CALCUTTA HIGH COURT

Kiranmoyee Dassi

Vs.

Dr. J. Chatterjee

Original Suit No. 988 of 1944

(S.R. Das, J.)

26.01.1945

JUDGMENT

S.R. Das, J.

1. This application by the plaintiffs for final judgment under Chap. XIIIA of the Rules of this Court raises an important question of practice, namely, in what circumstances an order for security or payment into Court can appropriately be made as a condition precedent to the granting of leave to the defendant to defend the suit.

2. The suit in which this application has been made is one for ejectment, arrears of rent and mesne profits until delivery of possession of the premises. The cause of action laid in the plaint and reiterated in greater detail in the joint affidavit of Panchanon Banerjee and Manindra Nath Bysack used in support of this application is as follows:

3. One Bibhuti Bibhusan Mukherjee, since deceased, was the owner of a half share in premises No. 17, Adwaitya Mullick Lane, having purchased the same under a deed of conveyance dated 16th June 1937. The plaintiff Kiranmoyee Dassee became the owner of the remaining half share in the premises by purchase at a sale held by this Court in December 1938. Under a verbal agreement made between the defendant and the said Bibhuti Bhusan Mukherjee and the plaintiff Kiranmoyee Dassee represented by Manindra Nath Bysack the defendant occupied the said premises from 1st August 1940 as a monthly tenant at a rent of ₹ 50 per month payable to the said Bibhuti Bhusan Mukherjee and the plaintiff Kiranmoyee Dassee in equal shares. The defendant paid full rent upto March 1941. Bibhuti Bhusan Mukherjee died intestate in April 1941 leaving the plaintiff Protima Sundari Debi as his sole heiress. After the death of Bibhuti Bhusan Mukherjee the defendant stopped payment of the half share of the rent payable to Bibhuti Bhusan Mukherjee and up to October 1941 only paid to Manindra Nath Bysack the agent of the plaintiff Kiranmoyee Dassi the half share of the rent payable to her. Since November 1941 the defendant

has not paid any rent at all. Thereupon, on 6th May 1944 the plaintiffs through their attorney served a notice on the defendant to quit and vacate the premises on the expiry of the month of May 1944. This notice was sent on 6th May 1944 by registered post and a copy of it was also sent on the same day by ordinary post under a certificate of posting. On 25th May 1944, the defendant sent a reply to the plaintiffs' attorney stating that he had received the registered letter on 16th May 1944, that he was not a defaulter, that he did not know Protima Sundari Debi at all and that he had received two letters, one from Mr. Madan Mohon Sen, B.L. and the other from Mr. B.K. Dhole. A copy of the letter of Mr. Sen was enclosed in the defendant's reply. Mr. Sen's letter purported to have been written on behalf of one Ashalata Debi who claimed to be the owner of a half share in the premises.

4. This suit was filed on 12th July 1944 for recovery of possession of the premises, for payment of ₹ 775 as and by way of arrears of rent payable to Kironmoyee Dassee from November 1941 to May 1944 and for ₹ 875 as and by way of arrears of rent payable to Protima Sundari Debi from April 1941 to May 1944 and for mesne profits until delivery of possession of the premises. The writ of summons having been served on the defendant on 25th July 1944, the defendant entered appearance through his attorney on 3rd August 1944. The present summons was taken out on 15th August 1944 for final judgment under Chap. XIIIA of the Rules of this Court.

5. The defendant has affirmed and filed an affidavit in opposition to this application. In this affidavit the defendant solemnly affirms and says that the premises was let out to him in March 1940 by Sm. Ashalata Debi at the monthly rent of ₹ 50 including municipal taxes and that he occupied the house as from the month of May 1940. It is said that it was agreed that the defendant would get the necessary repairs and alterations made and electric fittings installed at his own costs not exceeding ₹ 3,000 and that the amount with interest at 9 per cent. per annum would be recouped by him out of the rents or by other means. A copy of the letter of Sm. Ashalata Debi recording the terms of the agreement has been annexed to the affidavit. The defendant states that pursuant to the agreement he executed necessary repairs and fitted up electric installations at a cost of over ₹ 3,000 and that he has also been paying both shares of municipal taxes. The defendant further states that he has so far recouped about ₹ 2,000 out of the rents leaving a balance of about ₹ 1,000, still due to him. He denies having entered into any agreement with Kironmoyee Dassee or Bibhuti Bhusan Mukherjee as alleged or at all having paid any rent to either of them. He admits having received the notice of ejectment on 16th May 1944 but denies the validity thereof. He denies that the plaintiffs are his landlords or that he is liable to ejectment on any notice from them or to pay any rent to them.

6. An affidavit in reply has been affirmed by Manindra Nath Bysack and Panchanon Banerjee denying the allegations of the defendant in his affidavit in opposition. They characterise the letter

alleged to have been written by Sm. Ashalata Debi as having been got up for the purposes of this application. It is said that the premises were let out to the defendant by Kironmoyee Dassi and Bibhuti Bhusan Mukherjee on and from June 1940 and not from 1st August 1940 as wrongly stated in the plaint. It is said that it was agreed between Manindra Nath Bysack representing the then landlords and the defendant that the latter would put up electric installations at his own costs and that he did so in terms of that agreement.

