

T.P. Java Rowther Vs. Sulaiman Rowther and ors.

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Court : Chennai

Decided On : Sep-19-1929

Reported in : AIR1930Mad814

Appellant : T.P. Java Rowther

Respondent : Sulaiman Rowther and ors.

Judgement :

Anantakrishna Ayyar, J.

1. Suit to recover money due on a hypothecation bond dated 29th November 1906, executed for Rs. 300 by defendant 1 (Hameeda Beevi Ammal). Defendants 2 to 9 were impleaded as legal representatives of defendant 1, who died shortly after the filing of the plaint. The plea urged by the contesting defendants was that the property belonged to their father (husband of defendant 1), that owing to pressure of creditors and to settle their claims easily the father made a colourable settlement in favour of defendant 1, and in order to lend colour to the settlement the plaint hypothecation bond was executed in favour of the plaintiff who was the father-in-law of defendant 2 without any consideration; and after the death of their father (defendant 1's husband) the plaintiff having insisted on payment of Rs. 250, defendant 2, the eldest of the children, paid the plaintiff Rs. 360 in 1907, which was accepted in full discharge of the mortgage, and that the present suit was the result of collusion between the plaintiff and his son-in-law, defendant 2. The trial

Court framed five issues in the suit and found that defendant 1 was entitled to mortgage the plaint property, that the mortgage was true and supported by consideration, but that it must be deemed to have been discharged as alleged by the contesting defendants (defendant 3, etc.). It dismissed the suit, but without costs.

2. On plaintiff's appeal the lower appellate Court concurred with the Munsif's decision. It was however argued before the lower appellate Court that the defendants ought not to have been allowed to raise inconsistent pleas and that the trial in the first Court was vitiated by that circumstance. The lower appellate Court dealt with this matter in para 16 of its judgment. It observed as follows:

As regards the contention of the learned vakil for the appellant that the defendants had raised inconsistent and mutually antagonistic pleas in their written statement, viz, that the mortgage sued on is nominal and that it has also been discharged, I think on a close reading of the entire written statement it cannot be said that the defendants have raised any contentions which are mutually destructive. As pointed out on the respondent's side, the nominal nature of the transaction was set up only by way of probabalising the defendants' plea of discharge of the entire debt by payment of Rs. 250. In any case it is too late for the plaintiff to urge any such argument in the above appeal.

3. In the result the appeal was dismissed, but the lower appellate Court modified the decree of the 1st Court and allowed the contesting defendants' costs in both Courts. The plaintiff has preferred this second appeal. The learned advocate for the appellant, seeing that the findings on issues of fact are against the appellant, pressed two questions before me (1) that the defendants ought not to have been allowed to raise inconsistent and antagonistic pleas, viz.: (a) that defendant 1 had no title to the mortgage; (b) that the mortgage was nominal; and (c) that it had been discharged. He argued that such pleas were embarrassing to the plaintiff and that the lower Court's procedure in trying all the inconsistent issues had prejudiced the plaintiff; and (2) that the lower appellate Court ought not to have interfered with the order as to costs passed by the trial Court.

4. The question was argued how far parties to a suit are entitled to raise inconsistent pleas and what procedure should be accepted by Courts in such cases. Before the Judicature Acts the rule of pleading in England would seem to be that a plaintiff could not (without leave of Court) plead inconsistent facts. After the Judicature Acts it has been held in England that there is nothing to prevent either party from setting up two or more inconsistent sets of material facts and claiming relief thereunder in the alternative. It is said that since the Judicature Acts, inconsistent defences, such as (a) never indebted and, (b) payment, are daily pleaded. In *Berdan v. Greenwood* (1887) 3 Ex. 251, Thesiger, L.J., observed as follows:

In this state of circumstances the Judicature Acts and Orders came into existence and swept away the old forms and practice of pleading, leaving it open to a defendant, as the general rules, to raise, by his statement of defence without leave, as many distinct and separate, and therefore inconsistent defences as he may think proper, subject only to the provisions contained in Rule 1, Order 27, of the Rules of Supreme Court.

5. In *In re Morgan Owen v. Morga* (1878) 35 Ch. D 492 the Court of appeal held that pleadings will not necessarily be struck out as embarrassing because they are inconsistent. At p. 499, Lindley, L.J., observed:

Now a parson may rely upon one set of facts, if he can succeed in proving the same and he may rely upon another set of facts, if he can succeed in proving them and it appears to me to be far too strict a construction of this order to say that he must make up his mind on which particular line he will put his case, when perhaps he is very much in the dark. Let us take this particular case, an action by the executor of one person against the executor of another person, and let us assume, what may well happen, viz., that the defendant, who is the executor of the husband, really knows nothing at all. Now what is he to do?

6. Then his Lordship proceeded to state what possible defences may be raised by the defendant, and continued at p. 500:

I quite see that the power may be very much abused. It may be abused to such an extent as to be embarrassing and unfair and oppressive to the other side. To correct that, there is Rule 27 of the same order which enables a Judge to strike out as embarrassing any pleading, whether it is an alternative pleading or whether it is not. But to go the length of saying that no inconsistent pleading can be pleaded, which is the view taken by the learned Judge in the Court below, appears to be not warranted by the rules and contrary to the established practice of the Courts.

