

(1940) 06 CAL CK 0014
In the Calcutta High Court

Romesh Chandra Das

APPELLANT

Vs

National Tobacco Co. of India Ltd.

RESPONDENT

Date of Decision : 11-06-1940

Acts Referred:

Evidence Act, 1872 — Section 114

Presidency Small Cause Courts Act, 1882 — Section 80

Citation : AIR 1940 Cal 536

Hon'ble Judges : Khundkar, J

Bench : Division Bench

Judgement

Khundkar, J.—The facts which gave rise to this appeal are as follows: The plaintiff-appellant was the agent at Bakarganj for the sale of cigarettes of the defendant-respondent who are a company having their offices in Calcutta. The defendant-respondent instituted a suit in the Calcutta Court of Small Causes for recovery of certain moneys due from the plaintiff-appellant and obtained an ex parte decree. Thereafter, the plaintiff instituted a suit in the Munsif's Court at Bakarganj to set aside this decree and for a perpetual injunction restraining the defendant respondents from executing it. Both the Courts below have found in favour of the defendant-respondents. In this appeal the following points have been taken by Mr. Guha on behalf of the appellant 1. The contract of agency was entered at Bakarganj where the defendant resides and has his place of business; the entire cause of action arose at Bakarganj, and the Calcutta Court of Small Causes had no jurisdiction to entertain the suit instituted by the respondents. 2. Leave of the Court of Small Causes u/s 80, Presidency Small Cause Courts Act, was not taken prior to the institution of that suit. 3. No summons was served on the appellant who was cited as defendant in that suit 4. The Courts below erred in not rejecting in its entirety the evidence of a hostile witness, to wit the postal peon, who was examined to prove service, and in relying upon an admission extracted from this witness in cross-examination that he had tendered a registered postal cover (which contained the summons) to the appellant who had declined to accept it.

2. With regard to Mr. Guha's first contention, it is sufficient to say that both the Courts below have found upon the evidence that the contract of agency was entered into in Calcutta, and this point is therefore concluded by a finding of fact. As to the second contention, it appears that the appellant made no attempt to establish his allegation that the leave of the Court of Small Causes u/s 80 had not been obtained prior to the institution by the respondent of his suit in that Court. The burden of establishing this which lay on the appellant has not been discharged. In these circumstances, the lower Appellate Court was right in relying upon the presumption u/s 114, Evidence Act that judicial and official acts have been properly performed, and in holding that the presumption that leave had been granted had not been rebutted. Mr. Guha's next point that there had been no service of summons is answerable in two ways. Firstly, mere non-service of summons is in the absence of fraud not sufficient to support a subsequent suit to set aside the decree, and secondly the mode of service adopted in this case and established by the peon's evidence was not irregular. The grounds upon which a suit to set aside a decree in a previous suit may be sustained have been considered in numerous cases. Reference may be made to a few of these decisions. In *Kasiswar Goswami v. Amirudain* AIR (1919) Cal. 652, it was held that the mere fact that the decree was obtained by false evidence would not be sufficient by itself to have it set aside by suit. The case itself must be found to be a fraudulent one. In *Jhanda Singh v. Lachmi* AIR (1920) Lah. 408, it was held that no suit lay to set aside as against parties who were majors an ex parte decree not tainted by fraud, and that the objection that the decree was ex parte could only be taken by a proper proceeding in the suit itself, e.g., by an application under Order 9, Rule 13, Civil P.C., or an application for review, or an appeal to a superior Court. In *Ibrahim Harun Jaffer v. Jusuf Hossian Jaffar* AIR (1920) Bom. 351 the law was enunciated by MeLeod C.J. at p. 799 of the report in the following terms:

Now it is perfectly well recognized that it is only on certain grounds that the Court will entertain a suit to set aside a decree, and that is if it can be proved that the decree was obtained by fraud. Otherwise there would be no end to litigation.... Order 9, Rule 13 of the Code prescribed the course which should be followed by a party against whom a decree has been passed ex parte.

3. In *Narsingh Das v. Bibi Bafikan* (1910) 37 Cal. 197, it was laid down that a fresh suit would not lie to set aside a decree on the mere ground of non service of summons though it would be maintainable on the ground of fraud. In *Abdul Majumdar v. Mohamad Gazi* (1894) 21 Cal. 605, it was held that a suit will lie to set aside a decree when it is impeached on the ground not of mere non-service but of fraudulent suppression of the summons and the causing of a false return of service to be filed. In the present case there is no evidence and therefore no finding that the decree was obtained by a fraudulent suppression of summons, a false return of service or indeed by any fraud whatever. The findings of both the Courts below in regard to the service of summons which are amply supported by the evidence are that the summons was sent from the Court of Small Causes

Calcutta, by registered post, that the cover was tendered by the postal peon to the right person, namely, the present plaintiff and that he has refused to accept it. Service through registered post of a summons of the Calcutta Court of Small Causes is now permissible under the new proviso to Rule 18 of Order 5 of the Rules of Practice of that Court. The Rule and the proviso are in these terms:

A summons may be sent by the Court either by one of its officers or by post to any Court (not being the High Court) having jurisdiction in the place where the defendant resides, or carries on business or works for gain:

Provided that the summons may in any such case, on the application of the plaintiff, be ordered by the Court to be sent by post addressed to the defendant at the place where he resides or carries on business or works for gain.

4. The position created by this rule is fortified by Order 1A, Rule 2 of the Rules of Practice of the Court of Small Causes which attracts the provision of the General Clauses Act (Indian Act 10 of 1897). Rule 2 of Order 1A is as follows:

Section 2, Civil P.C., 1908, as extended to the Court of Small Causes of Calcutta, applies for the interpretation of these rules and the General Clauses Act, 1897, applies for the interpretation of these rules as it applies for the interpretation of a Central Act, made after its commencement.

