
(1915) 06 CAL CK 0013
In the Calcutta High Court

India General S.N. and R. Co. and Another	APPELLANT
Vs	
Lal Mohan Saha and Others	RESPONDENT

Date of Decision : 09-06-1915

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2

Citation : 31 Ind. Cas. 35

Hon'ble Judges : Roe, J; Asutosh Mookerjee, J

Bench : Division Bench

Judgement

1. This Rule was issued on the application of two of the defendants in the suit tried by the Court below. The plaintiffs opposite party instituted this suit against the India General Navigation and Railway Company and the River Steam Navigation Company for the recovery of damages on account of short delivery of goods committed to their care for transmission by them as public carriers. The third defendant, who was the consignor of the goods, was joined as a matter of form and no claim was made against him. The plaintiffs described the principal defendants as the India General Navigation and Railway Company and the River Steam Navigation Company by their joint agent Mr. A.E. Rogers. Mr. Rogers entered appearance and pleaded that the suit was not maintainable against him. When the case came on for trial, it was represented to the Court on behalf of Mr. Rogers that he had retired from the service of the Companies mentioned and had in fact left the country. The plaintiffs thereupon applied to the Court for leave to omit the name of Mr. Rogers from the plaint. This application was granted and the suit was decreed ex parte, as if it had been instituted properly against the two Companies. We are now invited to set aside this decree on the ground that the suit as brought was framed in contravention of Rule 1, Order XXIX of the Code of Civil Procedure; and that if the application for amendment of the plaint was properly granted, the two Companies should have been served in accordance with Rule 2 of Order XXIX. In support of this view reliance has been placed upon the cases of Ram Dass Sein v. Cecil Stephenson 10 W.R. 366 Nubeen Chunder Paul v. Cecil Stephenson 15 W.R. 534 and Campbell v. Jackson

12 C. 41.

2. There is no room for controversy that the plaint as originally framed was in contraven-of Rule 1 of Order XXIX. But on behalf of the opposite party, an ingenious argument has been put forward that the suit was in essence brought against the two Companies an J that the plaintiffs mentioned the name of Mr. Rogers as the person upon whom the process was to be served. There is obviously no foundation for this theory. The suit was substantially against Mr. Rogers although he was sued in his capacity as joint agent of the two Companies mentioned. The suit, however, should have been framed as one against two Companies, described by their proper names, as is clear from the decisions mentioned. There is plainly no excuse for the mistaken course deliberately adopted by the plaintiffs. Even a casual examination of the forms of pleadings appended to the CPC makes it manifest that the suit was not properly framed; this form is identical with what was contained in Section 26 of the CPC of 1859. In the circumstances of this case, as no question of limitation arises even if the suit be taken to have been instituted against the two companies on the date when the plaint was allowed to be amended, we are of opinion that the amendment may stand. But the plaintiffs were bound to serve notices of the suit in the manner provided in Rule 2 of Order XXIX after the amendmant had been made and the suit properly constituted. There is, moreover, nothing to show that Mr. Rogers was,, in respect of each of the two Companies, a, person entitled to receive notice under the provisions of that rule. It is needless, however, to deal with this aspect of the case in detail, because Mr. Rogers, it is conceded, is no longer connected with either Company.

3. The result is that this Rule is made absolute and the decree of the Small Cause Court Judge set aside. The case will be remitted to the Court below in order that the plaintiffs may proceed in accordance with law to serve the defendants, and then to have the suit tried afresh. We may add that a question has been raised before us as to the effect of the death of one of the plaintiffs during the pendency of the suit in the Court below; this will be determined by the Small Cause Court Judge when he takes up the case for final disposal. The petitioners are entitled to their costs in the Court. We assess the hearing fee at two gold mohurs.