7. Mr. Sett appearing in support of this application drew my attention to the fact that in the correspondence the defendant nowhere alleged as he is now alleging in his affidavit, that the premises had been let out to him by Sm. Ashalata Debi. Indeed the defendant did not at all refer to the letter of Ashalata Debi evidencing the alleged tenancy. Mr. Sett also referred me to Mr. Madan Mohan Sen's letter written on behalf of Ashalata Debi wherein she is alleged to be the owner of only a half share in the premises and not of the whole of it as now alleged. Mr. Sett pointed out that Ashalata Debi through Mr. Sen alleged that she had been enjoying the rents all along whereas the defendant in his affidavit stated that he had never paid any rent but had retained and appropriated the rent towards the amount alleged to have been spent by him in effecting repairs. These circumstances, Mr. Sett urged, clearly indicated that though the defendant had purported to set up some sort of a defense, the defense was sham, illusory and unconvincing. In the premises Mr. Sett insisted that even if the Court did not give judgment for the plaintiff straightway, it should put the defendant on terms as to paying the arrears of rent into Court or furnishing security therefore. Mr. Sett relied on Rr. 6, 7 and 9 of Chap. XIIIA of the Rules of this Court. He contended that Rr. 6 and 7 clearly provided that in order to entitle the defendant to leave to defend the suit the defendant should satisfy the Court that he had a good defense to the claim on its merits or should disclose Bach facts as might be deemed sufficient to entitle him to defend. From these two rules it followed, according to Mr. Sett, that the Court would have to scrutinize the evidence on either side and come to a decision as to the merits and then consider whether it would pass judgment in favor of the plaintiff or give the defendant leave to defend. If the Court found that the defendant had no defense at all then the Court would give judgment in favor of the plaintiff. On the other hand, if the Court found that the defendant had made out a defense then the Court would give leave to the defendant to defend the suit; but in that case the Court would consider whether such leave would be given unconditionally or subject to terms such as ate specified in R. 9, Mr. Sett argued that if the defendant made out a good defense he should have unconditional leave but if he only made out a defense which was not a very convincing or plausible one then he must be put on terms as to security. In support of his arguments, Mr. Sett relied on the observations of McNair J. in the case of *Mahadeolal v. Bisseswarlal*[1],

8. Mr. Sridhar Chatterjee appearing for the defendant insisted that the defendant had made out a good defense and that his defense was supported by a written document whereas the plaintiff's case was not supported by any writing. He pointed out that neither in the plaint nor in the affidavit in support of this application had the plaintiffs given any particular date when the

alleged oral agreement was made. He strongly relied on the discrepancy in the date of commencement of the tenancy as alleged in the plaint and that mentioned in the affidavit in reply. He also commented on the fact that although in the affidavit in reply it had been admitted that the defendant had been paying both shares of municipal taxes, yet in the plaint the plaintiffs had claimed full rent at ₹ 50 per month without any deduction what ever. These facts, Mr. Chatterjee urged, considerably weakened the plaintiffs' case. Mr. Chatterjee contended that if the facts disclosed on the affidavits are not such as would warrant or entitle the Court to pass a final judgment, then the Court should not direct the defendant to pay the amount of arrears of rent into Court or furnish security therefor as a condition precedent to his getting leave to defend the suit. Imposition of such a condition may, if the defendant be poor, render the leave to defend wholly illusory or nugatory. If the plaintiff was not, in the facts of this case, entitled to judgment it would be illogical, according to Mr. Chatterjee, to attach any condition to the

[1]44 C.W.N. 808

leave to be granted to the defendant for, if the defendant be unable, by reason of his poverty, to fulfil the condition, the plaintiff would automatically get the judgment which the Court, by giving leave to defend, held he was not entitled to. Mr. Chatterjee questioned the correctness of the decision of McNair J. on which Mr. Sett relied.

9. I have heard very able and interesting arguments from Learned Counsel on both sides. After considering the facts appearing on the affidavits filed herein, there is no doubt in my mind that a triable issue has been raised by the defendant and that the defense applies to the whole of the plaintiffs' claim. It may well be that weighing the probabilities in the light of the criticisms advanced by Mr. Sett the chances of success are more in favor of the plaintiffs than in favor of the defendant; yet, it is difficult to say, with any amount of certainty, that the defense is wholly sham or illusory or is bound to fail. It is, therefore, clear that the plaintiff is not entitled to final judgment on this summary application and the defendant must have leave to defend the suit. The question is whether such leave should be given unconditionally or subject to terms as to paying into Court or giving security.

10. The answer to the foregoing question depends upon a proper construction of the rules laid down in Chap. XIIIA. Those rules, it is well known, have been adapted from the provisions of Order 3, Rule 6 and O. 14 of the rules of the Supreme Court. Our Rr. 6, 7, order14rule 8 and 9 correspond to Rr. 1(a), 5, 4 and 6 respectively of O. 14 of the English Rules. Indeed, our R. 9 is word for word the same as R. 6 of the English Rules. It is necessary, therefore, to see how the English Rules have been construed and interpreted by the English Courts. The cases will be found collected in the notes under O. 14 in the Annual Practice. I shall only refer to a few of them in this judgment.

