In Re: Rustamji and Ginwala

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Court : Mumbai

Decided On : Sep-29-1941

Reported in : (1942)44BOMLR178

Judge : Chagla, J.

Appeal No. : O.C.J. Suit No. 1708 of 1938

Appellant : In Re: Rustamji and Ginwala

Judgement :

Chagla, J.

1. The defendants filed a suit, being Suit No. 1751 of 1937, in this Court against the plaintiff for recovering a sum of Rs. 18,149-8-9 and interest being the amount alleged to be due by the plaintiff at the foot of a current account. The plaintiff's defence to that suit was that he had been, doing business in partnership with the defendants, that the accounts of the said partnership had not been made up, that on proper making up of those accounts a substantial amount would be found payable to him by the defendants and that this particular amount claimed by the defendants was an item in the partnership accounts. The plaintiff thereafter filed this suit for making up of partnership accounts in respect of the dealings between them to which he had referred in Suit No. 1751 of 1937. Both these suits were referred to arbitration by consent decretal orders of reference dated November 8, 1938, respectively. The arbitrators named in the said consent decretal orders of

reference made separate awards in both the suits on April 30, 1941. The arbitrators in Suit No. 1751 of 1937 made an award in favour of the defendants awarding to them Rs. 18,149-8-9, interest and costs. The arbitrators in this suit by their award awarded to the plaintiff a sum of Rs. 500 in respect of his claim in the profits of the partnership and Rs. 500 for costs of the suit.

2. After the two awards had been filed, the defendants offered to give a set-off for Rs. 1,000 awarded to the plaintiff against the amount awarded to the defendants in their suit. The plaintiff's attorneys, however, contended that they claimed a lien on the amount of Rs. 500 awarded to their client for their costs and that the defendants were not entitled to have a set-off. Upon this the defendants obtained a decree on the award in their suit on August 14, 1941, for Rs. 22,047-30, a sum of Rs. 300 for costs and further interest, and Rs. 175 for the costs of the filing of the award and the notice of motion taken out for obtaining the decree on the award. The plaintiff also obtained a decree on August 19, 1941, for the sum of Rs. 1,000 awarded under the award in his suit and Rs. 125 for the costs of the notice of motion.

3. On September 1, 1941, the defendants' attorneys Messrs. Rustamji & Gin-wala, the applicants in this summons, obtained from Mr. Justice Kania a charging order on the sum of Rs. 625 being the amount payable by the defendants to the plaintiff for costs under the decree passed on August 19, 1941. I may state here that, as pointed out by Sir Amberson Marten C. J. in Tyabji Dayabhai & Co. v. Jetha Devji & Co. (1927) 29 Born. L.R. 1196, the proper order for the attorneys to have obtained was not a charging order but an order declaring their lien on the said amount. The defendants then took out the present summons praying that full satisfaction be entered up on the decree dated August 19, 1941, passed in this suit.

4. Now it is clear that as between the parties the defendants having obtained a decree for a: larger amount than the plaintiff, they are entitled to have the amount payable by them to the plaintiff under his decree set off against the amount payable by him to the defendants under their decree. The only question then that arises in this summons is whether the attorneys of the plaintiff are entitled to

intercept that set-off. It is to be noted that the set-off is claimed by the defendants, although the costs have been incurred in independent and separate proceedings. There is no doubt that the Court has ample discretion to allow a set-off when costs have been awarded in the same proceedings and that discretion has in most cases been exercised in favour of the party claiming the set-off notwithstanding the attorney's lien. The question is whether the Court's discretion is in any way fettered where the attorney claims a lien for his costs on the amount awarded to his client under a decree in independent and separate proceedings. As the matter is of considerable importance, I reserved orders on the summons so that I could give a considered judgment.

5. As far as our own Court is concerned, there is only one judgment of Black-well J. in In re Ebrahim Ahmed (1929) 32 Bom. L.R. 1076 where he considered the question of the attorney's lien in the case of independent and separate proceedings, and he allowed the lien to intercept the set-off. In that case Messrs. Dorab & Company, the solicitors, claimed a lien for their costs on the amount of costs awarded to their client as against the petitioning creditors who had made a petition to the Judge in Insolvency for the adjudication of their client insolvent, and the petition had been dismissed with costs. Subsequent to that, the client of Messrs. Dorab & Company was adjudicated insolvent on another petition. The petitioning creditors claimed to set off the costs payable by them to Messrs. Dorab & Company's client against the debt due by him to them. In allowing the solicitor's lien to prevail, Blackwell J. relied on the proposition of law as stated in Cordery on Solicitors, 3rd edn., page 376 :-

But a set-off will not be allowed, to the prejudice of the solicitor's lien, where the costs are incurred in independent proceedings.

