

Pleader, that even if the Magistrate had explained to the woman that she was not bound to make the confession she would still have made the confession. This we see every day. But I do not think that we are entitled to take this for granted, and, therefore, I accept the view that this confession was not admissible and must not be considered. Therefore, the appellant is entitled to an acquittal.

*Conviction and sentence  
set aside.*

J. G. R.

### ORIGINAL CIVIL.

*Before Mr. Justice Rangnekar.*

**RAHIMTULLA JIVRAJ v. JAMSHEDJI R. DRIVER.\***

*Practice—Bombay High Court Rules (Original Side), 1922—Rule 325 (rule 343 of the rules of 1930)—Notice of Motion—Service of notice on defendant before service of summons—Leave of Court—Consent of parties.*

A notice of motion in a suit on the Original Side of the High Court of Bombay cannot be served on the defendant, before service of the writ of summons, in the absence of leave of the Court previously obtained under Rule 325<sup>(1)</sup> of the Bombay High Court Rules (Original Side), 1922 (reproduced as Rule 343 in the present Rules, 1930).

It is not open to the parties to a suit to waive by consent the requirements of this Rule.

#### NOTICE of motion.

The plaintiff filed a suit on May 6, 1929, to recover a sum by way of damages from the defendant for failure to carry out certain terms of a lease and on May 10, 1929, he applied for the issue of a writ of summons against the defendant. The writ was lodged in the Sheriff's office on June 4, 1929, but it was not served on the defendant.

On June 10, 1929, the plaintiff appeared before Blackwell J. and applied for an order for stay, pending the disposal of

\*O. C. J. Suit No. 761 of 1929.

<sup>(1)</sup> Rule 325 of Bombay High Court (O. S.) Rules, 1922, which is reproduced as Rule 343 of Bombay High Court (O. S.) Rules, 1930, is in these terms:

"The plaintiff may, by leave of the Court or a Judge to be obtained *ex parte*, serve any notice of motion upon any defendant, after admission of the plaint, and before the time limited for the appearance of such defendant."

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the High Court suit, of a certain suit which the defendant was then prosecuting against the plaintiff in the Small Causes Court at Bombay. The notice of motion which was served on the defendant contained the following words :—

“ Please also take notice that leave has been obtained to serve this notice of motion on you before the service of the writ of summons.”

No leave of the nature contemplated by Rule 325 of the Bombay High Court Rules (O. S.), 1922 (now Rule 343), was in fact obtained from the Court. When the notice of motion came on for argument, counsel for the defendant raised a preliminary objection that the notice of motion could not be entertained by the Court inasmuch as the leave of the Court was not obtained to serve the notice of motion before service of the writ of summons.

*M. V. Desai*, for the plaintiff.

*M. A. Jinnah*, for the defendant.

RANGNEKAR J. Mr. Jinnah has raised a preliminary objection to this notice of motion, under Rule 325 of the Original Side Rules, 1922. Admittedly, the plaintiff has not obtained leave of the Court to serve the notice of motion as required by that rule. The notice of motion was in the main for restraining the defendant from prosecuting the suit which he had filed against the plaintiff in the Small Causes Court. It appears that on June 10, the plaintiff appeared before my brother Blackwell to apply for leave under Rule 325 and for an interim order. The defendant having come to know that the plaintiff was going to make an application in this Court appeared at the time, and as no notice of motion was served on him, by consent, an order was made by Mr. Justice Blackwell allowing the notice of motion to stand over to the following day, and directing the plaintiff to serve the notice of motion and copy of his affidavit on the defendant in the course of the day, the defendant agreeing in the meanwhile not to proceed with that suit.

Thereafter, a copy of the notice of motion with the plaintiff's affidavit was served on the defendant, and it distinctly stated that leave to serve notice of motion on the defendant before the service of the writ of summons had been obtained from the Court, a statement which the learned counsel for the plaintiff had to admit was false. The defendant took search in the Prothonotary's office and found that in fact, no leave under Rule 325 was obtained. He, therefore, inquired of the plaintiff as to whether the latter had obtained leave. No reply to that letter was given. On Tuesday the motion was allowed to stand to the 17th.

It is argued by Mr. Desai that under these circumstances the defendant waived the objection to the notice of motion being heard. In my opinion there is no substance in that contention. The Rule in question is very clear, and it is not open to the parties by consent to ignore it. In this case, however, it is clear that the defendant did not waive his objection to the notice of motion. All that he agreed to was, that the suit in the Small Causes Court should not be proceeded with before the disposal of the notice of motion which, in my opinion, does not amount to a waiver on his part of all objections which he may be entitled to raise to the notice of motion at the hearing, both as to the procedure adopted as well as to the form and the merits relating thereto. Apart, therefore, from the fact that the plaintiff made a false statement in the copy of the notice of motion which he served on the defendant, and which he never attempted to correct till to-day, the objection must be upheld, and the notice of motion must be dismissed with costs.

Attorneys for plaintiff: Messrs. *Lakhia & Co.*

Attorneys for defendant: Messrs. *Jamsedji, Rustomji & Devidas.*

*Motion dismissed.*

B. K. D.

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*Rangnekar J.*