11. In *Runnacles v. Mesquita*[2], which was an action by a builder for balance due for work done. Cockburn C.J. at p. 418 observed as follows:

> We are agreed that the order of my brother Denman, in making it a condition to the defendant being let in to defend that he should pay money into Court, was going too far. The Court is always very unwilling to interfere with any matter which is in the discretion of a judge at chambers. But this is a new power, and it is a discretion which must be exercised most scrupulously. This is the commencement of a new system, and of a practice, hitherto only applicable to bills of exchange, superseding the ordinary forms of law where the defendant's liability has to be made out by evidence. And I think we must not hesitate to establish a precedent that, when the defendant goes beyond the mere form of stating that he has a good defense, and states what his defense is, and gives reason for thinking that his defense is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into Court as a condition to his being allowed to come in and defend the action.

12. In *Ray v. Barker*[3], the defendant had received certain jewellery from the plaintiff "upon sale or return". The defendant delivered it to a woman who, and without his authority, pledged it and he was unable to recover it.

[2](1876) 1 Q.B.D. 416: (45 L.J.Q.B. 407)

[3](1879) 4 Ex. D. 279: (48 L.J. Ex. 569)

Plaintiff having applied under O. 14 a Master gave him leave to sign judgment unless the defendant paid into Court the amount claimed. Defendant appealed. In dismissing the appeal, Bramwell L.J. said at pp. 281-282:

> Order 14 no doubt contains useful provisions: it improves the procedure very much in actions for debts, where there is really no defense, for, it saves the expense attending the formality of a trial at which perhaps the defendant will not appear. Nevertheless it is a remedy, which ought not to be used except where the plaintiff's case is clear: if there be any doubt as to the right to recover, he ought not to be allowed to avail himself of a process, so summary in its nature. By the first rule of O. 14, an order may be made empowering the plaintiff to sign judgment in an action where the writ has been specialty indorsed; but this rule is to be read subject to the sixth rule, which provides that leave to defend may be given either unconditionally or upon terms.

Britt L.J. said at p. 282:

> In this case we have to consider what is the true construction of O. 14. When the existence of the debt has been clearly established upon the affidavits, the plaintiff is entitled to an order empowering him to sign judgment. The defendant, however, is to have leave to defend, either if he has a good defense upon the merits, or if he disclosed 'such facts as may be deemed sufficient to entitle him to defend'. If therefore the defendant shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim, he ought not to be debarred of all power to defeat the demand made upon him: by the very words of the order the plaintiff is not to

> be allowed to sign judgment merely because the defendant's affidavit does not shew a complete defense. By the sixth rule a discretion is conferred, and leave to defend may be granted either unconditionally or upon such terms as may be thought just.

Cotton L.J. observed at p. 284:

> I think that the power conferred by Order 14 ought to be used carefully, and that we ought to consider whether in the present case an order ought to have been made. It the defendant's affidavit sets up a good defense, the Court has no discretion and cannot order the money claimed to be paid into Court. But an alternative is allowed in which leave to defend may be given, namely, where the defendant discloses 'such facts as may be deemed sufficient to entitle him to defend', and it is this state of facts to which the discretionary power given by the sixth rule is directed. The affidavit may not make it clear that there is a defense but the defendant may be able at the trial to establish a bona fide defense. I am not satisfied that in the present case a valid defense exists; but the defendant may plausibly argue that he has a good defense.

13. *Blaiberg v. Abrams*[4], was a case on bills of exchange given in payment of price of goods sold and delivered. The defense set up was that the defendant gave the bills to his son to buy a piano and not the unusable fancy goods that he actually bought and that the

[4](1884) 77 L.T. (O.S.) 255

plaintiff had notice of the condition. It appeared that when the bills were presented for payment this defense was not mentioned at all. The Judge in Chambers ordered payment into Court. Bowen L.J. said:

> Nothing in practice was more difficult or required more discretion than the enforcing Order 14, as to summary judgment in the absence of a real defense, and in such cases all the circumstances must be looked at.

Then after referring to the facts his Lordship concluded as follows:

> Under these circumstances, though the case came very near the line, and was one very difficult to decide, upon the whole circumstances were such that he could not say that the Judge at Chambers was wrong, and, as he was not satisfied that the defense was bona fide, he did not think that it ought to be set up unless the money was brought into Court or security given.

14. The *Ironclad (Australia) Gold Mining Co. v. Gardner*[5], was an action by the company against a shareholder for calls. Defense set up was that the shareholder had applied for the share on certain conditions agreed upon between him and the pro-motor of the Company. Reply was that such agreement was not binding on the company after incorporation. Judge in Chambers gave

unconditional leave and this order was upheld by the appeal Court. When Learned Counsel for the defendant was asserting in argument that the plea afforded a good defense to the action, Charles J. said:

> It is not necessary for you to make that out, it is enough that there are fair grounds for setting up a defense.

