GUJARAT HIGH COURT

B. Kanjibhai

Vs.

Mohanraj Rajendra Kumar

Civil Revn. Applns. Nos. 585 and 586 of 1968

(J.M. Sheth, J.)

09.07.1968

ORDER

J.M. Sheth, J.

1. Civil Revision Application No. 585 of 1968 is filed by the petitioners who were the original defendants Nos. 1 to 5 in a Civil Suit No. 3787 of 1966, filed by the plaintiff-opponent M/s. Mohanraj Rajendrakumar, for recovery of Rs. 1415.68, the price of goods sold by the latter to the former. It was the plaintiff-opponent's say that the deceased Kanjibhai Jethabhai was running a partnership firm under the name and style of M/s. B. Kanjibhai. It was a cloth business done at Bombay. The deceased owed to the opponent the said amount for the price of the goods sold, etc. The defendants Nos. 2 to 5, i.e. the present petitioners were partners by holding out of the said firm M/s. B. Kanjibhai, the defendant No. 1 (petitioner No. 1) and hence they were liable for the suit amount. They had also claimed over and above the said amount Rs. 73.50 by way of interest and Rs. 25/-as notice charges. In all, the suit claim was for Rs. 1514.18.

2. Civil Revision Application No. 586 of 1968 is filed by the same petitioners who were the original defendants Nos. 1 to 5 in a summary Suit No. 3786 of 1966 filed by the plaintiff-opponent M/s. Chimanlal Nathmal, for recovery of Rs. 1,480/- in all. The allegations made by that opponent in that suit were also that the deceased Kanjibhai was running a partnership firm under the name and style of M/s. B. Kanjibhai, which did cloth business at Bombay. The deceased Kanjibhai owed to the opponent Rs. 1,384/- the price of the goods sold by the latter to the former. The defendants Nos. 2 to 5 were liable for the suit claim as they were partners by holding out of the said firm, the defendant No. 1 (petitioner No. 1). Rs. 70/- were claimed by way of interest and Rs. 25/- as notice charges. Both these suits were filed by different plaintiffs against the same petitioners in the Small Cause Court at Ahmadabad.

3. In those suits, the petitioners filed their appearance and sought for leave to defend. The

petitioner No. 2, Bhanubhai had filed affidavit on his behalf as well as on behalf of the alleged firm (petitioner No. 1). Other petitioners had also filed their affidavits and in those affidavits, these petitioners had set out their defense. The two important grounds of the defense were that the business run by the deceased Kanjibhai was a sole proprietor concern and it was not a partnership business. That Kanjibhai had died. The petitioners Nos. 2 to 5 were not the partners of the said firm and they never held out as partners of the said firm. The suit transaction was entered into with the agent of the plaintiff-opponent at Bombay who had full authority to sell the goods of the plaintiff at Bombay. There was no necessity of condition of getting it confirmed with the plaintiff at Ahmadabad; the transaction having been entered into, at Bombay and delivery having been given at Bombay and money had to be paid at Bombay to Shankerlal, the Ahmadabad Court has no jurisdiction to entertain and hear the suit. The heirs of the deceased, besides the defendants Nos. 2, 3 and 4, were other heirs including Induben. The suit is barred on account of non-joinder of parties also. The defendant No. 5 who is the wife of defendant No. 2 is not the heir of the deceased Kanjibhai and the plaintiff had joined her as defendant No. 5 and hence there is a misjoinder of parties. Similar is the position in Civil Revision Application No. 583 of 1968.

4. The plaintiff-opponent had filed the affidavit in support of the summons for judgment. Practically, it was on the basis of averments made in the plaint. After the defendants filed their affidavits, setting their defense and praying for leave to defend, the plaintiff filed a rejoinder affidavit setting out the contentions taken by the different defendants. Thereafter it refers to the prayer made by him in the plaint that the decree be passed against the property of Kanjibhai or the property that may have come into possession of the defendants and the decree be passed against the defendants Nos. 2 to 5.

