1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 6 = Chitty's S. C. C. R. 336.

however, as we have shown, anomalous, and we think that as the Legislature has not enacted that the representatives of a deceased partner must join in suing in a partnership contract jointly with the surviving partners, we are not wrong in holding that, notwithstanding the provisions of the Contract Act, the old practice of the Small Cause Court need not be changed.

The decision of this Court in *Raghavendra Madhav* v. *Bhima* (1) involves an answer in the affirmative to the second question.

Attorney for the plaintiff:—Mr. *T. A. Bland.*

---

17 B. 14.

ORIGINAL CIVIL.

Before Mr. Justice Bayley, Acting Chief Justice, and Mr. Justice Farran.

VASSONJI TRICUMJI AND CO. (*Plaintiffs*), *Petitioners v.* THE SOUTHERN MARATHA RAILWAY COMPANY (*Defendants*), *Opponents.** [2nd September, 1892.]

Presidency Small Cause Courts Act (XV of 1882), ss. 38 and 69—Rehearing—Miscarriage or failure of justice—Case stated for the opinion of High Court.

In a suit in the Court of Small Causes, in which questions of law and fact were raised, the plaintiffs at first asked the Judge to state a case for the opinion of the High Court under s. 69 of Act XV of 1882. The Judge was willing to do [15] so, but the plaintiffs withdrew their request. The Judge thereupon delivered his judgment and dismissed the suit. The plaintiffs then applied to the High Court for a rehearing under s. 38 of Act XV of 1882. It was contended that the Judge was wrong in his view of the law as applicable to the facts.

Held that, even if that were the case, there was no "miscarriage or failure of justice" within the meaning of s. 38, and that the plaintiffs were not entitled to a rehearing.

APPLICATION for a rehearing under s. 38 of the Presidency Small Cause Courts Act (XV of 1882).

The plaintiffs petitioned for a rehearing of this suit, which had been dismissed with costs by C. W. Chitty, the Chief Judge of the Small Cause Court, on the 10th August, 1892.

The plaintiffs had at first asked the Chief Judge to state a case for the opinion of the High Court, under s. 69 of the Small Cause Courts Act, but subsequently withdrew such request on the ground that they were advised to apply for a rehearing under s. 38 of the Act.

The petition stated as follows—

1. That your petitioners brought a suit (No. 12790 of 1892) in the Bombay Court of Small Causes against the defendants, the Southern Maratha Railway Company, for the recovery from them of the sum of Rs. 1,481-15, being the amount levied by the defendant Company, or their agents, the Bombay Steam Navigation Company, at Bombay in respect of Port Trust charges and in excess of the freights for which the defendant Company had agreed to carry from stations on the line of their railway to Bombay, *via* Marmagoa, several consignments of cotton belonging to the petitioners, and which amount the petitioners were forced to pay and did pay under protest for obtaining delivery of their said consignments.

---

* Small Cause Court Suit, No. $\frac{200}{12790}$ of 1892.

(1) 16 B. 349.

2. That the defendant Company without filing any written statement of their defence proceeded to a trial of this suit, which took place before His Honour the First Judge of the Bombay Court of Small Causes.

3. That the hearing of this suit took place on Wednesday the 3rd and Friday the 5th August instant, on which last-mentioned day the judgment was reserved; and on Wednesday the 10th [16] August His Honour gave judgment dismissing the said suit with costs, and certifying the defendant Company's professional costs Rs. 90.

4. That the receipts of the defendant Company put in for the plaintiffs in the said suit, which formed their contracts for carriage of the plaintiffs' goods, purport to be dated at the booking stations, and to acknowledge the receipt of such goods for conveyance "to Bombay station by goods train," or "to Bombay station by rail and sea," with different rates of freight inserted in a column therein, in that behalf for the defendant Company, the West of India Portuguese Railway and the Bombay Steam Navigation Company respectively; and among the conditions of contract endorsed upon such receipts the following are set forth, namely:—

(i) "The Southern Maratha Railway Company's responsibility for all goods will be considered to have terminated when forty-eight hours have expired after arrival at the station to which they are consigned."

(ii) "Goods booked to Bombay or elsewhere by sea, *via* Marmagoa are subject to rules and regulations, conditions of carriage, wharfage and other charges in force on the railways and the shipping lines over and by which they are conveyed."

