1938

PERFORMING RIGHT SOCIETY LTD. v. INDIAN MORNING POST RESTAURANT

B. J. Wadia J.

provided that the person verifying shall specify by reference to the particular paragraphs of the pleading what he verifies of his own knowledge and what he verifies upon information received and believed to be true. There is nothing in this rule which prevents the person verifying from saying that the whole plaint is upon information received and believed to be true. That has been done, and I would therefore also answer issue No. 3 in the affirmative.

[His Lordship then dealt with the merits of the case and found as a fact that there was an infringement of the copyright and granted the injunction prayed for and awarded Rs. 50 as damages for the breach.]

Decree accordingly.

N. K. A.

APPELLATE CIVIL.

Before Sir John Beaumont, Chief Justice, and Mr. Justice Rangnekar.

1938 *November* 8

GANESH VISHNU VIJAPURE (ORIGINAL DEFENDANT), APPELLANT *v.* KASHINATH THAKUJI JADHAV (ORIGINAL PLAINTIFF), RESPONDENT.*

Specific Relief Act (1 of 1877), s. 42—Suit for declaration—Injunction, essence of relief claimed—Injunction not prayed for in plaint—Suit not competent.

One K filed a suit against R to recover a debt and obtained an order for attachment before judgment of R's press. At a later date in the same year G filed a suit against R and obtained a decree based on an award and in execution of the decree attached R's press. K, therefore, filed a suit against G for a declaration that the decree obtained by G against R was fraudulent and collusive and that G was not entitled to attach the property which K had previously attached. The Subordinate Judge held that G's decree was fraudulent and collusive and made a declaration that the press attached by K was not liable to be attached and sold in execution of the decree obtained by G. On appeal to the High Court,

Held, dismissing K's suit, that the relief which K really required was an injunction to restrain G from attaching the property, and not merely a declaration of title as claimed by K and therefore the suit was not competent under s. 42 of the Specific Relief Act, 1877.

Venkatarama Aiyar v. *The South Indian Bank, Limited*[1] and *Jamnabai* v. *Dattatraya*,[2] referred to.

*First Appeal No. 167 of 1936.

[1] (1919) 43 Mad. 381.

[2] (1935) 60 Bom. 226.

1938

GANESH VISHNU v. KASHINATH THAKUJI

FIRST APPEAL against the decision of M. B. Pradhan, Joint First Class Subordinate Judge at Poona.

Suit for declaration.

One Ramlinga owned a Press at Poona. He published a newspaper which was printed in the press. During 1930 to 1933 Ramlinga borrowed various sums from the plaintiff for the purposes of the press and the paper by passing promissory notes. In the beginning of 1934, plaintiff filed suit No. 335 of 1935 to recover Rs. 2,735 which were due on the promissory notes. As Ramlinga was heavily indebted, the plaintiff obtained an order for attachment of the press before judgment.

The defendant who held two promissory notes passed by Ramlinga, had the dispute between them regarding the debt on the promissory notes referred to arbitration and got an award for Rs. 5,000 and odd on March 26, 1934. A decree on that award was obtained on March 27, 1934. In execution of the decree, the defendant got the press attached, notwithstanding the prior order of attachment before judgment obtained by the plaintiff.

On October 29, 1934, the plaintiff filed a suit to have it declared that the award decree in suit No. 423 of 1934 obtained by the defendant against Ramlinga was fraudulent and collusive and that the defendant was not entitled to attach the property which the plaintiff had previously attached.

The Subordinate Judge held that the award decree obtained by the defendant was fraudulent and collusive, and therefore incapable of execution. He, therefore, granted a declaration that the press attached by the plaintiff in suit No. 335 of 1934 was not liable to be attached and sold in execution of the decree obtained by the defendant in suit No. 423 of 1934.

The defendant appealed to the High Court.

B. Moropanth, for the appellant.

D. A. Tuljapurkar, for the respondent.

1938

GANESH VISHNU v. KASHINATH THAKUJI

BEAUMONT C. J. This is an appeal from a decision of the Joint First Class Subordinate Judge at Poona, and it raises a question of law. One Ramlinga owned a press, from which he published a newspaper, and he owed debts, including a debt due to the plaintiff on promissory notes for a sum of Rs. 2,700 odd. The plaintiff filed a suit in 1934 to recover that debt, and in the suit he got an order for attachment before judgment of the press. Later in the year 1934, the defendant filed a suit against Ramlinga and obtained a decree for Rs. 6,000 odd, the decree being based on an award. The plaintiff's case is that that decree obtained by the defendant against Ramlinga was fraudulent and collusive and that the defendant is not entitled to attach the property which the plaintiff had previously attached. The learned Judge held that the defendant's decree was fraudulent and collusive, and he made a declaration that the goods attached by the plaintiff are not liable to be attached and sold in execution of the decree obtained by the defendant.