5. In para 3 of that affidavit filed on behalf of the plaintiff, it is averred that the order which Shankerlal had taken from the said firm was confirmed at Ahmedabad and hence the Court had jurisdiction to hear and entertain the suit. In the bill that had been sent, a condition is mentioned that it is subject to Ahmedabad jurisdiction. As the contract was F.O.R., the delivery was given at Ahmedabad and money were to be paid at Ahmedabad and hence the Ahmedabad Court had jurisdiction. The letter Ex. 3/3 is written by the defendant No. 2. Ex. 3/4 is a cheque and that cheque is drawn fry Mrs. P.B. Desai, that is the defendant No. 5 for B. Kanjibhai as proprietor. She is also the wife of the defendant No. 2. Ex. 3/5 is a telegram written by B. Kanjibhai. Ex. 3/6 is a letter written by Mr. H.K. Desai. All these documents are significant to indicate that that Ahmedabad Court had got jurisdiction. Except the defendant No. 5, other defendants are the heirs of Kanjibhai. As cheque was issued by the defendant No. 5, she has been joined as a party and she has written that cheque for M/s. B. Kanjibhai. She is, therefore, a partner by holding out.

6. On taking into consideration these affidavits, the learned trial Judge, in his order, granting a conditional leave to defend, has observed as under :-

> "There are disputes about the jurisdiction and partnership and therefore, there are triable issues even though prohibitory order is issued to the third party not to pay amount to the defendant but there is no reply. Defendant or any of them, therefore, can be granted conditional leave to defend on depositing Rs. 1,514.18 with costs within 8 weeks and in that view of the matter the prohibitory order will stand vacated as soon as the deposit is made". Similar is the position practically in another suit. As common questions arise in both these revision petitions, they are being disposed of by a common judgment. It thus clearly appears from the orders passed by the learned trial Judge himself that the learned trial Judge, on consideration of affidavits filed by the parties, found that there were triable issues. In spite of it, the learned trial Judge has imposed a condition. Leave to defend has been granted on a condition to deposit the suit amount. The suits in question were summary suits filed by the plaintiff-opponent in Small Cause Court Ahmadabad.

The material part of Rule 39 of the Ahmedabad Small Cause Court Rules, runs as under :-

> "In a suit filed under Order 37 of the Code of Civil Procedure, if the defendant enters an appearance or files a Vakalatnama, the plaintiff shall on affidavit made by himself, or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action, and the amount claimed, and stating that in his belief there is no defense to the action, apply by summons for judgment returnable not less than 10 clear days from the date of service to the sitting Judge in Chamber for the amount claimed, together with interest (if any) and costs. The Judge may thereupon, unless the defendant by affidavit or declaration shall satisfy him that he has a good defense to the action on the merits, or disclose such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly."

This is the material rule which has to be considered by us in these two revision petitions.

7. It is significant to note that the Court has, in both these suits, while making an order of granting conditional leave to defend, observed that there are triable issues regarding jurisdiction of the Court and partnership. The factum of partnership is itself challenged. It is the say of the present petitioners (defendants) that the business run by Kanjibhai or M/s. B. Kanjibhai was the sole proprietary concern of the deceased Kanjibhai. It was not a partnership business. It is their further say that they had nothing to do with that business. They were not the partners. They have further contended that they have not held out as partners; even in the rejoinder affidavit by the plaintiff-opponent, so far as defendants Nos. 2 to 4 are concerned, the plaintiff has not stated as to how the defendants Nos. 2 to 4 held out as partners. So far as defendant No. 5 is concerned, it is stated that she had given a cheque wherein it was stated that it was given as a proprietor and it was given for M/s. B. Kanjibhai. It is not suggested that it was given as a partner. On consideration of the relevant affidavits, it could not be gainsaid that there are triable issues arising in these two suits. The learned trial Judge also found it. In spite of it, he has imposed these

conditions. It is significant to note that he has not found that he is not satisfied about a good defense to the action on the merits or the petitioners have not disclosed such facts as may be deemed sufficient to entitle them to defend. Except finding that there are triable issues, he has not made any observations in support of his order suggesting that the defense is not *bona fide* or the defense is sham or there are special justifiable circumstances for imposing a condition. It is a speaking order. The reasons have been given in the order. The learned trial Judge observes that there are triable issues in regard to jurisdiction and partnership. He does not say that these are merely raisable issues. He, thereafter only refers to the issue of a prohibitory order and non-receipt of the reply from the garnishee. One has toconsider whether in these circumstances this order of im posing the condition can be sustained in law.

8. It appears that rule 143 of the Ahmedabad City Civil Court Rules is not in pari materia with the Rule 39 of the Ahmedabad Small Cause Court Rules. So far as these two revision petitions are concerned, they can be disposed of, without entering into a general question whether there would be any difference in the powers of the Courts, i.e. the Small Cause Courts and the City Civil Courts in regard to imposing of conditions in view of slightly different wordings of the two rules.

