

Govindram Shivnarayan Vs. Shivnarayan Sarupchand

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Court : Mumbai

Decided On : Jun-29-1938

Reported in : (1939)41BOMLR545

Judge : Somjee, J.

Appeal No. : O.C.J. Suit No. 131 of 1938

Appellant : Govindram Shivnarayan

Respondent : Shivnarayan Sarupchand

Judgement :

Somjee, J.

1. This notice of motion was part heard at the end of the last term and was adjourned to June 17, 1938. During the vacation the plaintiffs took out a summons for amendment of the plaint. That summons was returnable on June 14, 1938, and was placed on the Board of Mr. Justice Engineer. By consent of the parties it was transferred to my Board and appeared on my Board on June 17, 1938, along with this notice of motion, On the morning of June 17, 1938, the summons was heard and an order was made granting leave to the plaintiffs to amend the plaint. On that day the notice of motion was adjourned to June 22, 1938.

2. When the notice of motion was called on for hearing on June 22, 1938, the learned Counsel for defendant No. 1 tendered an affidavit of one Ram Krishna Chaumar dated May 16, 1938. The learned Counsel for the plaintiffs objected to the affidavit being taken on file. After hearing arguments, I granted leave to defendant No. 1 to file the affidavit.

3. On that order being made, the learned Counsel for the plaintiffs tendered an affidavit of one Bholaram Jwaladut dated June 21, 1938, in answer to the affidavit taken on file as stated above. The learned Counsel for defendant No. 1 objected to this affidavit being taken on file and after hearing arguments I granted leave to the plaintiffs to file this affidavit and the affidavit was also taken on the file.

4. After these two affidavits had been taken on the file, the learned Counsel for defendant No. 1 raised a preliminary objection that the motion had been abandoned by reason of the amendment of the plaint as no order was obtained that the amendment of the plaint was without prejudice to the pending motion. In support of this contention the learned Counsel for defendant No. 1 referred to Daniell's Chancery Practice, 8th edn., 2nd Vol., p. 1357, Gouthwaite v. Rippon (1838) 1 Beav. 54, Smith v. Dixon (1804) 12 W.R. 934 and Halsbury's Laws of England, Vol. XVIII, p. 105, Article 155. In the article of Halsbury's Laws of England it is stated that the amendment of the statement of claim pending notice of motion operates as an abandonment of the notice, unless the plaintiff obtains leave to amend without prejudice to the pending notice. This is the practice in England with regard to the effect of the amendment of the statement of claim on a pending motion. The learned Counsel for the plaintiffs in reply stated that there was a difference between the way in which suits were instituted and pleadings filed in this country and the way in which suits were instituted in England and pleadings delivered to the opposite parties. He contended that under the rules of the Supreme Court the statement of claim or the writ with the endorsement thereon was taken away and the amended statement of claim or the writ with the amended endorsement was substituted for it. Thus the original statement of claim or the writ with the original endorsement was not the record in existence after the amendment. The argument is, that the practice arose and prevails on account of the fact that the original statement of claim or the writ with the original

endorsement is removed and the amended one takes its place. That is the meaning, the learned Counsel for the plaintiffs contended, of the expression 'the original record does not exist' used in the argument of the counsel in the English cases relied upon by the learned Counsel for defendant No. 1. That contention does not appear to me to be sound. The expression does not mean that merely the papers containing the statement of claim or writ are changed by other papers being substituted. The expression means that the averments contained in the statement of claim or in the endorsement on the writ are by reason of the amendment different from what they originally were and therefore the original record on which the notice of motion was taken out does not exist. It must be remembered that the order allowing the amendment may be obtained without prejudice to the pending motion.

5. The contention of the learned Counsel for defendant No. 1 that the plaint after amendment is different from the plaint as it was originally filed and on which the notice of motion was taken out and therefore the pending motion, unless saved by the order of the Judge allowing the amendment, must be deemed to have been abandoned is correct. In this case undoubtedly the amendment was not obtained without prejudice to the pending motion and the object of the amendment was unquestionably, as was also in *Smith v. Dixon*, to strengthen the pending motion. In the original plaint there was no averment that the adoption in question was valid according to the custom prevailing among the Agarwal Vaishnav Marwaris. By the amendment averments, inter alia, of such a custom are now incorporated in the plaint. Therefore I hold that this objection, if properly raised, would have been upheld. But the learned Counsel for defendant No. 1 did not raise this objection when the motion was brought on by the learned Counsel for the plaintiffs. He tendered an affidavit on the motion which, according to the objection subsequently raised, was already abandoned and not in existence. That affidavit was taken on the file on this motion as stated above and then the learned Counsel for the plaintiffs tendered an affidavit which was also taken on the file after considering the objection thereto and the arguments of the learned Counsel for both sides.

6. Thus the learned Counsel for defendant No. 1 actually took steps to have his own affidavit on the file and obtained leave from the Court to file that affidavit on

this motion. He also resisted the application of the plaintiffs that their affidavit be taken on the file. I hold that defendant No. 1 unquestionably waived the objection that was available to him when the motion was brought on by the learned Counsel for the plaintiffs. The objection not having been raised when the motion was brought on and proceeded with, defendant No. 1 must be deemed to have waived the objection which was available to him to be raised when the motion was brought on. I cannot entertain the objection now that it has been waived by defendant No. 1. Therefore the notice of motion must proceed as if no such objection had been raised.

7. On June 30, 1938, Somjee J. made an order appointing the Court Receiver as receiver of the properties moveable and immoveable including all properties in the possession of plaintiff No. 1 and defendant No. 1 and of the rents, income and profits of the properties with all powers under Order XL, Rule 1(d), of the Civil Procedure Code, and also issued an injunction restraining defendant No. 1 from dealing with or disposing of any of the properties in the hands of defendant No. 1.

8. Defendant No. 1 appealed against the judgment and order passed on June 29 and 30, 1938 (Appeal No. 31 of 1938).

9. On March 13, 1939, the appeal was dismissed by consent of parties.]