

(1960) 09 MP CK 0028

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No. 66 of 1958

Ratanlal Saligram and Another

APPELLANT

Vs

Nathulal Pankarji Namdeo

RESPONDENT

Date of Decision : 02-09-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 3, Order 41 Rule 23, 96(3), 99
Evidence Act, 1872 — Section 4
Oaths Act, 1873 — Section 8

Citation : AIR 1961 MP 108

Hon'ble Judges : Shiv Dayal, J

Bench : Single Bench

Advocate : R.S. Bajpai, for the Appellant; G.P. Patankar, for the Respondent

Final Decision : Allowed

Judgement

Shiv Dayal, J.—This is an appeal from an order of remand under Order 43 Rule 1(u), of the Code of Civil Procedure. In the respondent's suit for the recovery of Rs. 612/-, the appellant inter alia pleaded repayment of the loan. On December 5, 1957, which was fixed for plaintiff's evidence, the defendant offered to the plaintiff to take Ganges water in his hand and swear that the defendant had not repaid the debt.

Thereupon, the plaintiff threw a counter proposal offering the defendant to take Ganges water in his hand that he had nothing to pay to the plaintiff. The plaintiff's proposal was accepted by the defendant. The defendant then took the holy water in his hand before the Court and stated that he had repaid the entire debt due to the plaintiff and that he did not owe a single pie to him. The plaintiff accepted this statement and prayed for dismissal of his suit. The suit was accordingly dismissed leaving the parties to bear their own costs.

However, feeling himself aggrieved by what had happened the plaintiff filed an appeal to the District Judge, Guna, on January 8, 1958. This appeal has been allowed on the ground that the trial Judge did not record the defendant's

statement and no application was filed by the parties proposing and accepting the special oath. He has ordered a remand for disposal of the suit on merits, aggrieved by which the defendants have come here in appeal.

2. Shri Patankar raises a preliminary objection, that the judgment of the trial Judge dismissing the plaintiffs suit not being on a preliminary point, the order of remand does not fall within the ambit of Order 41 Rule 23 C. P. C. In my opinion, this objection must be overruled. Learned counsel argues that a preliminary point is one which does not relate to the merits of the case. In my opinion, such a narrow interpretation is unwarranted. A preliminary point is not restricted to points like limitation, jurisdiction and res judicata.

A preliminary point may be either collateral to the merits which precludes their determination altogether or a point which, though relating to the merits, precludes their general determination. It is a point which if determined in favour of the plaintiff permits the progress of the suit, but when determined against him brings the suit to an end, leaving other issues undetermined. In this view I am supported by a number of decisions including, Madhoroa Ganesh v. Kesho Gajanan AIR 1941 Nag 304, Mathura Prasad v. Sitaram AIR 1940 Oudh 314 and Malayath Veetil Raman and Others Vs. C. Krishnan Nambudripad (dead) and Krishnan Nambudripad, legal representative of the deceased, . In this case, the plaintiffs suit was dismissed on the short ground that the defendants took oath and stated that nothing was due by them and this rendered the determination of the merits of the case unnecessary.

3. It is urged by Shri Bajpai that the plaintiff's first appeal was not competent as it was against a consent decree. In my opinion, when a suit is decided on special oath, oath having been administered in pursuance of an agreement of the parties, the decree passed on such evidence cannot be said to be a consent decree although such evidence is conclusive. The first appeal was therefore, competent. See Laxmibai v. Bajirao AIR 1938 Nag 64.

4. Adverting to the merits of the case, it is true that the plaintiff's proposal and the defendants' acceptance to administer special oath were not made by means of applications, and it is also true that on a separate deposition form the statement of the defendant was not recorded. I am called upon to decide the effect of this. In the Oaths Act 1873, no such formalities of procedure have been prescribed. All that is required is that there must be an offer to be bound by a special oath as mentioned in section 8, and the acceptance of the offer by the other party; thereupon the court may proceed to administer such oath. The evidence given by the party taking oath then becomes conclusive proof of the matter stated.

Where all this is recorded in the order sheet of the Court, it is inconsequential that the proposal, the acceptance and the statement were not separately recorded. In the absence of any special procedure, the judgment and decree of the trial Judge could not be set aside for want of those formalities. The Court has

to see in substance whether the requirements of the Oaths Act were fulfilled. In this case, below the order-sheet of December, 5, 1957, the plaintiff has put his signature. Neither on that day nor on any other day, did he approach the trial Judge with any grievance.

After about a month he filed an appeal before the District Judge, presumably as a consequence of repentance why he offered special oath to the defendants. In the memorandum of first appeal also, the plaintiff did not file any affidavit stating what was recorded in the order-sheet was incorrect. The statement in an order of the Court is conclusive of what happened before the Presiding Officer of that Court. This is now settled by their Lordships in *Catholicos v. Athanasius* AIR 1954 SC 526.

5. Since the CPC applies, section 99 of the Code condones all irregularities of form and procedure unless the merits of the case are affected.

6. Shri Patankar lays some stress on the fact that the defendant's statement should have been recorded in a formal manner. The omission to do so was also in my opinion a mere omission of formality. The person who made the statement on special oath does not state that his statement was different from the one recorded by the trial Judge in his order sheet. The plaintiff also does not say that the defendant did not make that statement. No cross examination was permissible. In this situation the judgment and decree cannot be set aside just because a statement was not separately recorded on a deposition form.

7. As was laid down in AIR 1927 165 (Privy Council) , an oath can be in any form common (amongst) or held binding by persons of the race or persuasion to which the deponent belongs and not repugnant to justice Of decency. Taking Ganges water in hand is undoubtedly such a form so far as the parties in the suit are concerned. In *Chedilal v. Jwala Prasad* ILR 31 All 315 the plaintiff stated that he would accept whatever evidence the defendant would give with Ganges water in his hand and on his honour. The defendant swore with Ganges water in his hand that the claim was false inasmuch as the amount due to the plaintiff had been set off against a larger sum due to the defendant. The suit was dismissed, the defendant having sworn in the manner prescribed.

8. For these reasons, this appeal is allowed, the judgment and order of the first appellate Court are set aside and the judgment and decree passed by the trial Judge are restored; leaving the parties to bear their own costs throughout.