9. In the case of *Saraswatiben v. Kantilal*[1], Divan J., has observed as under :-

> "Where in a summary suit on a negotiable instrument, it was clear on a perusal of the affidavit in reply filed by the defendant that a triable issue did arise on the averments set out in it but the plaintiff failed to file any affidavit-in-rejoinder controverting the statements of the defendant contained in the affidavit in reply.

It was held that it was the duty of the Court to give to the defendant unconditional leave to defend, the reason being that triable issues clearly emerged on a perusal of the affidavit in reply and since no affidavit-in-rejoinder was filed by the plaintiff to controvert the statements contained in the affidavit-in-reply, he must be deemed to have admitted the statements."

10. In the case of *Santosh Kumar v. Bhai Mool Singh*[1], the Supreme Court has made the following material observations :-

> "It is *Jacobs v. Booth's Distillery Co*[3]., Judgment was delivered in 1901. Their Lordships said that whenever the defense raises a "triable issue", leave must be given, and later cases say that when that is the case it must be given unconditionally, otherwise the leave may be illusory.
> The learned Counsel for the plaintiff-respondent relied on *Gopala Rao v. Subba Rao*[4], *Manohar Lal v. Nanhe Mal*[5], and *Shib Karan Das v. Mohammed Sadiq*[6], All that we need say about them is that if the Court is of opinion that the defense is not bona fide, then it can impose conditions and is not tied down to refusing leave to defend. We agree with

Varadachariar J. in the Madras case that the Court has its third course open to it in a suitable case. But it cannot reach the conclusion that the defense is not *bona fide* arbitrarily. It is as much bound by judicial rules and judicial procedure in reaching a conclusion of this kind as in any other matter. It is unnecessary to examine the facts of those cases because they are not in appeal before us. We are only concerned with the principle.

It is always undesirable, and indeed impossible, to lay down hard and fast rules in matters that affect discretion. But it is necessary to understand the reason for a special procedure of this kind in order that the discretion may be properly exercised. The object is explained in *Kesavan v. South Indian Bank Ltd*[7]*.,* and is examined in greater detail in *Sundaram Chettiar v. Valli Ammal*[8]*,* to which we have just referred. Taken by and large, the object is to see that the defendant does not unnecessarily prolong the litigation and prevent the plaintiff

[1] AIR 1964 Guj 81 [3](1901) 85 L.T. 262 [5] AIR 1938 Lah 548
[2]1958 SCR 1211 at pp. 1215 and 1216 : (AIR 1958 SC 321 at p. 323) [4] AIR 1936 Mad 246
[6] AIR 1936 Lah 584 [8] ILR 58 Mad 116 : AIR 1935 Mad 43
[7] ILR 1950 Mad 251 : AIR 1950 Mad 226

from obtaining an early decree by raising untenable and frivolous defenses in a class of cases where speedy decisions are desirable in the interests of trade and commerce. In general, therefore, the test is to see whether the defense raises a real issue and not a sham one, in the sense that, if the facts alleged by the defendant are established, there would be a good, or even a plausible, defense on those facts."

After referring to the facts of that case, their Lordships further observed as under :-

"This at once raised an issue of fact, the truth and good faith of which could only be tested by going into the evidence and, as we have pointed out, the learned trial Judge held that this defense did raise a triable issue. But he held that it was not enough for the defendants to back up their assertions with an affidavit; they should also have produced writings and documents which they said were in their possession and which they asserted would prove that the cheques and payments referred to in their defense were given in payment of the cheque in suit; and he said -

'In the absence of those documents, the defense of the defendants seems to be vague consisting of indefinite assertions .....'.

This is a surprising conclusion. The facts given in the affidavit are clear and precise, the defense could hardly have been clearer. We find it difficult to see how a defense that, on the face of it, is clear becomes vague simply because the evidence by which it is to be proved is not brought on file at the time the defense is put in. The learned Judge has failed to see that the stage of proof can only come after the defendant has been allowed to enter an appearance and defend the suit, and that the nature of the defense has to be determined at the time when the affidavit is put in. At that stage all that the Court has to determine is whether 'if the facts alleged by the defendant are

duly proved', they will afford a good, or even a plausible answer to the plaintiff's claim. Once the Court is satisfied about that, leave cannot be withheld and no question about imposing conditions can arise; and once leave is granted, the normal procedure of a suit, so far as evidence and proof go, obtains.