15. The observations of the learned Judges in *Saw v. Hakim*[6], may be usefully quoted:

> Per Pollock B:- It was an action in which there was prima facie a case for the plaintiff, and prima facie a case for the defense, and then, as to the facts, the affidavits were entirely contradictory, and in order to decide the ease between the parties the evidence on both sides must be gone into, and that would be in effect trying the case upon affidavits, which, he thought, was not the object or intention of Order 14.
> Per Manisty J.- It was moat important that Order 14, which if properly acted on, was moat beneficial to the suitors by saving unnecessary litigation, should not be perverted to the trial of disputed question of fact upon affidavits.

16. *Ward v. Plumbley*[7] , was an action to recover about 170 alleged to be due on accounts arising out of stock transactions. The Judge in Chambers ordered payment into Court as a condition for leave to defend. In reversing this order, Wills J. referred to a case before him. In that case the defendant obtained leave to defend on condition of payment into Court. He could not pay and consequently the plaintiff obtained judgment. The defendant then went bankrupt. The trustee in bankruptcy disputed the judgment and Wills J. himself after hearing the matter came to the conclusion that the

[5](1887) 4 T.L.R. 18
[6](1888) 5 T.L.R. 72
[7](1889) 6 T.L.R. 198

defendant's story was true. After referring to this case Wills J. is reported to have concluded as follows:

> He could not help concurring with those judges who had said that, even though the case for the plaintiff appeared to be supported by documents and letters, yet it might be that there was a defense. And that if there was a fair probability of a defense, as defense ought to be allowed, without imposing the condition of payment of money into Court, for perhaps the defendant had, as in the case be had mentioned, no money to pay; and if that were so, and he was deprived of the opportunity of defense, a poor man would, merely on account of his poverty, be put in a worse position than a rich one, which as far as possible should be avoided. He quite agreed that in this class of cases the Court should be careful in giving powers to take judgment summarily.

17. In *Bowes v. The Caustic Soda and Chlorine Syndicate*[8], Lord Coleridge said that condition should not be imposed in a case where "there was a fair dispute" and the defendant "had a fair

right to defend the action."

18. In *Ford v. Harvey*[9], Lord Coleridge said:

> It was sufficient, however, to say that there was a bona fide complaint on the part of the defendants of the conduct of the Late Mr. Ford. Whether, or how far, those were well founded, it was not necessary to inquire. It was enough to say that it was clear that there was a bona fide counter-claim and defense; and that very serious questions might arise which ought to go before a jury. The condition, therefore, imposed by the learned Judge ought to be set aside, and the appeal allowed.

19. *Wing v. Thurlow*[10], was an action on a bill of exchange. The defense made out was that of no consideration and of certain misrepresentation. The Master and Judge in Chambers directed payment into Court. In reversing that order Wills J. said:

> Unless one is prepared very nearly to give judgment for the plaintiff, we ought not to impose conditions which may prevent the trial of the action. It is very serious that a condition of this kind should be imposed upon impecunious people.
> It will be noticed from subsequent cases I shall presently mention that from henceforth the Courts became more and more reluctant to order security or payment into Court as a condition precedent to giving leave to the defendant to defend the suit.

20. *Jones v. Stone*[11], is in point. It was a suit in ejectment. Plaintiff's case was that the defendant had been let into possession of the property as tenant by the plaintiff's mother, that the defendant paid rent to the plaintiff's mother and after her death to the plaintiff and that the plaintiff had determined the tenancy by a notice to quit. The plaintiff applied under O. XIV of the Rules of the Supreme Court of Western Australia which was in terms identical with O. XIV of the Rules of the Supreme Court in England. The defendant in his affidavit admitted having paid rent to the plaintiff's mother and then to the plaintiff but

[8](1893) 9 T.L.R. 328
[9](1893) 9 T.L.R. 328
[10](1893) 10 T.L.R. 53
[11](1894) A.C. 122 : (63 L.J.P.C. 68)

alleged that the plaintiff's mother and the plaintiff acted as collector on behalf of Atkinson who was the real owner. The Judge in Chambers allowed the plaintiff to sign judgment as the defendant did not disclose any reasonable ground of defense, for, he had attorned tenant to the plaintiff. This order was upheld by the Full Court. Defendant appealed to the Privy Council. Their Lordships allowed the appeal. Lord Halsbury in delivering the judgment of the Board observed as follows at p. 124:

> The Chief Justice of the Supreme Court, who dissented from the order of the Court giving the plaintiff liberty to sign judgment, remarked in his judgment that the case seemed to him to be 'eminently one which required the fullest investigation before a jury, as the

> conduct of the plaintiff in his dealings with the defendant in connection with the land in question was of a most suspicious character'. Whether that is so or not, it is abundantly clear to their Lordships that there are very serious questions of fact in debate which never ought to have been determined in a summary manner under Order 14. The proceeding established by that order is a peculiar proceeding, intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment, and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay. The present case is not one of that kind.

