
(1933) 04 BOM CK 0008
In the Bombay High Court
Case No : Letters Patent Appeal No. 6 of 1922

Sarafalli Mahomedalli

APPELLANT

Vs

Mahasukhbhai Jechandbhai

RESPONDENT

Date of Decision : 13-04-1933

Acts Referred:

Citation : AIR 1933 Bom 476 : (1933) 35 BOMLR 965 : (1933) ILR (Bom) 802 : 147 Ind. Cas. 426

Hon'ble Judges : Rangnekar, J; John Beaumont, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is a second appeal brought under the Letters Patent from the decision of the District Judge of Broach and Panchmahals. The plaintiff sued the defendants for the balance of moneys due and the balance was secured by a promissory note dated August 31, 1926, signed by defendant No. 2. The plaintiff's case was that defendant No. 3 was a partner of defendant No. 2 and that he was liable for the amount due. The issues raised in the trial Court were (1) whether defendant No. 3 was a partner of defendant No. 2 in the firm in question, and (2) whether defendant No. 3 was liable for the claim in suit. The trial Judge held that defendant No. 3 was a partner in the firm and that he was liable for the claim in suit. In the lower appellate Court it seems to have been assumed that the plaintiff's case was based on the promissory note, and as the promissory note was signed only by defendant No. 2, the learned pleader for the plaintiff felt doubtful whether he could sustain the judgment against defendant No. 3, and he accordingly asked for leave to amend the plaint by claiming in the alternative the moneys due from defendant No. 3 on the dealings which resulted in the debt secured by the promissory note, that is to say, he sought to claim in the alternative on the promissory note or for the consideration giving rise to the promissory note, and the learned District Judge gave leave to amend on certain terms as to costs. The question which we have to decide is whether that leave

was properly granted. The learned District Judge did not decide the question in issue, but he referred the matter back to the trial Court.

2. It has been strenuously argued before us that the learned District Judge had no right to give leave to amend and we have been referred to various cases. Strong reliance is placed on the decision of Mr. Justice Blackwell in *Burjorji v. Hormusji* (1931) 34 Bom. L.R. 643 The head-note in that case is :-

Where a suit is brought on a promissory note, it is not permissible to the Court at the trial of the suit to allow an amendment in order to entitle the plaintiff to sue on the original cause of action on the loan-that being a cause of action wholly distinct from the cause of action based upon the promissory note.

Now we are not concerned with the question whether in that case the learned Judge was right or wrong in refusing leave to amend, but if the learned Judge intended to lay down as a proposition of law that in a suit on a promissory note an amendment claiming in the alternative on the consideration for the note should never be allowed at the trial, I think, with great respect to the learned Judge, that his judgment cannot be supported. It is quite true, as the learned Judge points out, that the cause of action on the promissory note is distinct from the cause of action on the loan which gave rise to the promissory note. But it is equally true that those two distinct causes of action can be set up in the same suit by the original plaint. Authority for that proposition, if needed, is to be found in *Sadasuk Janki Das v. Sir Kishan Pershad* ILR (1818) Cal. 663 21 Bom. L.R. 605 where the proposition is stated by Lord Buckmaster who delivered the opinion of the Privy Council. If two alternative and inconsistent claims can be combined originally in the plaint, I see no reason on principle why they should not be combined at a later stage by amendment. Whether in any particular case the amendment is asked for at too late a stage, or in circumstances which make it unfair to grant the leave, is another matter, but as a mere proposition of law I see no reason why an amendment of this nature should not be allowed at the trial or even in appeal. Mr. Justice Blackwell based his judgment in that case on the decision of the Privy Council in *Ma Shwe Mya v. Maung Mo Hnaung* ILR (1921) Cal. 832 24 Bom. L.R. 682 But that was a very different case. In that case the original suit was upon a contract made in 1912, and it was sought by amendment to base the cause of action on a totally different contract made in 1903. The whole subject-matter of dispute was sought to be changed, which is not the case in the present suit where the real subject-matter is the indebtedness of defendant No. 8. I think, therefore, that there is no objection in law to the amendment which the learned Judge allowed.

3. It was contended further that the claim on the loan was at the date of the amendment barred by limitation. That point was considered by the learned District Judge and he thought it not sufficient reason for refusing leave to amend. I am not sure that I agree with the learned Judge's view on that point, but as far as I can see it is extremely doubtful whether in fact the claim was barred. Moreover I am disposed to think that as a matter of fact the plaint is not limited

to the claim on the promissory note. The plaint is not very clearly worded. It refers to dealings subsequent to the promissory note and on the whole, on the construction of the plaint, I think that it is a claim for balance of moneys due on the dealings between the parties and that the promissory note is only relied on as evidence of the amount due on the balance of the account. If that is right it is of course unnecessary to amend the plaint. But as the plaintiff asked for leave to amend, whether that leave is necessary or not, he should, I think, be given leave. That being so we see no reason to interfere with the learned Judge's judgment. The appeal is dismissed with costs.

Rangnekar, J.

4. Mr. Amin objects to the leave granted by the learned Judge to amend the plaint on two grounds. The first ground is that the effect of allowing the amendment would be to deprive his client of the defence under the law of limitation. The second ground is that the effect of the amendment would be to introduce a totally new and inconsistent cause of action. The first answer is that it was not at all necessary for the plaintiff to amend the plaint, for it seems to me to be clear, on reading the plaint as a whole, that the plaintiff sued not on the promissory note but on dealings between him and the defendants, that is to say, on the original cause of action in respect of which the promissory note was passed.

5. The second contention is, in my opinion, untenable. The position is that the amendment was allowed in order to enable the plaintiff to plead, in the alternative, the original consideration, namely, the dealings between the parties. I see no objection to this. Mr. Amin relies upon a decision of Mr. Justice Blackwell in *Burjorji v. Hormusji* (1931) 34 Bom. L.R. 643 In that case the learned Judge seems to have held that in a suit based on a promissory note leave should not be granted to amend the plaint by pleading the original cause of action, as the causes of action are distinct. With all sincere respect to the learned Judge I am unable to accept the view which he has taken. Mr. Justice Blackwell referred to *Ma Shwe Mya v. Maung Mo Hnaung* ILR (1921) Cal. 832 24 Bom. L.R. 682 as an authority for the view which he took. But that case was decided on its facts, and. I am unable to see that any proposition of law as such was laid down there. It is clear from the facts of that case that the amendment sought was based on a contract totally different from the contract on which the plaint was originally based. Now it is true that a cause of action based on dealings between the parties is distinct from that based on a promissory note passed for the amount due in respect of such dealings. But there is clear authority for the proposition that the plaintiff may "rely upon several different rights or claims alternatively although they may be inconsistent" : see *Philippe v. Philipps* (1878) 4 Q.B.D. 127 I may also refer to the decision of the Privy Council in *Sadasuk Janki Das v. Sir Kishan Pershad* ILR (1918) Cal. 663 21 Bom. L.R. 605 If, then, a plaintiff can set up inconsistent claims in the alternative in the plaint to start with, it is difficult to see why, on principle, he cannot be allowed to amend the plaint by pleading an

inconsistent claim in the alternative at a later stage. Whether such an amendment should be allowed or not depends upon the circumstances of the case and various other considerations. In the present case, however, the application for amendment is to plead the original cause of action in the alternative. In this case the amendment was unnecessary, and that being so, the appeal fails and must be dismissed with costs.