(iii) "Delivery orders for goods booked to Bombay, *via* Marmagoa, will be granted at the Bombay Steam Navigation Company's offices at Bombay on production of this receipt note."

5. That the agreement in writing, dated the 7th November 1890, and made between the said West of India Portuguese Railway Company of the one part and the said Bombay Steam Navigation Company of the other part, in respect of the carriage of goods by the steamers of the latter Company from Marmagoa to Bombay, put in for the plaintiffs, contains, in the 14th clause thereof, a provision to the effect that the said Bombay Steam Navigation Company shall land and deliver the goods to the consignees from their godowns in Bombay.

6. That in the absence of any special agreement to the contrary, all terminal services, such as those for which the Port [17] Trust charges in question are made, are always regarded as included in the railway freights and performed by the railway free of any additional charge.

7. That the British India Steam Navigation Company, by whose steamers the goods arriving by the railways were brought down from Marmagoa to Bombay prior to the month of November, 1890, made no charge whatever against the goods, in the nature of the Port Trust charges now made by the Bombay Steam Navigation Company, and the plaintiffs have never had any notice whatever, either from the defendant Company or the Bombay Steam Navigation Company, that the payment of such charges would, at any time, be insisted upon.

8. The plaintiffs respectfully submit to this Honourable Court—

(*a*) that the said learned Judge ought to have held the contracts of the defendant Company in question in the said suit to be for conveyance of the plaintiffs' goods to, and delivery of the same at Bombay station for the freights therein specified and free of any further charge;

(*b*) that the said learned Judge ought to have held that the words "to Bombay station," in the railway receipts forming such contracts,

1892
SEP. 2.
ORIGINAL CIVIL.
17 B. 14.

were not so important as he supposed, but on the contrary the same were of the gravest moment in the case, and clearly signified the liability of the defendant Company to convey, land and deliver the goods to the plaintiffs at Bombay for the freights therein specified, and without making any additional charge ;

(*c*) that the said learned Judge ought to have held that the defendant Company, having by their written contracts agreed for the freights therein specified to convey, land and deliver, the plaintiffs' goods to and at Bombay station, ought to have themselves performed the services of removing, sorting, storing and delivering such goods to the plaintiffs, for which the Port Trust charges in question are made, and which services were included in such freights; and that since the defendant Company did not perform such services, they were bound to pay the said Port Trust charges themselves ;

[18] (*d*) that the said learned Judge ought to have held that the Bombay Steam Navigation Company, having under the fourteenth clause of the said agreement expressly agreed to give delivery of the goods to the consignees from their godowns at Bombay, were liable to perform the said services, or to pay the said Port Trust charges made for such services ;

(*e*) that the said learned Judge was in error in holding, as he did, that the inclusion of wharfage in the proportion of freight due to the West of India Portuguese Railway Company in the book of rates of the defendant Company, indicated, in the absence of any such inclusion in the proportion of freights due to the Bombay Steam Navigation Company, a liability on the part of the plaintiffs to pay the wharfage at Bombay ;

(*f*) that the said learned Judge was in error in holding, as he did, that the clause commencing "goods booked to foreign stations," &c., clearly indicated that the further charges might have to be levied to which the consignees will be liable, inasmuch as the said clause, endorsed on the said receipts, by its latter part relating to goods booked to Bombay, or elsewhere, *via* Marmagoa, makes such goods subject to the rules and regulations conditions of carriage, wharfage and other charges in force only " on the railways and shipping lines over and by which they are conveyed, and the Prince's Dock at Bombay, where the Port Trust charges in question are made, forms no part of the shipping line by which the plaintiffs' goods were conveyed ;

(*g*) that the said learned Judge ought to have held that the " wharfage " so included in the proportion of freight due to the West of India Portuguese Railway Company and the " wharfage " mentioned in the said clause endorsed on the said receipts were neither of them of the nature for which the said Port Trust charges are made at Bombay, but of the nature defined in clause thirty- six at page seven of the rate book of the defendant Company itself, namely :—" All goods left on the railway premises more than forty-eight hours after midnight of the day on which they arrive, either for the convenience or by the desire or neglect of the consignor or consignee, will be subject to a wharfage charge of three pies per maund per twenty-four hours ;"

[19] (*h*) that the said learned Judge ought to have held that, even in the absence of any special agreement either one way or the other, the defendant Company was bound to perform all terminal services of the nature for which the said Port Trust charges are made ;