21. I next come to the well-known case of *Jacobs v. Booth's Distillery Co*[12]*.,* In that case the defendant (appellant) had signed a memorandum of charge and two promissory notes with a co-defendant to secure an advance and further moneys. He received an indemnity from his co-defendant and stated that he had been told that he incurred no liability by signing and that he had signed the memorandum and the two promissory notes relying on that representation. The plaintiff (respondent) brought an action for 3294. On an application under O. XIV, the Master ordered the amount to be paid into Court within 7 days with judgment if the sum was not so paid. This order was affirmed on appeal by the Judge in Chambers and by the Court of appeal. The defendant appealed to the House of Lords and the appeal was allowed. Lord Halsbury L.C. observed:

> People do not seem to understand that the effect of Order 14, is that upon the allegation of the one side or the other, a man is not to be permitted to defend himself in a Court; that his rights are not to be litigated at all.
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Further on, his Lordship concluded as follows:

> I do not propose to enter into the merits of the case or the comprehension of it, which is necessary to soma extent in order to deal with the merits. That question will have to be dealt with when the cause is tried, as it ought to be tried. But I am bound to say that it startles me to think that in a case of this sort an order should be made the effect of which is that the defendant is not to be heard to make his defense.

Lord James made the following observations:

[12](1901) 85 L.T. 262 : (50 W.R. 49)

> The view which I think ought to be taken of O. 14, is that the tribunal to which the application is made should simply determine, 'is there a triable issue to go before a jury or a Court?' It is not for that tribunal to enter into the merits of the case at all. It ought to make the order only when it can say to the person who opposes the order, 'you have no defense. You could not by general demurrer, if it were a point of law raise a defense here. We think it impossible for you to go before any tribunal to determine the question of fact.'

> We are not expressing any opinion whatever upon the merits of the case. It appears to me that there is a fair issue to be tried On which side the chances of success are it is not for this House to determine; but thinking, as I do, that there is a fair issue to be tried by a competent tribunal, it seems to me to be perfectly clear that the order of the Court of appeal ought to be reversed.
> Lords Macnaughten, Brampton and Lindley concurred.

22. The case of *Codd v. Delap*[13], is also a decision of the House of Lords. The action out of which the appeal arose was one on a foreign judgment. On an application being made under O. 14, the defendant made an affidavit that the judgment had been obtained by fraud. Walton J. gave the plaintiff leave to sign judgment. The Court of Appeal affirmed the order. The defendant's appeal to the House of Lords was allowed. Lord Halsbury L.C. said:

> There is an affidavit by the person sued that he has a good defense. I am not satisfied that he has not a good defense. I do not say that be has, I know nothing more about it than this: that in the state of conflict which there, is between the parties, with the allegation that the judgments relied upon have been obtained by fraud, there is a question to be tried, and not to be stifled by an order of the Court under Order 14.

Lord James observed:

> I wish to add that I think O. 14 is a very useful process indeed, but it has to be used with very great care, and must never be used unless it is clear that there is no real substantial question to be tried.

Lord Lindley added:

> When an application is made under O. 14 for judgment on a foreign judgment, and an affidavit is put in to the effect that the foreign judgment is impeachable for fraud, the greatest possible caution is required in proceeding further; and, unless it is obvious that the allegation of fraud is frivolous and practically moon-shine O. 14 ought not to be applied.

23. The cases of *Kodak Ltd. v. Alpha Film Corporation Ltd.* and *Frederick Huth & Company v. Jackson*[14], are indeed instructive. In the first mentioned case the plaintiffs brought an action for 802. 103. 2d. for goods sold and delivered on a specially indorsed writ and took out a summons under O.14. The defendants in their affidavit stated that the

[13](1905) 92 L.T. 510
[14](1930) 2 K.B. 340 : (99 L.J. K.B. 692)

goods were not ordered by them on their own behalf but as agent and on behalf of one Geneen, as the plaintiffs must have known. The plaintiffs in their reply denied such knowledge and

produced a letter from the defendants ordering certain goods to be sent to Geneen. The Master gave leave to the defendants to defend on condition that the action should be entered in the short cause list for trial by a Judge alone. The Judge in Chambers dismissed an appeal from the Master's order. The defendants appealed. In the second mentioned case the plaintiffs issued a specially indorsed writ claiming 9676 alleged to be due upon a guarantee in writing. The plaintiffs having applied under O. 14 the defendant in an affidavit stated that the guarantee was given upon certain conditions. The Master gave leave to the defendant to defend on condition that the action should be entered in the short cause list for trial by a Judge alone. The defendant did not object to trial by the Judge but objected to the action being entered in the short cause list. On appeal the Judge in Chambers substantially upheld the order of the Master. The defendant appealed. Before the Appeal Court two questions were discussed:

> (1) Can the Court make any condition as to mode of trial in a case where there is a triable issue which prevents judgment and entitles the defendant to have leave to defend?
> (2) In any event, can the Court under Order 14, Rule 6 impose a condition depriving the defendant of the right to trial by jury which he would otherwise have by reason of Order 36, Rule 6?