6. As I shall presently point out, this statement of law is laid down in much too wide terms. Blackwell J. also felt that the particular question before him was a matter of first impression as far as India was concerned and he teemed to have decided, as he did, apart from the particular facts which were proved before him, on the proposition of law, as enunciated in Cordery on Solicitors. In Vallabhdds v. Pranshcmkar : AIR1932 Bom619 the same learned Judge had a case where there

were cross-claims between parties to the same suit, and he allowed a set-off irrespective of the solicitors' lien for costs. After reviewing the authorities, the learned Judge came to the conclusion that the question whether an attorney's lien should or should not be allowed to intercept a set-off between the parties to a suit is in India a matter of discretion. In Anwar Laljee v. Ebrahim Laljee : In re Burjor Hosangji Vakil : (1939)41BOMLR1091 B. J. Wadia J. allowed a set-off refusing to allow the attorney's lien to intercept the set-off, but the lien was claimed in respect of costs awarded in the same suit. It is true that in this case B. J. Wadia J. expressed his opinion that the Court had complete discretion to allow a set-off whether in the same action or different actions. But that opinion of the learned Judge was merely obiter, as, as I have already stated, on the facts before him he was called upon to decide whether the set-off should be allowed in the same action. There is one decision of the Calcutta High Court where the question of a set-off in different actions arose, and that was in Bhupendra Nath Bhose v. Sassoon & Co. (1916) I.L.R. 43 Cal. 932. In that case Chaudhuri J. held that a solicitor's lien should not be allowed to intercept the set-off claimed. This decision is capable of being explained as having been decided on the particular facts found in that case, for Chaudhuri J. in his judgment observes that the attorney in his application for a declaration of lien did not say that there was no chance of recovering his costs from his clients and that this was the only property out of which his claim could be satisfied.

7. In England the decisions have been very conflicting, and widely divergent opinions have been held by learned Judges there and have been expressed in the most vigorous language. Sir George Jessel in Pringle v. Gloag (1879) 10 Ch.D. 676 stated as follows (p. 680):-

It appears to me that it would be a monstrous extension of the rights of a solicitor against the parties to an action to say that he should have the right to make the party who may have been successful in the ultimate result pay the losing party's costs ; and unless I found an authority so deciding, I should decline to accede to any such proposition.

(1889) 41 Ch.D. 518

8. Kay J. in Blakey v. Latham referred to the equity in favour of a solicitor as the most extraordinary equity he ever heard of. On the other hand, Lord Justice Cairns in Ex parte Cleland : In re Davies (1867) L.R. 2 Ch. App. 808 thought that the debt or claim for costs was not the debt or claim of a client alone but upon the principles of a Court of equity it was a debt or claim which had been assigned or encumbered and that the persons entitled to it were not the client alone but the client and his solicitor, the claim of the solicitor being paramount to that of his client. Further he observed that the costs, though recoverable in the name of the client, and though ordered to be paid to the client by name, were paid to him, not for his own benefit, for he could not take the money and spend it, but were to be paid to him subject to the lien of his solicitor and were therefore to be held by him, either in whole or in part, as a trustee for his solicitor. Lord Eldon in Hall v. Ody (1799) 2 Bos. & P. 28, while refusing the attorney his lien, regretted that the attorney could not claim the advantage of a more just principle. These conflicting observations were further accentuated by the fact that the different Courts in England before the passing of the Judicature Act adopted different practice as to the attorney's lien. The Courts of Chancery, King's Bench and Exchequer, while permitting in their discretion a set-off for costs incurred in the same cause, did not allow such a set-off for costs awarded in distinct causes. The Court of Common Pleas, however, followed a different practice and allowed a set-off even in distinct causes irrespective of the attorney's lien. After the passing of the judicature Act and the enactment of the Rules of the Supreme Court, it was held that Order LXV, Rule 14, which applies to a set-off being allowed notwithstanding the attorney's lien, only applied to proceedings in the same action. But where Order LXV, Rule 14, did not apply, the different Divisions of the High Courts in England adopted different practice in accordance with the decisions given prior to the passing of the Judicature Act. But although up to a time the practice in the Courts of Chancery and the King's Bench Division had been the same, namely, not to allow a set-off to the prejudice of the solicitor's lien in different actions, still the King's Bench Division did in proper cases after a time begin to exercise its discretion to ignore the solicitor's lien and allow the set-off; but the Chancery Division remained adamant. Kay J. himself in Blakey v. Latham, to which I have already referred, felt himself compelled, sitting as he did in the Chancery Division, to give effect to the

