

(1954) 11 BOM CK 0005
In the Bombay High Court
Case No : First Appeal No. 387 of 1953

Gokulprasad Poddar

APPELLANT

Vs

Ramrikhdas Parasrampur and Co.

RESPONDENT

Date of Decision : 17-11-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 2, Order 37 Rule 3, Order 37 Rule 3(2)

Citation : AIR 1955 Bom 276 : (1955) 57 BOMLR 402 : (1955) ILR (Bom) 507

Hon'ble Judges : Chagla, C.J.;Dixit, J

Bench : Division Bench

Advocate : J.L. Nain and A. Gupta, for the Appellant; K.K. Desai and Motichand Devidas and Co., for the Respondent

Judgement

Chagla, C.J.—This is an appeal against a decree passed by a Judge of file City Civil Court on a summary suit. A summons for judgment was taken out" by" the plaintiffs and conditional leave to defend was granted to the defendant, who is the appellant before us. The appellant failed to comply with the conditions on which he could defend the suit. Therefore the suit was placed on hoard for a decree and a decree was passed. It is against that decree that this appeal is preferred.

2. The first contention of Mr. Nain on behalf, of the appellant is that the suit is based on three oral agreements and therefore it was not maintainable as a summary suit.

Now, the two agreements are referred "to in the plaint and these two agreements are that the defendant saw Ramrikhdas a partner of the plaintiffs at Muttra and it was then agreed between the parties that the plaintiffs should accept and honour "hundis" drawn by the defendant against the plaintiffs and that the defendant should pay to the plaintiffs on demand the amounts of the said "hundis" with interest thereon from the dates to payment at the rate of 6 per cent. per annum, and para. 3 of the plaint goes on to state that in pursuance

of the said agreement and under instructions from the defendant, the plaintiffs honoured and paid three "hundis" respectively dated 9-4-1950, 10-4-1950 and 10-4-1950, for the respective sums of Rs. 5,000, Rs. 5,000 and Rs. 2,000 drawn by the "defendant against Messrs. Ramrikhdas Chiranjilal Parasrampur in favour of the Punjab National Bank Ltd.

The "hundis" are annexed to the plaint and they show that they were not drawn in favour of the plaintiff-firm but they were drawn upon Ramrikhdas Chiranjilal Parasrampur. In the affidavit in support of the summons the plaintiffs stated that in the plaintiff-firm Ramrikhdas and Chiranjilal are partners and the "hundis" were drawn upon Ramrikhdas Chiranjilal pursuant to the instructions of the defendant, and therefore Mr. Nain says that really in this affidavit the plaintiffs are relying on a third agreement which is that the plaintiffs were liable for "hundis" not drawn upon the plaintiff-firm but upon the individual Ramrikhdas Chiranjilal Parasrampur.

3. Now, the question raised by Mr. Nain is of considerable importance because this question often arises where leave to defend is either refused or conditionally granted. The question we have to consider is whether a summary suit would lie when the plaintiff's claim is not based upon any written agreement but is based upon an agreement in order to prove which evidence would have to be given by the plaintiff.

It seems that a view was taken in - *Parmanand Waneklal v. Special Land Acquisition Officer, Ahmedabad*", F. A. No. 16 of 1953, D/- 3-12-1954 (Bom) (A), by myself and my brother Mr. Justice Shah and also in - *"Hirachand Parsaram v. Lach-mandas Parsaram"*, Civil Revn. Appln. No. 536 of 1953, D/- 11-12-1953 (Bom) (B), by me sitting singly that where the plaintiff has got to prove an oral agreement, he could not enforce that agreement by a summary suit. It seems to us that that view should be reconsidered on a more careful consideration of the rule framed by us with regard to the filing of a summary suit. Now, the High Court has amended Order 37, Rule 2, and the amended rule to the extent that it is material runs as follows :

"All suits upon bills of exchange, hundis or promissory notes and all suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant with or without interest, arising on contract express or implied, or on an enactment where the sum sought to be recovered is a fixed sum of money."