We are not concerned, in this application, with the second question. On the first question Scrutton L.J. was of opinion that, although on giving leave to defend an order might be made under R. 8(b) of O. 14 (corresponding to our R. 14) for entering an action in the special list, no condition either that this should be done or that the action should be tried without a jury, can be imposed except under R. 6 of that order and then only when but for the condition the Judge was prepared to give the plaintiff leave to sign judgment under R. 1. The majority of the Court consisting of Greer and Slesser L. JJ., however, held that on a summons to sign final judgment the Court refusing the plaintiff leave is not bound to give the defendant unconditional leave to defend; but in allowing him to defend may under Order 14, Rule 6 impose the condition that the case shall be entered in the special list established by Order 14, Rule 8(b), and notwithstanding Order 36, Rule 6 may add the condition that the case shall be tried by a Judge without a jury. In delivering his judgment Scrutton L.J. at p. 346 said:

> > The important point in both cases is that counsel for the plaintiffs in each case admits, and the Court is of opinion, that the facts in his case would not entitle him to judgment under O. 14. The question is whether, the plaintiff not being entitled to judgment under O. 14, the defendant can nevertheless he restricted in his ordinary right to defend himself against the claim on the writ by being deprived of a jury or of the right to trial in the ordinary way.

Then after referring to *Codd v. Delap*[15], the learned Lord Justice proceeded as follows:

> The Judge is not to try the action; he is to see that there is a bona fide

[15](1905) 92 L.T. 510

> allegation of a triable issue, which is not illusory; he need not be satisfied that the defense will succeed; it is enough that such a plausible defense is verified by affidavit. If the Judge is satisfied of this, in my opinion the operation of O. 14 is exhausted.

The learned Lord Justice then referred to *Jacobs v. Booth's Distillery Co*[16]*.,* and continued at p. 347:

> The justice of this seams obvious; if the defendant has such a defense as that he should be given leave to defend, to refuse him leave unless he pays the amount claimed into Court may deprive a poor man of a real defense. The Court is not to determine whether the defense will succeed, but whether a bona fide defense, which may succeed, is raised; and the amount of money the defendant has cannot determine this. On the other hand if the Judge thinks there is no real defense, the rule gives him power to protect the plaintiff by only allowing the defense to proceed if the amount claimed is secured, in which case mercy may be shown to the defendant in enabling him to try to prove a defense.

At p. 349 the learned Lord Justice observed as follows:

> But after considering the views of the House of Lords in the two cases cited, I have come to the conclusion that unless the Judge Is entitled to give judgment under Order 14, Rule 1, he is not entitled to fetter his leave to defend with conditions under R. 6. The plaintiff having failed in his application for judgment, how can the defendant be limited in his defense because the plaintiff is not entitled to summary judgment? This was suggested, in relation to the actual defenses raised, by the Court of Appeal in *Langton v. Roberts*[17]*,* where Davey L.J. doubted whether 'the Master having given leave to defend could dictate to the defendant how he should restrict his defense.' This result seems to me to follow from the decision of the House of Lords in *Jacobs v. Booth's Distillery Co*[18]*.,* It is said that this view makes Order 14, Rule 6 meaningless, for if the Judge can give judgment under O. 14 no condition as to security or trial are wanted. But in my view R. 6 is wanted and can be used to protect the defendant by giving him a right to trial if he will protect the plaintiff by security or a speedy trial; in other words it is only applicable when the plaintiff is entitled to judgment, but the Judge thinks that he may in mercy to the defendant mitigate the strict rights of the plaintiff if he protects him in certain ways. order14rule8 gives the Judge, whether he gives unconditional or conditional leave to defend, power to put the case in a special list that is the short cause list if he is of opinion that a prolonged trial will not be necessary; but it does not, in my opinion, justify the Judge in ordering under that rule trial by a Judge alone where the defendant has a right under Order 36, Rule 6, to trial by a jury. If that is to be done it must be done under Order 14, Rule 6, and only in cases where the Judge is entitled and prepared to enter judgment for the plaintiff. In other words the plaintiff must be entitled to judgment under O. 14,

before the Judge under R. 8 of that order can restrict the defendant's leave to defend.

[16](1901) 85 L.T. 262 : (50 W.R. 49)
[17](1894-10 T.L.R. 492)
[18](1901-85 L.T. 262 : 50 W.R. 49).

At p. 350 Scrutton L.J. concluded as follows:

> The practical result for the future in my view is that the class of cases where, to use the phrase of one of the counsel, the plaintiff has 'very nearly a right to judgment under O. 14' but not quite, must be excluded from the operation of conditional leave to defend. The Master must face the question: Is the plaintiff entitled to judgment under O. 14? Unless he can answer Yes, he cannot impose conditions under O. 14, or use the new Form VII of the Orders.

The observations of Greer L.J. at pp. 351-352 were as follows:

> It was contended by the defendants that the Court could only make an order under Order 14, Rule 6, imposing) conditions as an alternative to entering judgment, that is to say, the power to impose conditions only arose, where the defendant failed to show that there was a triable issue. This contention seems to me practically to delete R. 6 from the rules. If there be a triable issue the defendant would, in the absence of R. 6, be entitled to unconditional leave to defend; if there be no triable issue the plaintiff would be entitled to judgment. It the defendant in the one case did not get unconditional leave to defend, he would be entitled to have the order set aside on appeal; if, on the other hand, the plaintiff who had established his right to judgment was put off with a conditional order for leave to defend he would be able to get the order reversed on appeal. There would be no room at all for the operation of R. 6.