most extraordinary equity he had ever heard of. But these conflicting decisions have now been set at rest by the judgment in Puddephatt v. Leith (No. 2). [1916] 2 Ch. 168, Younger J., following the judgment in Reid v. Cupper [1915] 2 K.B. 147, laid down that ' Lord Eldon's views have now been displaced by those of Kay J., as to what is the best and most salutary rule of practice in this matter ', and he held that notwithstanding the earlier decisions he had a discretion in the matter although the set-off was claimed in different actions, and the only question that remained for determination was how he ought to exercise that discretion ; and the test that he applied for the exercise of his discretion was that prima facie a set-off should be allowed whether the costs awarded were in the same action or in different and separate proceedings. The attorney's lien should only be allowed to prevail and intercept the set-off provided he established that the set-off would not be fair and just as between the parties or if some fraud or imposition had been practised upon the solicitor by collusion between the parties.

9. I think that is a fair and equitable rule for our Court to adopt. The discretion of the Court should be the same whether the set-off is claimed in the same or in different proceedings, and ordinarily as between the parties the set-off should be allowed. Primarily I think the solicitor must look to his own client for his costs. I see no reason in principle or equity why, because a solicitor has not taken the precaution to take proper advances from his client, he should compel a party to pay his costs who has to recover from the other party more than he has to pay to him. Of course there may be circumstances which may compel the Court to go to the rescue of the attorney. As pointed out by Younger J., it may not be fair and just under certain circumstances to allow the set-off, or there might be a case where the parties by colluding between themselves had practised a fraud or imposition upon an innocent attorney.

10. Mr. Engineer has argued that this suit was a partnership suit filed by the plaintiff, and the effect of the decree in favour of the plaintiff was that he was given his costs out of the partnership assets. He contended that I should apply the general rule in partnership actions that costs of the parties must go out of the partnership assets in the first instance. Mr. Engineer argued that the partnership assets were preserved by the labour of the attorney and therefore he was entitled

to be paid his costs in any event for the work done by him for the preservation of those assets. It is to be remembered that in the suit filed by the defendants, Suit No. 1751 of 1937, the plaintiff had actually contended that the amount claimed by the defendants was an item in the partnership accounts. If his contention had prevailed, then it would have been a matter of accounts whether a decree should have been passed in favour1 of the defendants or the plaintiff. It is further to be remembered that it was open to the plaintiff instead of filing this suit to have counter-claimed in Suit No. 1751 of 1937, and it is beyond dispute that if a decree had been passed in favour of the plaintiff on the counterclaim, the costs of the counterclaim would have been set off against the costs of the suit. In Puddepkatt v. Leith (No. 2) Younger J. also attached importance to the fact that the plaintiff's case in that action might have been raised by way of counterclaim in the King's Bench Division in the action brought by the defendant against the plaintiff. If that had been done, the set-off would have been allowed in the King's Bench action as a matter of course, and he felt that the result should not be affected by a mere accident of procedure. As regards the question of the preservation of the partnership assets, what the arbitrators awarded in the award made in this suit was that the defendants were accountable to the partnership for the sum of Rs. 6,800 and that the plaintiff was accountable to the partnership for the sum of Rs. 5,000. On this they held that there was a surplus of Rs. 1,800 in the hands of the defendants, and out of this surplus they directed that Rs. 500 should be paid to the plaintiff for his costs and Rs. 500 for his share in the profits. This was merely a result of the accounting between the parties. There was no question of the arbitrators finding that there were any specific partnership assets out of the sale-proceeds of which these costs were made payable. Mr. Engineer's argument was on the assumption that there was a fund out of which these costs were to be paid and that the costs were in the nature of a charge on that fund.

11. I, therefore, hold that the defendants are entitled to set off the amount payable by them under the decree dated August 19, 1941, in favour of the plaintiff and that they are also entitled to have full satisfaction entered up on that decree.

12. I, therefore, make the summons absolute and order the applicants, Messrs. Rustamji & Ginwala, to pay to the defendants the costs of this summons. I make

no order as to the costs of the plaintiff. I certify counsel.