
(1950) 07 CAL CK 0011
In the Calcutta High Court
Case No : Suit No. 349 of 1949

Nalini Ranjan Bose

APPELLANT

Vs

Martin and Co.

RESPONDENT

Date of Decision : 18-07-1950

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 11 Rule 12, Order 11 Rule 13, Order 11 Rule 20

Citation : AIR 1951 Cal 39

Hon'ble Judges : Sarkar, J

Bench : Single Bench

Advocate : A.N. Ray, for the Appellant; G.K. Mitter, for the Respondent

Final Decision : Allowed

Judgement

Sarkar, J.—This is an application by the plaintiff for an order that the defendants do file a further and better affidavit of documents.

2. The suit is for damages for breach of a contract for supply of cement by the defendants to the plaintiff. The defence, so far as is relevant for the present application is first that there was no contract between the parties. The second defence is that even if there was such a contract, cement being a controlled article the defendants were liable under the Control Order to supply cement to public bodies before supplying the plaintiff who was a private consumer and that it had not sufficient stock of cement to "supply the plaintiff" after it had supplied the public bodies.

3. It appears from the affidavit filed by the defendants in this application that they have certain stock books of cement. Admittedly these stock books are not relevant to the issue-whether there was a contract but are relevant to the issue whether the defendants had sufficient stock to supply the plaintiff after it had supplied the public bodies. There was a previous order for discovery against the defendants but they had not disclosed these stock books in the affidavit of

documents that they had filed pursuant to that order. An affidavit of documents is ordinarily conclusive but the Court can look into certain sources to find out if there are other relevant documents in the possession of the party affirming that affidavit and if satisfied about the existence of such documents to order a further and better affidavit of documents. It was held in *British Association of Glass Bottle Manufacturers Ltd. v. Nettleford* (1912) A. C. 709 : (81 L. J. K. B. 1125) that the Court can for this purpose look into any document which contained an admission by the party affirming that affidavit of the existence of other documents. As in this case there is the defendants' own admission in his affidavit in this application I shall be fully justified in directing further discovery.

4. Mr. Mitter relied on Order 11, Rule 20 of the CPC which is in the following terms:

"Where the party from whom discovery of any kind or inspection is sought objects to the same, or any part thereof, the Court may, if satisfied that the right to the discovery or inspection sought depends on the determination of any issue or question in dispute in the suit, or that for any other reason it is desirable that any issue or question in dispute in the suit should be determined before deciding upon the right to the discovery or inspection, order that such issue or question be determined first, and reserve the question as to the discovery or inspection."

This rule is identical in terms with Order 31, Rule 20 of the Rules of the Supreme Court in England.

5. Mr. Mitter argued that the stock book Was relevant only for the purposes of the second of the two issues mentioned above and that the right to the discovery of documents relevant to the second issue arises only on the first issue being decided in favour of the plaintiff. Hence Mr. Mitter argued that under Rule 20 the discovery should be postponed till the first issue was decided.

6. A question arose whether Rule 20 has any application once an order for discovery has already been made, the point being that that order decided the right to the discovery and the question of that right cannot be gone into over again. In *Lever v. Land Securities Co. Ltd.* (1893) 70 L. T. 323, such a contention was rejected. Referring to Order 31, Rule 20 R. S. C. *Lidley L. J.* said :

"It appears to me to be rather a narrow construction of that rule to say the right to the discovery has been determined by the common order, and that the Court is powerless after that to make an order under this rule. I am not at all prepared to hold offhand that the right to discovery does not mean there, the exercise of that right, and that if any application were made to delay the enforcement of that right this order might not be used for that purpose."

It would be hazardous to disregard an opinion so authoritative.

7. Laying aside this preliminary objection, it has yet to be decided whether the rule helps the defendants. This rule is one of discretion and cannot, therefore, be circumscribed by rigidly fixed principle and the authorities have not attempted

this either. One thing, however, is clear namely that discovery should not be refused if it is required for the purposes of the trial. So Cotton L. J. said in *Leitch v. Abbott* (1886) 31 Ch. D. 374: (55 L. J. Ch. 460):

"If, then this discovery is required for the purpose of ascertaining the plaintiff's rights at the trial it does not come within the first part of the rule," and Bowen L. J., said at p. 378, "The framers of the rules saw how ridiculous it would be if they did not give a power for the defendant to refuse discovery until the right of the plaintiff to have it had been established. Therefore rule 20 enables the Judge to sever the trial of the issue of facts from the trial of the right to discovery. But in the present case it seems to be that Rule 20 does not apply. The Judge could not properly say that he was satisfied that the right to discovery depended on the determination of any issue or question in dispute in the cause. The discovery is wanted for the determination of the issue in the action. Nor could it be said that for any other reason it was desirable that the issue in dispute should be determined before deciding upon the right to discovery."

