
(1937) 11 PRI CK 0004

In the Privy Council

Case No : Privy Council Appeal No. 4 of 1936

Firm Harjivanlal Balkison

APPELLANT

Vs

Firm Radhakison Gopikison

RESPONDENT

Date of Decision : 09-11-1937

Acts Referred:

Citation : (1938) AIR(PC) 4

Hon'ble Judges : George Rankin, Shadi Lal, Lord Thankerton, JJ.

Advocate : T.L. Wilson and Co., Hy.S.L. Polak and Co., J.M. Parikh, A.M. Dunne, C. Bagram, Sir Thomas Strangman, for the Appearing Parties.

Judgement

Lord Thankerton

This is an appeal from a decree dated 25th September 1934 of the High Court of Judicature at Bombay, Appellate Civil Jurisdiction, reversing a decree of that Court in its Original Civil Jurisdiction dated 27th July 1933. The present suit, which may be conveniently referred to as the Bombay suit, was brought by the respondents, a firm, against the appellants, a firm, on 15th January 1929, for the recovery of Rs.3,219-4-6, as the balance due from the defendants in respect of certain transactions between the parties in cotton, wheat and silver and interest thereon up to the date of suit. The above balance was composed of Rs.476-11-9 in respect of transactions during 1927-28 in cotton and Rupees 2,569-4-9 in respect of transactions in wheat and silver. The balance of Rupees 476-11-9 in respect of the cotton transactions was arrived at after appropriating to these transactions the remittances by the defendants amounting to Rs.18,000 or thereby referred to in the counter-claim. At a late stage the defendants admitted liability in respect of the wheat and silver transactions, but they maintained a counter-claim for a refund by the plaintiffs of a sum of Rs.18,154, which had been paid to them by the defendants in various amounts during the period over which the transactions took place.

The counter-claim had been made by the defendants in a supplemental written statement, filed on 3rd December 1929, in which they also challenged the cotton

transactions as void in respect that they did not comply with the statutory form prescribed by the bye-laws of the East Indian Cotton Association Ltd., and were, therefore, rendered void by the provisions of the Bombay Cotton Contracts Act, (14 of 1922); and they maintained that accordingly the plaintiffs were not entitled to appropriate any of the defendants' moneys to the losses on such transactions, but were bound to return them to the defendants. The issue as to the validity of the cotton transactions, along with three of the other issues, which are not now material, was selected for trial in the first instance by Kemp J., who, by a judgment dated 18th February 1930, held the cotton transactions subsequent to 16th January 1928 to be void; on appeal, the High Court held, on 12th August 1930, that the whole of the transactions were void. By consent this decision followed the decision of the High Court in a similar suit also then before them, their decision in which was afterwards affirmed by His Majesty in Council: *Radhakisan Gopikisson v. Balmakund Ramchandra*, (1933) 20 AIR PC 55 = 141 IC 828 = 60 IA 63 = 57 Bom 218 (PC)

The suit having returned for trial of the remaining issues before Kania J., on 26th July 1933, the defendants, as already stated, admitted their liability for the wheat and silver transactions, and the plaintiffs proposed a new issue as to whether the counter-claim was barred by reason of the dismissal of Suit No. 113 of 1928 at Cawnpore, which may be conveniently referred to as the Cawnpore suit. The learned Judge disallowed the issue, on the ground that it was not pleaded, that it was too late, and that, although it was a question of law, it would require to be argued on facts which were not pleaded and for which the necessary documents were not disclosed. He further refused an application for amendment of the plaintiffs' reply to the counter-claim in order to raise the issue of *res judicata*, and he declined a tender by the plaintiffs of the plaint, written statement and judgment in the Cawnpore suit as evidence. On 27th July 1933 Kania J. held that the plaintiffs were not entitled to any indemnity from the defendants in respect of the losses in the cotton transactions and that the defendants were entitled to recover under their counter-claim. He therefore dismissed the suit, and gave the defendants a decree for the amount of their counter-claim, which was agreed at the figure of Rs. 16,244-3-0.

On an appeal by the plaintiffs, the Appellate Court, on 13th March 1934, allowed the plaintiffs to amend their reply to the counter-claim so as to raise the plea of *res judicata* in regard to the counter-claim, and remanded the case to Kania J. for trial of the issue. On 31st August 1934, the case came on before Kania J., who delivered judgment in favour of the defendants, holding that the Cawnpore suit was confined to the question whether the defendants had lent money to the plaintiffs, whereas the counter-claim was for agency accounts. On appeal, the Appellate Court held in favour of the plea of *res judicata* and dismissed the counter-claim, and passed a decree in favour of the plaintiffs for Rs. 2,179-4-3. Rangnekar J. expressed the opinion that the case fell within S. 65, Contract Act, and that the plaintiffs were not bound to restore to the defendants moneys which the former had applied, or had become bound to apply, in carrying out the

instructions of the defendants. The present appeal is by the defendants as appellants from that decree of the High Court and they ask for restoration of the decree of Kania, J. As in the opinion of their Lordships the appeal fails on the merits of the counter-claim, it will be unnecessary to express any decision on the plea of *res judicata*.

