
(1943) 01 BOM CK 0010
In the Bombay High Court
Case No : Second Appeal No. 730 of 1941

Bai Kamala

APPELLANT

Vs

Shankerrao Laxmanrao Jadhav

RESPONDENT

Date of Decision : 06-01-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17

Citation : AIR 1943 Bom 407 : (1943) 45 BOMLR 791

Hon'ble Judges : Macklin, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Macklin, J.—The plaintiff to this action claimed Rs. 1,500, which he said was due to him under a writing in the account books of one Jadavji dated January 6, 1937. The writing stated that the plaintiff had helped Jadavji for the last two years and worked for him, and that a khata for Rs. 1,500 was therefore executed that day for his remuneration and the money would be paid without interest when Jadavji's monetary condition became easy. The cause of action for the suit was stated to be this agreement; and although an issue was framed and found in favour of the plaintiff as to the plaintiff having been engaged on a salary of Rs. 750 a year, it is clear that the suit throughout was tried as a suit based upon the agreement of January 6, 1937. The trial Court dismissed the suit because the agreement could not be regarded as a promissory note, since it did not contain an unconditional promise to pay, and, if it was to be regarded otherwise than in the light of a promissory note, the money would not become payable until Jadavji's circumstances permitted it, and there was no evidence to show that his circumstances did permit it. The lower appellate Court on appeal by the plaintiff accepted the situation as found by the trial Court, but allowed the plaintiff to amend his plaint in spite of the fact that at the date of the amendment the claim for two years' salary earned up to January 6, 1937, was barred by time, the amendment having been asked for more than three years after January 6, 1937.

The learned Judge thought that this was a special case where justice required an amendment of the plaint to be allowed so as to base the claim upon a different cause of action, namely the fact that the plaintiff had served for two years on an agreed salary of Rs. 750 per year. There was no clear finding of fact that the plaintiff actually served for two years on an agreed salary of Rs. 750 per year; but the learned Judge evidently assumed that that was correct. There was also no issue or decision as to the fact of the plaintiff having worked for two years on an agreed salary of Rs. 750 being in any way affected by Jadavji's written undertaking to pay him Rs. 1,500 when circumstances permitted, and there is nothing in the judgment of the learned Judge to suggest that this last question was before his mind at all. The learned Judge however passed an order allowing the appeal with Costs against the successful plaintiff in the appellate Court, making no order as to costs in the trial Court. This order, though it does not say that the plaintiff's claim is allowed, has been reproduced verbatim in the decree. The defendant now comes in second appeal.

2. Her learned advocate's principal point is that the amendment should not have been allowed, The decision of the Bombay High Court upon which the lower appellate Court allowed the amendment is *Kisandas Rupchand v. Rachappa Vithoba* ILR (1909) 33 Bom. 644. That was a case where a member of a partnership sued for dissolution of partnership and accounts but omitted to ask for a sum of Rs. 4,000 which was due to him. There was an issue framed as to his right to recover this amount and it was found that the money was owing to him. But the suit was dismissed by the trial Court on the technical ground that the agreement of partnership set up by the plaintiff did not constitute a partnership between him and the defendant. It was obvious that the plaintiff's object in bringing the suit was to recover his money; and on his appealing and asking in appeal for the first time for leave to amend the plaint by adding a prayer for the recovery of his money, although at that time the claim for money was barred by limitation, the appellate Court allowed the application for amendment because the point of limitation could not have been taken if the pleadings had not been defective in the first instance, and the suit was dismissed on a point that was purely technical.

3. At first sight that is very much the position here. It was nothing more than defective pleading to base the suit upon the agreement of 1937 instead of upon the fact of the plaintiff having worked for two years on an agreed salary of Rs. 750. But on behalf of the defendant the case of *Kisandas Rupchand v. Rachappa Vithoba* is distinguished on the ground that that was a case where an amendment of the claim was allowed in respect of the same cause of action, whereas here the plaintiff has asked for an amendment of the cause of action in respect of the same claim. I was referred to the case of *Weldon v. Neal* (1887) 19 Q.B.D. 394, discussed by Sir Dinshah Mulla in his note to Order VI, Rule 17, of the Code (at page 594 of the eleventh edition), and I am told that the ratio decidendi of that case is that you cannot allow an amendment of a cause of action when a suit on the amended cause of action would be barred by time. But

the position in *Weldon v. Neal* was this. The plaintiff brought an action for damages for slander. Having failed in that respect the plaintiff asked to be allowed to amend so as to claim damages for assault and false imprisonment, and the application was refused because at the time of the application for amendment a claim for damages in respect of assault and false imprisonment was barred. The suggestion of the defendant's learned advocate here comes to this, that *Weldon v. Neal* was a case of the same claim being based on a different cause of action. But obviously it was a different claim altogether. If the plaintiff was entitled to anything at all, he could in his original suit have claimed damages for assault, damages for false imprisonment, and damages for slander—three different claims in fact,—and naturally the application for amendment was refused when it was made in respect of a claim which could not by any stretch of imagination be deemed to have been included in the suit as originally framed. Here the claim is in no way changed. It is still a claim for Rs. 1,500; but instead of being based upon an agreement recognising the fact of the plaintiff having worked at a salary of Rs. 750 it is based upon the actual fact of his having worked at a salary of Rs. 750. If the cause of action had been properly stated in the plaint, no plea of limitation could have arisen. The defendant is certainly not entitled to rely on a plea of limitation at this stage upon a ground which is purely technical.

4. The Court may, under Order VI, Rule 17, allow either party to amend his pleadings in such manner and on such terms as may be just, and it is impossible to say that in this case there is any injustice in allowing amendment in the manner sought. It would be unjust to allow pleadings to be amended if the defendant had acquired a good defence by way of limitation. But that is not the case here, since the difference between suing upon an agreement recognising service and suing upon the service itself when service is held to be proved is no more than a technical difference. I think, therefore, that the lower appellate Court was right in allowing the plaint to be amended....

5. The appeal must therefore be dismissed. But the decree of the lower appellate Court should be properly drawn up, and the department which draws up decrees of the Joint Judge of Ahmedabad should be instructed how to do its work and to bear in mind that a decree is a formal expression of the Court's order. Interest at six per cent. on Rs. 1,500 will be payable from the date of this decree, and it will be executable not against the defendants personally but only against the estate of Jadavji in their hands. The costs of this appeal will be paid by the appellant.