

(1936) 02 BOM CK 0001

In the Bombay High Court

Case No : O.C.J. Appeal No. 42 of 1935 and Suit No. 778 of 1935

The Calico Printers Association Ltd.

APPELLANT

Vs

Ahmed Abdul Karim Bros.

RESPONDENT

Date of Decision : 26-02-1936

Acts Referred:

Citation : AIR 1936 Bom 310 : (1936) 38 BOMLR 531

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

Bench : Division Bench

Final Decision : Dismissed

Judgement

John Beaumont, Kt., C.J.—This is an appeal from an order made by Mr. Justice B. J. Wadia, which raises rather an important question of practice. The suit is a suit for an injunction to restrain the defendants from wrongful user of the plaintiffs' registered design, and an application was made ex parte for an injunction, and on that application an injunction was granted by Mr. Justice Divatia until the hearing of the motion, costs being made costs in the motion. When the motion was heard, Mr. Justice B. J. Wadia continued the injunction until the trial, and directed that the costs of the motion be costs in the cause. Now if an order had been drawn up in those terms, in my opinion, it is quite clear that the applicants would have got separate sets of costs for the ex parte motion and the motion on notice. They would have got, since no contrary direction had been given, Rs. 125 for the ex parte motion under item 54 of the Table of Fees, and they would have got Rs 175 for the costs of the contested motion. But when the order of Mr. Justice B. J. Wadia came to be drawn up, the defendants' attorneys inserted a provision that the costs of the ex parte application and of this order, viz. Rs. 175, be costs in the cause, that is to say, they sought to limit the costs of both motions to Rs. 175. The plaintiffs' attorneys, who presumably thought they would have the better chance of ultimately getting the costs, objected, and the matter was placed before the learned Judge again to determine the point. The learned Judge gave a judgment on the matter, and I think that the effect of it is

that he did make an order that the costs of the motion be costs in the cause, but that he intended that to involve only the payment of the one lump sum set of costs, viz. Rs. 175, and as the order had not been passed and entered, the learned Judge was entitled to put it into such a form as would carry out what he really intended, although the actual effect of the language he used at the hearing might have produced some other result. In my opinion, therefore, there is no ground on which we can differ from the learned Judge's order, but I cannot agree with the reasoning on which the order was based. The learned Judge's view is that the ex parte motion and the motion inter partes were only one motion, and, therefore, unless the Judge otherwise directed, there could only be one lump sum as costs, viz. Rs. 175, under item 55. In my opinion that view is not correct. It seems to me clear that there were two motions, two distinct orders were made, and it might have been necessary to take separate steps to enforce each of those orders. The Judge, however, has an absolute discretion in dealing with the costs of motions, because both item 54 and item 55 are subject to any order to the contrary. It would, I think, generally be better if Judges hearing ex parte motions, instead of making the costs of the ex parte motion costs in the motion to be heard on notice, the effect of which, I think, (unless the costs are limited by the order) is to allow Rs. 125 for the ex parte motion, were to reserve the costs to be dealt with on the hearing of the motion. Then the Judge who hears the motion can do what I understand is done in practice in such cases, namely allow such additional sum beyond the costs of the motion, as he thinks will compensate the successful party for the costs of the ex parte motion. Technically the proper form of order in such cases is to allow so much under item 54 for the ex parte motion, and so much under item 55 for the inter partes motion. To take an illustration, supposing the Judge desires to allow an extra Rs. 50 for the ex parte motion, instead of providing, as I understand is generally done in practice, that Rs. 175 plus Rs. 50 will be allowed for the costs of the motion (treating the two motions as one), to direct that Rs. 175 is allowed for the motion inter partes, and Rs. 50 is allowed for the ex parte motion under item 54. The net result comes to the same thing, but the method I have suggested preserves what seems to be the correct view, namely, that there are two motions, and not only one motion. In the present case the learned Judge could justify the order which he made by saying that as the order already made by Mr. Justice Divatia allowed Rs. 125 for the ex parte motion, and as the Judge did not intend the successful party on the two motions to get more than Rs. 175, he allowed only Rs. 50 under item 55 for the inter partes motion. That carries out in a technically correct form the order which the learned Judge says that he intended to make. That being so, I do not think there is any ground for interfering in appeal. There was a preliminary objection that an appeal does not lie, but as we do not think it necessary to make any order on the appeal, it is not necessary to discuss whether an appeal lies. I assume, without deciding, that it does. The appeal is dismissed with costs.

Rangnekar, J.

2. I agree.