Their Lordships agree with Rangnekar J. that the counter-claim falls to be dealt with as a claim for the restoration of an advantage under S.65, Contract Act, and that if the respondents have applied the Rs. 18,000 or have become legally liable to meet losses arising from the carrying out of the appellants' instructions, the respondents cannot be said to have received an advantage within the meaning of S.65. The respondents employed a firm in Bombay, Chimaniram Motilal, to put through the cotton transactions in the market; it was admitted that there were no written contracts between them. The appellants sought to maintain (first) that the respondents had failed to prove their liability to Chimaniram Motilal and (secondly) that the contracts between the respondents and Chimaniram Motilal were void, in respect that they were not in writing, as required by bye-law 81 of the East Indian Cotton Association Ltd.

In their Lordships' opinion, neither of these contentions is now open to the appellants. The respondents proved that these transactions had been entered into with Chimaniram Motilal, and that the resulting losses had been debited as between them. The only points taken by the appellants were that these transactions had not been entered into on their behalf, and that they were void because they were not in conformity with bye-law 81. This is made clear by the refusal of Kania J. on 27th July 1933 to admit further evidence of the incurring of the liability to Chimaniram Motilal as unnecessary. The first point of these contentions is only now maintained to the extent that there was no privity of contract between the appellants and Chimaniram Motilal, but that would make no difference if the respondents have incurred the liability to Chimaniram Motilal in carrying out the appellants' instructions which is not now disputed. As regards the arguments before the Appellate Court, Rangnekar J. states :

It was suggested that there was no clear evidence that the appellants paid over the sum to the firm of Chimaniram Motilal. But that there was a loss to the appellants which they were bound to make good to that firm is not challenged. Their liability to Chimaniram Motilal is not challenged, and on principle it makes no difference particularly as they in fact appropriated the sums received from the respondents in their accounts, which are not challenged.

As regards the alleged invalidity of the contracts between the respondents and Chimaniram Motilal in respect that they were not in writing, this is clearly a matter which should have been raised in the pleadings and put in issue. It is not raised in the pleadings and is not the subject of an issue. As pointed out by Rangnekar J., there are contracts known as hedge contracts which do not require to be in writing, and the respondents were entitled to notice of such a contention, and the exact nature of the contracts in question should have been

determined on evidence as to their circumstances. The learned trial Judge appears to have wrongly assumed that bye-law 81 necessarily applied to them, as is pointed out by Rangnekar J.

Under these circumstances this contention is not open to the appellants.

The appeal accordingly fails on the merits and it is therefore unnecessary to deal with the plea of *res judicata*, which raises some difficult questions. The Cawnpore suit was brought by the present appellants on 3rd September 1928 just over four months before the present suit was filed on 15th January 1929. The Cawnpore suit was dismissed on 4th April 1929. Three questions arise in this connection. In the first place, was that dismissal under R.2 or R.3 of O. 17 ? If it was under R.2, the plea of *res judicata* is not available, but while the terms of the judgment would seem to suggest that the dismissal was under R.3, it is not clear whether the granting of time had been before or after the first hearing. In the next place, the two cases were concurrent, and the amendment which added the plea was not applied for until after the respondents had allowed the issue as to the validity of the contracts to be finally determined, which might bring the case within those in which the Court should decline to allow the plea to be raised, on the ground that, though the issue might have been raised in the earlier suit, it could not be held that it ought to have been so raised, as both elements are necessary to the plea under Explan. 4 of S. 11, Civil PC. Lastly, there remained the question as to whether the Appellate Court were right in overruling the refusal of Kania J. to allow the amendment at such a late stage in the case. Their Lordships express no opinion on any of these points.

It should be added that the appellants did not maintain that the payments should be appropriated in the account, which does not deal separately with the cotton, wheat and silver items, under the rule in Clayton's case, (1816) 1 Mer 572 as it would make no material difference in the result. Their Lordships will accordingly humbly advise His Majesty that the decree of the High Court dated 25th September 1934 should be affirmed, and that the appeal should be dismissed with costs.