The learned High Court Judge is also in error in thinking that even when the defense is a good and valid one, conditions can be imposed. As we have explained, the power to impose conditions is only there to ensure that there will be a speedy trial. If there is reason to believe that the defendant is trying to prolong the litigation and evade a speedy trial, then conditions can be imposed. But that conclusion cannot be reached simply because the defendant does not adduce his evidence even before he is told that he may defend the action." It is significant to note that in that decision which the Supreme Court had to deal with, the trial Court had stated that the defense was not *bona fide* but it was on a ground which was not sustainable. In the instant case, as said earlier, the trial Court has found that there are triable issues arising. The trial Court has not found that the defense is not bona fide. The trial Court had not found that the efforts are being made to prevent a speedy trial. On consideration of the relevant affidavit, it cannot be gainsaid that the triable issues do arise and they are in regard to jurisdiction and partnership.

11. The learned Advocate Mr. Gandhi, appearing on behalf of the plaintiff-opponents, invited my attention to a 'Note' in the case of *Fieldrank, Ltd. v. Stein*[9], At p. 682, Devlin L.J., has observed as under:-

[9]1961-3 All England Reporter 681

> "The broad principle, which is found on (1901) 85 L.T. 262 (to which Supreme Court in the aforesaid decision has made reference) is summarized on page 266 of the Annual Practice (1962 Edn.) in the following terms:
> 'The principle on which the Court acts is that where the defendant can show by affidavit that there is a *bona fide* triable issue, he is to be allowed to defend as to that issue without condition.'

If that principle were mandatory, then the concession by counsel for the plaintiffs that there is here a triable issue would mean at once that the appeal ought to be allowed; but counsel for the plaintiffs has drawn our attention to some comments that have been made on (1901) 85 L.T. 262. They will be found at pp. 251 and 267 of the ANNUAL PRACTICE, 1962. It is suggested (see p. 251) that possibly the case, if it is closely examined, does not go as far as it has hitherto been thought to go; and on the top of p. 267, the learned editors of the ANNUAL PRACTICE have this note:

> 'The condition of payment into court, or giving security, is nowadays more often imposed than formerly, and not only where the defendant consents but also where there is a good ground in the evidence for believing that the defense set up is a sham defense and the matter "is prepared very nearly to give judgment for the plaintiff'."

It is worth noting also that in *Lloyd's Banking Co. v. Ogle*[10], in a dictum which was said to have been overruled or qualified by (1901) 85 L.T. 262, Bramwell, B., had said that

> '..... Those conditions of bringing money into court or giving security should only be applied when there is something suspicious in the defendant's mode of presenting his case.'
> I should be very glad to see some relaxation of the strict rule in (1901) 85 LT 262. I think that any judge who has sat in chambers in R.S.C. Ord. 14 Summonses has had the experience of a case in which, although he cannot say for certain that there is not a triable issue, nevertheless he is left with a real doubt about the defendant's good faith, and would like to protect the plaintiff, especially if there is not grave hardship on the defendant in being made to pay money into court. I should be prepared to accept that there has been a tendency in the last few years to use this condition more often than it has been used in the past, and I think that that is a good tendency; but with great respect to the learned Judge, I do not think that, giving the widest interpretation to his power to impose a condition, it was the right course to take in the circumstances here. There is not merely a triable issue put forward but one which has not been challenged on affidavit by the plaintiffs. There is some doubt (as I have pointed out) whether they can succeed in the form of action which they have elected to adopt on their writ."

It will be significant to note that even in that English decision, it has been observed that a condition can be imposed by the Court if the Court finds that triable issue is really a sham and the defense is not bona fide. In the instant case, as said earlier, the learned trial Judge has merely stated that triable issues regarding jurisdiction and partnership arise. He has not found that the defense is not a *bona fide* one. He has not found that the defense is not

[10](1876) 1 Ex. D. 262 at p. 264

a good defense or not a plausible defense. The learned trial Judge was, therefore, not justified in imposing a condition. It will be a great hardship that will be caused to the petitioners. The order passed by the learned trial Judge in both these suits cannot, therefore, be sustained in law. These were the cases where unconditional leave to defend ought to have been given. I, therefore, set aside the orders passed in the aforesaid two suits and allow this revision petition.

12. As a consequence of the order passed by the learned trial Judge, he had directed that prohibitory orders passed will stand vacated as soon as the deposit is made. As the order regarding a direction of depositing the amount is being set aside, that consequential order, that prohibitory order will stand vacated, will not survive. Unconditional leave to defend is granted to the petitioners-defendants in both the suits, namely. Summary Suit No. 1387 and Summary Suit No. 1386 of 1966. The Court below will give the necessary directions regarding filing of written statement etc.

13. The plaintiff-opponent in these two revision petitions to pay the costs of the petitioners in the revision petitions. Rule is made absolute in both these revision petitions.

Petitions allowed.