7. The learned Judge added:

There is no difference in this respect between the practice in the Chancery Division and the practice in the Queen's Bench Division, where, we know ever since the Judicature Acts have been passed, inconsistent defences, such as 'never indebted' and 'payment' are daily pleaded and they give rise to no trouble. They are not considered embarrassing...

8. Under our Civil Procedure Code (Act 5 of 1908), Order 6, Rule 16, enables

the Court at any stage of the proceedings, to order to be struck out or amended any matter in any pleading which may be unnecessary or scandalous or which may tend to prejudice, embarrass or delay a fair trial of the suit.

9. The plaintiff, the appellant before me, ought, if he felt himself aggrieved by the defendants' pleadings, to have applied to the trial Court to take action under Order 6, Rule 16. Instead of doing that the parties went to trial and evidence on all the points was adduced by both parties. Because he (the plaintiff) has failed on the merits, I cannot say that he has been in the present case really prejudiced in the trial of the suit.

10. I find statements to the effect that there are differences between the position of a plaintiff and that of a defendant-that plaintiff has often a real knowledge of the facts which the defendant may not have and while it is open to a plaintiff under certain circumstances to reserve a ground of claim a defendant failing to urge a ground of defence in one action cannot generally raise it afterwards in another action against the same party. It is true that the defendants may be strangers to

the transaction and that defences raised by them may have reference to matters not necessarily or probably within their own knowledge, as in the case of an executor defendant. It is also said that the decision of the Privy Council in the case reported in *Mahomed Buksh Khan v. Hussein Bibi* [1888] 15 Cal. 684 is an authority in favour of such a distinction: see also *Iyyappa v. Ramalakshamma* [1890] 13 Mad. 549. The case before me is one where it is the defendant that is alleged to have put forward inconsistent pleas and even according to the distinction drawn in the case reported in *Narayanctswami v. Ramaswami* [1891] 14 Mad. 172, the defendants are not precluded from putting forward inconsistent pleas. At p. 174, Shephard, J., observed:

There is a material distinction between the present case and the one cited: *Mahomed Buksh Khan v. Hussein Bibi* (8) where both charges related to matters necessarily within the plaintiff's personal knowledge. Moreover the circumstance that in the case before the Judicial Committee it was the plaintiff who sought to raise inconsistent issues is material; for, while it is open to a plaintiff, under certain circumstances, to reserve a ground of claim a defendant failing to insist on a ground of defence in one action cannot afterwards raise it in another action at the suit of the same party.

11. Best, J., agreed with Shephard, J., that the case of a defendant was distinguishable from the case of a plaintiff: *Mahomed Buksh Kahan v. Hussein Bibi* [1888] 15 Cal. 684. This case is therefore a direct authority in favour of the defendants.

12. I may, however, state that the headnote of the report of the case in *Mahomed Buksh Khan v. Hussein Bibi* [1888] 15 Cal. 684 is too comprehensive and goes beyond the actual decision of the Privy Council which was to the effect that where a plaintiff sets up a forgery and undue influence both these questions could not be tried in the same suit. It is doubtful whether the Privy Council decision could be treated as an authority for the proposition that the inflexible rule of law is that inconsistent claims or defences could not be set up by the same party in the same litigation. In *Jino v. Manon* [1896] 18 All. 125 a plaintiff was allowed to sue for the cancellation of a bond on the ground that it was a forgery or in the alternative that

it was void as unsupported by consideration. I do not think it necessary in this case to go into the question whether the rule applies to a plaintiff or not and whether the only limitation is not that contained in Order 6, Rule 16, Civil P.C. But the law seems to be clear that it is open to a defendant, to raise by his written statement as many distinct and separate and therefore inconsistent defences as he may think proper, and that the party aggrieved should be left to move the Court to take action under Order 6, Rule 16, in case the Court considers that the defence is embarrassing and thus direct one or more inconsistent defences to be struck out and the pleading amended accordingly.

13. In the case before me it cannot however be said that the written statement raised really inconsistent pleas. As observed by the lower appellate Court, the gist of the plea would seem to be that though defendant 1 who died before filing any written statement, executed the plaint hypothecation bond, yet it was not supported by any consideration but was executed nominally and with an ulterior motive; and that to purchase peace the defendants paid the plaintiff Rs. 250 in full satisfaction of all the claims under the hypothecation bond, and that the plaintiff accepted the same as such. I do not see how the plaintiff could have been prejudiced by such a defence; and in any event, if the plaintiff really felt any embarrassment in proceeding with the trial of the suit, he ought to have moved the Court under Order 6, Rule 16, Civil P.C., which course however he did not take. He proceeded to have the suit tried on the merits. Both parties let in evidence, and simply because both the lower Courts have found the merits of the case against him (the plaintiff), he is not, for that reason alone entitled to contend in second appeal that the whole trial was vitiated, and claim retrial at this stage. I accordingly overrule the first contention raised by the learned advocate for the appellant. The second point raised may be summarily dealt with. The plea of the defendants was held to be proved. It was found that the plaintiff had accepted Rs. 250 in full discharge of his claim. This suit should never have been brought in the circumstances. The lower appellate Court was therefore right in directing that the plaintiff should pay the defendants costs in both the lower Courts. I find myself unable to interfere with the decision of the lower appellate Court on the question of costs in the circumstances. The second appeal is accordingly dismissed with costs.