5. The section of the General Clauses Act, which is material is Section 27:

Where any Act of the Governor-General in Council or Regulation made after the commencement of this Act authorizes or requires any document to be served by post, whether the expression "serve" or either of the expressions "give" or "send" or any other expression is used, then, unless a different intention appears, -the service shall be deemed to be effected by properly addressing pre-paying, and posting by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of post.

6. Now the effect of this section when read with Order 5, Rule 25, Civil P.C., has been considered by the Bombay High Court. Order 5, Rule 25 provides for the sending of a summons by post to a defendant residing outside British India. In *Baluram v. Bai Pannabai* (1911) 35 Bom. 213, a summons was sent by registered post addressed to a defendant in the States of Jaipur and it purported to be sent in accordance with the provisions of Order 5, Rule 25, Civil P.C. The cover was returned with an endorsement "refused to take. The handwriting of Chunilal, postman." It was held that as it appeared that the cover was properly addressed to the defendant and had been registered, duly stamped, and posted, the Court was entitled to draw the inference indicated in Section 27, General Clauses Act, and to hold that there was sufficient service. In *Hari Pada Dutt v. Joy Gopal Mukherji* 39 C.W.N. 934, a summons sent by registered post under an order made by a Judge on the original side of this Court under Rule 11, Chapter VII, Original Side Rules, and returned with endorsement "refused" is *prima facie*

evidence that the addressee had an opportunity to accept it and the service, thus effected, is, therefore, a good and valid service. To invalidate such a service the defendant must expressly prove, to the satisfaction of the Court, that what would happen in the ordinary course did not happen and that he did not get an opportunity to accept it; and for that purpose it is open to him to prove that he never refused it and that it was never tendered to him. A mere denial that it was never delivered to him is not sufficient.

7. In the present case, the circumstances from which service could be legitimately inferred are stronger because the postal peon was examined and deposed that the defendant in the Small Cause Court suit, that is the present appellant, had refused the cover. This brings me to Mr. Guha's last point. He has argued that as the postal peon was declared hostile and cross-examined on behalf of the plaintiff in the Small Cause Court suit his entire evidence should be rejected. With this contention I am entirely unable to agree. In criminal cases - and reference has been made to decisions of this Court in criminal cases which have subsequently been overruled by a Full Bench - the law is that the Judge must caution the jury regarding the credibility of a hostile witness's testimony and must then leave the question of belief or disbelief entirely to the jury. I am aware that there are observations in the decisions in some civil cases which would lend support to the proposition that when a witness is discredited it is not open to the Court to accept a part only of his testimony while rejecting the rest. But, in my judgment, such observations do not elucidate the entire position. When a witness becomes hostile it would in certain cases be unsafe to accept any portion of the testimony which he has rendered in examination-in-chief. To pick and choose between the statements which a witness makes in examination-in-chief under the influence of an animus adverse to the party who has called him would sometimes be an unsound proceeding. But to say that the Court has no discretion to decide whether or not what is elicited from such a witness in cross-examination is the truth is an entirely different proposition. The cross-examiner's very function is not only to get rid of testimony which examination-in-chief has brought on the record, but to strive to extract from the witness the real truth. It would, in my judgment, be quite wrong to hold that a Court is entirely debarred from bringing its judicial discretion to bear on materials which cross-examination elicits and of deciding whether the truth lies there.

8. In the Full Bench case in *Profulla Kumar Sarkar and Others Vs. Emperor*, it was laid down, overruling the earlier decisions, that there is no such rule of law that the evidence of a witness who has been treated as "hostile" must be rejected either in whole or in part, or that it must be rejected so far as it favours the party calling the witness or so far as it favours the opposite party. In *Sohrai Sao and Another Vs. Emperor*, Courtney-Terrell, C.J. dealt in the following terms with the contention that the prosecution were not entitled to rely on any part of the evidence of a witness called by them whom they have declared hostile and cross-examined:

I am aware that in India from time to time this curious view of the consequence of declaring a witness hostile has become current. The whole idea has been allowed to grow out of an observation reported as having been made by Lord Campbell in an old Scottish case *Faulkner v. Brine* (1858) 1 F & F 254. This was accepted by the Calcutta High Court in such cases as *Khijiruddin and Others Vs. Emperor*, and more recently by *Gumming and Lort-Williams JJ.*, in *Mokbul Khan Vs. Emperor*, . In this latter case the learned Judges said, "In other words a party cannot be allowed to say that his witness is a truthful witness so far as a part of his evidence is concerned but an untruthful witness so far as some other portion is concerned." The theory so stated is fallacious. A party is allowed to cross-examine his own witness because that witness displays hostility and not necessarily because he displays untruthfulness. The theory has gained currency owing perhaps to the common belief that the sole object of cross-examination is to discredit the witness whereas its main purpose is to obtain admission, and it would be ridiculous to assert that a party cross-examining a witness is thereby prevented from relying on admissions, and to hold that the fact that the witness is being cross-examined implies an admission by the cross-examiner that all the witnesses' statements are falsehoods.

9. In the present instance, the postal peon admitted in cross-examination that he had tendered the postal cover to the present plaintiff and that he refused to accept it. The Court below have believed this and it is clear that there is no law which precluded them from so doing. It follows that the concurrent findings of the Courts below that the postal cover was tendered to the plaintiff in the present suit and that he refused to accept it cannot be disturbed in second appeal. The appeal fails and is dismissed with costs.