, that I regard the decision as a *non sequitur* from the premises from which it is held to flow. For the reasons that I have given, in my opinion, a defendant under Order XXXVII who has not obtained leave to appear and defend is precluded from contending either by way of argument or by adducing evidence that he has any defence to the suit on the merits or otherwise. But by applying at the time of passing the decree that the Court should make an order for payment of the decretal amount by instalments the defendant is not seeking to contravene any of the provisions of Order XXXVII. He merely applies to the Court as the party defendant in the suit for an order that the decretal amount should be paid by instalments pursuant to the jurisdiction that it possesses under Order XX, rule 11 (1), of the Code. It appears to me that because a defendant is not entitled to appear and defend the suit it does not follow that he is not

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(1) Civil Regular No. 377 of 1932.

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entitled to ask the Court to pass an order that the decretal amount should be payable by instalments. What is there in Order XXXVII that bars him from making such an application? Nothing, as I understand the terms of that Order. The view, however, that has been expressed by Mya Bu J. in the present case found favour also with the Bombay High Court in *Pestonji Shapurji Narielwalla v. Jamsedji Nowroji Gamadia* (1). In that case Macleod C.J. and Coyajee J. reversed the decision of Mirza J. which, in my opinion, with all due respect to those learned Judges, correctly laid down the law. Mirza J. in the course of his judgment held that :

“A summary suit contemplates that the defendant shall not be heard on the merits of his defence unless, prior to the date of the hearing, he has obtained leave to defend. In my opinion, a defendant in a summary suit is not debarred from obtaining the benefit of Order XX, rule 11, and may be heard at the time of passing the decree.”

The learned Judges on appeal in that case, however, appear to have based their judgment upon the ground that Order XX, rule 11, sub-rule (1) “clearly contemplates that the application for instalments should be part of the hearing and an order made simultaneously with the decree. Ordinarily speaking, then, a person who cannot appear at the hearing cannot be allowed to appear in order to apply for payment of the decretal amount by instalments.”

For the reasons that I have given I am of opinion that the *ratio decidendi* of that case involves a *non sequitur*, and with all due respect to the learned Judges who decided that case, in my opinion they did not correctly lay down the law.

(1) (1925) I.L.R. 50 Bom. 262.

A further question, however, remains as to how we ought to dispose of the present appeal. In my opinion it must be dismissed. If the application out of which the appeal arose was an application for leave to appear and defend the suit on the merits, then, inasmuch as no such defence was, or could be, substantiated, the application was rightly dismissed. If, on the other hand, the application is treated merely as one for leave to appear for the purpose of applying to the Court for an order that the decretal amount should be paid by instalments the application was misconceived, for no such leave was required, as the applicant was entitled to make such an application without the leave of the Court.

In these circumstances the appeal will be dismissed without costs.

DAS, J.—I agree.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Das.

ABDUL HOOSEIN

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL.*

*Workmen's Compensation Act (VIII of 1923), s. 2 (1) (n)—Workman, who is a—
Employment in business of employer—Employment of a casual nature.*

If a man is employed for the purpose of the trade or business of the employer, even though the employment is of a casual nature, he is a workman within the meaning of s. 2 (1) (n) of the Workmen's Compensation Act.

If such a person suffers injury as the result of an accident arising out of and in the course of an employment to which the Act applies he is entitled to compensation.

Manton v. Cantwell, (1920) A.C. 781—referred to.

* Civil Misc. Appeal No. 171 of 1932 arising out of the order of the Commissioner for Workmen's Compensation, Minbu, in his Trial No. 1 of 1932.

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