At pp. 352-353 the learned Lord Justice concluded his opinion on this question in the following terms:

> Order 14, R. 6 has performed a very useful purpose by enabling speedy trials to be ordered in cases where, though the defendant has established that there is a triable issue, it seems just and convenient that there should be a prompt trial in eases where the defense raises a simple issue and in cases where, though there is a triable issue, the success of the defense seems improbable. From any point of view the wording of the rule makes it some what illogical; but in this case logic must give way to convenience. It seems odd that a defendant who is entitled to defend should be told by the Master or the Judge that unless he performs conditions laid down in the order there will be judgment against him; and if a condition is imposed in this form, it might conceivably make the order for leave to defend illusory. In *Jacobs v. Booth's Distillery Co*[19]*.,* the order which the House of Lords reversed was to the effect that, unless the defendant paid the whole amount of the claim into Court, judgment should be given for the plaintiff. An order in this form would, in the

case of a man who was unable to find the money, entirely deprive him of the right to defend which the order purported to give him. In my judgment all that was meant by the decision in Jacobs' case, (1901-85 L.T. 262 : 50 W.R. 49) is that where a defendant is entitled to defend, an order cannot be made upon him that, if he does not comply with a prohibitive condition, judgment shall go against him. It is worthy of notice that terms as to the mode of trial, such as were

[19](1901-85 L.T. 262 : 50 W.R. 49)

ordered in the present case, are not conditions in the same sense as the order in Jacobs' case, (1901-85 L.T. 262 : 50 W.R. 49) or an order to the same effect as the one made in Jacobs' case, (1901-85 L.T. 262 : 50 W.R. 49) was or would be conditional. Neither of the orders under consideration in these appeals is an order for judgment; they merely prescribe the methods whereby the plaintiff's or defendant's right to judgment is to be determined. Though the power to impose conditions, if the word 'conditions' is strictly construed, seems to have no logical place in proceedings under O. 14 this does not in my judgment justify the Court in treating the rule as a nullity; though illogical, the power to impose conditions may be, and has in practice been found to be, both just and convenient.

Slesser L.J. dealt with this point at pp. 362-363 as follows:

In my judgment that Order has produced a condition of affaire which, subject to one important qualification mentioned hereafter, enables the Court, in the case of a defendant appearing to a writ of summons specially indorsed under Order 3, Rule 6 to give leave to defend with or without conditions of the kind mentioned in R. 6 or to refuse it at the discretion of the Court, and this irrespective of the degree of merit of the defense. In my view the limitation of discretion on triable issues arises only where the condition sought to be imposed would make the leave to defend illusory. This is most likely to happen in cases where the condition relates to payment into Court as security. Thus 'when the defendant goes beyond the mere form of stating that he has a good defense, and states what his defense is, and gives reason for thinking that his defense is substantial and will be sustained in evidence, the defendant ought not to be compelled to pay money into Court as a condition to his being allowed to come in and defend the action': per Cookburn C.J. in *Runnacles v. Mesquita*[20], In *Jacobs v. Booth's Distillery Co*[21]., the House of Lords decided that where there is a triable issue, the Court should not order so large a sum to be paid by way of security under Order 14, Rule 6 as a condition to defend, as would have the result that, in the language of Lord Halsbury L.C. the rights would not be litigated at all: see also *Wing v. Thurlow*[22], *Ward v. Plumbley*[23], *Bowes v. Caustic Soda & Chlorine Syndicate*[24], Order 14, Rule 6, which has already been quoted, speaks of leave to defend being given unconditionally or subject to such terms as to giving security or mode of trial or otherwise as the Judge may think fit. This on the face of it would appear to give to the Court an unqualified discretion. The cases of *Jacobs v. Booth's Distillery Co.*[25], *Runnaclos v. Mesquita*[26], *Reaveley v. Nicolopulo*[27], and others must now be read as

limiting this discretion by saying that security or payment in may not be ordered to such an extent as would have the effect of excluding the defendant from his right to defend altogether, that is to say, conditions may not be attached to leave to defend, in a case where leave to defend ought properly to be given, which would have the effect of making that leave nugatory by asking for such security as would in effect prevent the defendant from defending at all; but the reasoning in Jacobs' case, (1901-85 L.T. 262 : 50 W.R. 49) does not seem to me to have application to a case where the condition made is,

[20](1876-1 Q. B.D. 416) : 45 L.J.Q.B. 407 [22](1893 10 T.L.R. 53) [24](1893 9 T.L.R. 328)
[21](1901-85 L.T. 262 : 50 W.R. 49) [23](1890-6 T.L.R. 198) [25](1901-85 L.T. 262 : 50 W.R. 49)
[26](1876 1 Q.B.D. 416 : 45 L.J.Q.B. 407)
[27](1893-28 L.J. (Newspapers) 508)

as in the present cases, merely procedural as to time or mode of trial. In the second appeal argued before us, that of *Huth v. Jackson*[28], the facts of which it is not necessary to set out, the condition objected to by the defendant and ordered on an admittedly triable issue was, as I have said, that the case should go into the short cause list, which is a condition as to time, In *Kodak, Ld. v. Alpha Film Corporation*[29], conditions both as to time and mode of trial arise. But the principle to be determined is the same. In my view, in bath cases the Court has within R. 6 in its discretion an unfettered power to impose conditions, subject only to this, that such conditions must not operate unjustly to deprive the defendant of his right to defend at all-a consideration which can hardly arise in cases of time or mode of trial though it is, as the cases have indicated, very material when the condition is one of payment into Court or the giving of security.