The first question is whether the plaintiff has any cause of action, and the next, whether, if he has, the particular cause of action upon which he relies, namely, the right to a declaration under s. 42 of the Specific Relief Act, is the right cause of action. It is clear that if a plaintiff has obtained a judgment, which he is seeking to enforce by attachment of his debtor's property, the debtor may to a great extent defeat his rights if he suffers judgment by collusion with other persons and those persons then claim rateable distribution in respect of the attached property under s. 73 of the Civil Procedure Code; and it is clear also that an executing Court granting rateable distribution is bound by the decrees which it is executing and cannot entertain a claim that one or more of those decrees had been fraudulently obtained. It is true that s. 73 (2) provides that "Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so

entitled may sue such person to compel him to refund the assets." So that if the defendant here obtained payment under s. 73, it would be open to the plaintiff subsequently to sue him for return of the money on the ground that the judgment in respect of which he had received payment was fraudulent and, therefore, he ought not to have received the payment. But the possibility of a judgment-creditor being able to obtain a refund of moneys paid away by the Court is speculative, and in my opinion it is open to a judgment-creditor to file a suit to restrain another creditor from seeking to enforce the latter creditor's judgment against property which the former creditor is attaching or has attached. That view is in accordance with the view expressed by the learned Judges in *Venkatarama Aiyar* v. *The South Indian Bank, Limited.*[1]

Our attention has been drawn to an unreported case in this Court, *San Hanmappa Rangappa Hosmani* v. *Deckappa Mallappa Hubli*[2], in which Mr. Justice Barlee, delivering the judgment of the bench, distinguished the Madras case on the ground that in the Madras case the assets had been sold and, therefore, there was no doubt that there would not be sufficient to provide for the debts both of the plaintiff and of the defendant, whilst in the case then before the Court assets had not been sold, and Mr. Justice Barlee expressed the view, therefore, that the claim for an injunction was premature. The Court never grants an injunction unless there is some evidence that the plaintiff's right is in danger or is threatened. I have no doubt that if a plaintiff were seeking to restrain a defendant from sharing in the benefit of attachment of property which has not been sold, it would be necessary to provide some evidence that the value of the property was such as to make it unlikely that the debts of both the plaintiff and the defendant could be satisfied out of it. But as long as evidence of that nature is furnished, it seems to me that it is wrong to hold that

[1] (1919) 43 Mad. 381.

[2] (1937) F. A. No. 68 of 1933.

1938

GANESH VISHNU v. KASHINATH THAKUJI

Beaumont C. J.

a suit of the nature I have discussed is premature. In the present case the property has been sold since the suit was filed, and as it only produced some Rs. 3,000, it is obvious that the plaintiff's right to attach will be prejudiced if the defendant is also allowed to help himself out of the property. So that I think that if the plaintiff had framed his suit for an injunction, he would have been on safe ground. But he has not done so. He has asked merely for a declaration and no further relief; and, in my opinion, it is clear that this is not a case which falls under s. 42 of the Specific Relief Act. That section provides that "Any person entitled . . . to any right as to any property . . . ,"—[and a right to attach property has been held to be a right as to property within the section. See *Jamnabai* v. *Dattatraya*,[1]]—" . . . may institute a suit against any person denying, or interested to deny, his title to such right, and the Court may in its discretion make therein a declaration that he is so entitled."

Here nobody is denying the plaintiff's right to attach. What is being denied is the defendant's right to attach, and it seems to me that the plaintiff is not entitled to a declaration that the defendant is not entitled to attach the property. The relief which the plaintiff really requires is an injunction to restrain the defendant from attaching the property, which injunction would be based on a declaration that the defendant's judgment was fraudulent and collusive; but it is an injunction which is the essence of the relief which the plaintiff requires and not a declaration as to his title. On that ground, and without going into the merits of the case as to whether the defendant's judgment was fraudulent or not,—a question which has not been argued—, we must allow the appeal and hold that the plaintiff's suit does not lie.

Appeal allowed with costs and suit dismissed with costs.

RANGNEKAR J. I agree.

Decree reversed.

J. G. R.

(1) (1935) 60 Bom. 226.