Now, this case falls in the category of a debt or liquidated demand in money payable by the defendant with or without interest arising on the contract express or implied. Therefore the rule itself assumes that the contract on which the plaintiff is suing need not be a contract in writing. It may even be an implied contract. But so long as there is a debt or liquidated demand which becomes payable under such a contract, the plaintiff is entitled to sue for the amount due under the contract. This amended rule has been borrowed from the

corresponding English rule in Order 3, Rule 6 of the Rules of the Supreme Court and we find at p. 18 at the Annual Practice a commentary on the expression "debt or liquidated demand", and this is what the learned Commentator says :

"In order to come within the definition "liquidated demand" a claim on a contract must (a) state the amount demanded, or be so expressed that the ascertainment of the amount is a mere matter of calculation; and (b) must give sufficient particulars of the contract to disclose its nature. It is the nature of the contract on which the claim is based, as well as the fact that a specific sum is claimed, which brings the claim, or fails to bring it, within the definition."

Now, here a specific sum is demanded by the plaintiffs which is the amount of the hundis" honoured by the plaintiffs under an agreement with the defendant, Therefore there can be no doubt that on this interpretation of the rule the plaintiffs are suing on a debt or liquidated demand which arises on an express contract although the contract is oral and not in writing. In our opinion, therefore, a summary suit would be maintainable although it is based on an oral agreement or contract. It would be maintainable even if the contract or agreement is not admitted by the defendant. It may be said that if that were so, the plaintiffs would be bound to lead oral evidence to prove the contract.

But the scheme of filing a summary suit is that when the summons is served upon the defendant which contains the cause of action - in England it is a specially endorsed writ - if he does not answer to the summons, he is deemed to admit the averments contained in the plaint, and therefore if the plaintiff relies on an oral contract and the defendant does not appear in answer to the summons, the Court would pass a decree in such a suit because the defendant has admitted the claim of the plaintiff by failing to appear in answer to the summons. When the defendant docs appear and files an affidavit and the matter is to be decided upon by affidavits by the Court, then the question that has to be considered is not with regard to the maintainability of the suit, but with regard, to the question as to whether unconditional leave should be granted to the plaintiffs.

Now, we do feel that there is considerable force in Mr. Nain's argument that when a plaintiff is relying on an oral agreement which is denied by the defendant on affidavits, ordinarily the Court should grant unconditional leave: but there may be cases where the Court may hold the contract established after perusing the affidavits. It may be held to be established by surrounding circumstances or it may be held to be established from the conduct of the defendant. But where the affidavits do not clearly establish the oral contract relied upon by the plaintiff, it may well be that the Court should grant unconditional leave in order that the plaintiff should establish the contract by oral testimony to be tested by the Court.

4. Now, in this case, the position seems to us to be very clear. The amounts of the three hundis" which were paid by the plaintiffs are admitted to have been received by the defendant. So he has received consideration in respect of the

three "hundis", on which in a sense this suit is based. His only defence seems to be that the "hundis" were to be drawn in the name of the plaintiffs, according to the agreement pleaded by the plaintiffs", whereas in fact the "hundis" were drawn in the name of a partner in the plaintiff-firm. To that the answer given by the plaintiffs is that they honoured the "hundis" although they were drawn in the name of a partner under instructions given by the defendant.

It seems to us that there is hardly any defence to the suit when the defendant clearly and unequivocally admits the receipt of the monies on the "hundis"; nor does the defendant deny the contract. All that he says is that the "hundis" were not drawn pursuant to the contract, and in respect of that it was open to the Court to consider the conduct of the defendant and the averment of the plaintiff that the "hundis" were honoured under instructions from the defendant. Therefore, it seems to us that the learned Judge of the City Civil Court was justified in taking the view that this was not a case where unconditional leave should be granted, but that the defendant should have the right to defend the suit only on his depositing the sum mentioned in the order on the summons for judgment.

5. There is not much force in the other contention raised by Mr. Nain that the cause of action mentioned in the summons is different from the cause of action in the plaint, The cause of action in the summons really sets out the three "hundis" and mentions that they were drawn on Ramrikhdas Chiranjilal Parasrampur. Mr. Nain's quarrel with this is that in the plaint according to the agreement the hundis should have been drawn on the plaintiff-firm and not on Ramrikhdas Chiranjilal Parasrampur, but the summons states the actual fact and the cause of action is not altered by the summons stating that the "hundis" were drawn not on the plaintiff-firm but on the individual mentioned in the summons. In our opinion, there is not much substance in this appeal.

6. The result is that the appeal fails and must be dismissed with costs.

7. Appeal dismissed.