I have at the risk of prolixity set out long extracts from the judgments in this case for easy and ready reference and as I consider them to be illuminating and instructive on the point. From the passages I have quoted it is clear that while Scrutton L.J. did not make any distinction between one condition and another and went the whole way against imposing any condition whatever except in a case where but for the condition the Court would be entitled to give leave to the plaintiff to sign judgment, the majority of the Court (Greer and Slesser L. JJ.) made a distinction between the conditions and held that condition as to time or mode of trial may be imposed even if the Court was not prepared to give the plaintiff leave to sign judgment. All the three Lord Justices, however, appear to me to agree that condition as to payment into Court or furnishing security can be ordered only in a case where the Court is prepared to give the plaintiff leave to sign judgment but out of pity gives the defendant a chance to defend.

24. From the above authorities the following propositions may be laid down with regard to an application under O. 14:

(a) If the defendant satisfies the Court that he has a good defense to the claim on its merits

the plaintiff is not entitled to leave to sign judgment and the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises a triable issue indicating that he has a fair or bona fide or reasonable defense although not a positively good defense the plaintiff is not entitled to sign judgment and the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is to say, although the affidavit does not positively and immediately make it clear that he has a defense yet shews such a state of facts as leads to the inference that at the trial of the action he may be able to establish a defense to the plaintiff's claim the plaintiff is not entitled to judgment and the defendant is entitled to leave to defend but in such a case the Court may in its discretion impose conditions as to the time or mode of trial but not as to payment into Court or

[28](1930-2 K.B. 340 : 99 L.J.K.B. 692)

[29](1930-2 K.B. 340 : 99 L.J.K.B. 692)

furnishing security.

(d) If the defendant has no defense or the defense set up is illusory or sham or practically moonshine then ordinarily the plaintiff is entitled to leave to sign judgment and the defendant is not entitled to leave to defend.

(e) If the defendant has no defense or the defense is illusory or sham or practically moon shine then although ordinarily the plaintiff is entitled to leave to sign judgment, the Court may protect the plaintiff by only allowing the defense to proceed if the amount claimed is paid into Court or otherwise secured and give leave to the defendant on such condition, and thereby show mercy to the defendant by enabling him to try to prove a defense.

25. In the case of *Radha Kissen Goenka v. Thakursi Das Khemka*[30], Ghose J. directed the defendant to furnish security and ordered that in default there would be judgment in favor of the plaintiff. In setting aside that order Rankin J. (as he then was) observed as follows:

To begin with, the claim for interest was denied and it is entirely a wrong practice under Chap. 13A to order security merely because looking at the statements on either side one rather thinks that the plaintiff has a better prospect of success than the defendant. There was a specifics denial with respect to this agreement and it would be quite impracticable to decide that matter under Chap. 13A.

These observations are binding on me and I am happy to note that they accord with the principles laid down in the English cases to which I have referred. Those English eases and particularly the cases of *Kodak Ltd. v. Alpha Film Corporation Ltd.* and *Frederick Huth & Co. v. Jackson*[31], do not appear to have been placed before McNair J. when he delivered his judgment in *Mahadeolal v. Bissesswarlal, 44 C.W.N. 808*. The principles laid down by the learned Judge are not, if I may say so with utmost respect, consonant with those laid down in the English cases. In particular his Lordship does not appear to have adverted to the distinction between conditions as to payment into Court or security

and conditions as to the time or mode of trial. In the light of the observations of eminent Judges on the interpretation of the provisions of O. 14 of the rules of the Supreme Court from which the provisions of our Chap. 13A have been adapted, I am unable, in spite of my very great respect for the experience and learning of McNair J. to accept his judgment in *Mahadeolal v. Bissesswarlal*[32], in so far as it deals with the question of imposing security as a condition for granting leave to the defendant to defend the suit to be a quite correct or complete enunciation of the law. In any event according to the test there laid down I would not be prepared, in the case before me, to impose security as a condition to granting leave to defend.

26. In the circumstances as I am not prepared to give the plaintiffs judgment at this stage and as I am not convinced that the defense is illusory or sham or practically moonshine I am prepared to give the defendant unconditional leave to defend the suit. But this I do without expressing any opinion as to the merits or the ultimate result of the case. I propose, however, to give directions as to the further conduct of this suit under R. 10 of Chap. 13A. I direct that the written statement be filed within a week and affidavits of documents be filed by both parties within a week thereafter and inspection be given

[30] AIR 1926 Cal 713 : (1926) ILR 53 Cal 412 [32]44 C.W.N. 808

[31](1930) 2 K.B. 340 : (99 L.J.K.B. 692)

forthwith thereafter and the suit may appear in the appropriate prospective list a month hence. There will be no other order on this application except that the costs of this application will be the defendant's Costs in the cause. Certified for counsel.

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