A very instructive case on the point is *Benno Jaffe etc. Fabrik v. Richardson and Co.* (1893) 62 L. j. Ch N 710: (68 L. T. 404). That was a case of infringement of a patent where it was held that, although the defendant denied the validity of the plaintiff's patent, he might still be compelled to answer interrogatories as to his own process before the validity of the patent had been established. The argument was the same as that advanced before me and North J. dealt with it in the following manner:

"Before the rules of 1883 and the preceding rules under the Judicature Act on the same lines, no doubt discovery was enforced more than has been done since, and sometimes in such a way as to cause unnecessary expense and unnecessary disclosure of facts that in the result turned out to be immaterial. There were evils arising from that in two ways, both from pressure on a defendant and also from costs incurred, and a very salutary alteration has been made by giving the Court a discretion now which it used not to have, both as to saying whether discovery should be given at a particular stage or postponed to a later stage, as well as that of refusing it altogether. But if that means what it is contended it does mean, that in every patent action in which invalidity is set up--that is to say, in every patent action ever launched--there is first to be a deliberate trial before the judge and jury if necessary, of the validity of the patent, and only after that has been settled are issues to be raised and discovery obtained by interrogatories and otherwise with regard to the question of infringement, the benefit gained by getting rid of the waste of time and money in answering interrogatories will be far more than made up for by the increased waste of time and money involved in having two trials of every patent action in which the plaintiff succeeds in establishing his patent instead of one. In my opinion that is not the meaning of the rules, and it would have a very bad effect if that were so. The rule is intended to give the Court the opportunity of saying that discovery should not be given before the trial of the action unless it is wanted for the

purposes of the trial; for example, if a mortgagor wants to redeem an estate, and it is denied that he has a right to redeem at all, it is quite useless going into any questions of accounts until it is known whether there is such a right or not, and then if that right is established at the trial the taking of the accounts afterwards is a matter of course. So in the case of an action by a principal against an agent, agency denied. If the agency does not exist, on the relation of principal and agent does not exist, there are no accounts to be taken, and it is unnecessary to put the parties to the trouble and expense of going into statements of accounts, which, unless the agency is established, would never be necessary at all. But in the case of a patent it is different : no doubt validity is one thing and infringement another, but both have to come on to be tried at the same time and the parties must come before the Court ready to deal with both cases at the one trial."

8. I am unable to find any distinction between that case and the case before me. Here, as there, both the issues have to come on to be tried at the same time. Hence the discovery sought in this case is necessary for the trial of it. The trial of issues in stages, particularly when they are issues of fact, is not encouraged in our country. It is at least conceivable that if the trial Court was to decide the case on the first issue only, having determined that in favour of the defendant, the ultimate Court of appeal might take a different view of that issue. The result of such an event happening would be to make the parties start afresh again right from the stage of discovery. That would not be an expedient or desirable state of things in the interest of the parties and all possibility of its occurrence should be prevented.

9. There may, however, be circumstances, such as of hardship or disclosure of trade secrets or even of extraordinarily heavy costs being incurred which might lend some countenance to an argument that the discovery as to an issue which may turn out to be irrelevant should be postponed. I am not called upon to decide in this case whether such an argument should have prevailed for here no such circumstances have been alleged and no argument has been addressed to me on that basis. Some authorities would tend to show that the power to postpone discovery under the rule might be exercised where such circumstances exist. See e.g. *Rawes v. Chance* 7 R. P. C. 275 and *Wood v. Anglo Italian Bank Ltd.* (1876) 34 L. T. 255. I do not say anything on this matter. Mr. Mitter relied on the case of *British India Steam Navigation Co. v. Secretary of State* 38 Cal. 230 : 8 I. C. 107). It was held there that discovery should be postponed till certain preliminary issues of law had been tried. With regard to this case it is enough to say that there are no preliminary issues of law to be tried in the case before me.

10. The objections to this application fail. There will, therefore, be an order on the defendants to make and file a further and better affidavit stating what documents are or have been in their possession or power relating to the matter in question in this action. Costs, costs in the cause. Certified for counsel.