(*i*) that the said learned Judge was in error in holding, as he did, that the said Port Trust charges " are recoverable in all cases whether all or any of the said services are rendered or not," inasmuch as there is

1892
SEP. 2.
ORIGINAL
CIVIL.
17 B. 14.

no evidence whatever in the case to warrant such assumption, and it is absolutely impossible for any consignee to take charge of his goods, unless the services, at least of sorting and delivering, have been previously rendered;

(*j*) that the said learned Judge was in error in drawing the distinction, he did, between Messrs. Shepherd and Company as agents for the defendant Company and Messrs. Shepherd and Company as agents for the Port Trustees, inasmuch as no such distinction actually existed, and Messrs. Shepherd and Company could not have been the agents of the Port Trustees if they had not been the agents of the defendant Company; nor could Messrs. Shepherd and Company, as agents for the Port Trustees, make charges for the services which they, as agents of the defendant Company, were bound to render free of charges;

(*k*) that the said learned Judge was in error in thinking, as he did, that the payment of the said Port Trust charges by the British India Steam Navigation Company, in their time, was "owing to the keen competition between the shipping lines at that time," and "in order to retain the contract themselves," inasmuch as there is no evidence whatever in the case to justify such supposition.

(*l*) that the said learned Judge was in error in holding, as he did, that neither the defendant Company, nor their agents the Bombay Steam Navigation Company, were bound to perform the said services for which the said Port Trust charges were made, inasmuch as such holding was against the evidence given in the case by the witness Gopal Bapuji, himself a clerk in the employment of the Bombay Steam Navigation Company, who stated: "The Bombay Steam Navigation Company is bound to [20] sort the goods when they arrive in Bombay; we pile them; we have our own staff for working; we ourselves deliver the goods; we charge nothing for that work; it is included in our two annas;" and also against the evidence given in the case by Mr. Moir himself, the manager of the Bombay Steam Navigation Company, and called on behalf of the defendant Company, who likewise stated: "I admit we are bound to give delivery from our godowns in Bombay; we have no godowns of our own in Bombay; we contemplated building godowns in Bombay, but when we found we could use Dock, we did so: we saved costs of building godowns;"

(*m*) that the learned Judge was in error in holding, as he did, that the Port Trust charges were payable by the plaintiffs, notwithstanding that it is in evidence (1) that Messrs. Shepherd and Company by the fourteenth clause of their said agreement with the West of India Portuguese Railway undertook to make delivery of the goods to the consignees from their godowns at Bombay; (2) that Messrs. Shepherd and Company did not, in breach of such agreement, build such godowns to save expense to themselves; and (3) that, if such godowns had been built and used, the said Port Trust charges could never have been levied in respect of the plaintiffs' goods;

(*n*) that the learned Judge was in error in applying, as he did, in this case the usages and customs relating to shipments covered by ordinary bills of lading, under which consignees are bound to take delivery from the ship's tackles, and which are entirely different from the said receipts under which the defendant Company, or their agents at Bombay, were bound to convey, land and deliver the plaintiffs' goods at Bombay station;

(*o*) that the said judgment is against the weight of evidence in the case, and against law, equity and good conscience."

1892
SEP. 2.
ORIGINAL
CIVIL.
17 B. 14.

The petitioners prayed for an order under s. 38 of the Presidency Small Cause Courts Act, 1882, that the said suit might be re-heard in the High Court.

Inverarity, for the petitioners.—The learned Chief Judge has gone wrong in his law and appreciation of the facts, and has [21] consequently come to a wrong decision. That amounts to a failure of justice, such as is contemplated by s. 38 of the Small Cause Courts Act (XV of 1882). Counsel argued the various points of law set forth in the petition, citing several authorities.

[FARRAN, J.—These are all nice points of law, and it may be desirable that the opinion of the High Court should be taken upon them. If so, why did you withdraw your request for a case to be stated? That would have been the right procedure; would it not?]

We are not bound to have a case stated. The Act gives this additional remedy in cases of importance over Rs. 1,000. This is the appropriate remedy in such a case as the present. We are not satisfied with the learned Judge's findings on the facts; and, if we were to take a case, we should be bound by the facts as the Judge might state them.

JUDGMENT.

BAYLEY, C. J. (ACTING).—The plaintiffs had a hearing of some length before the learned Chief Judge of the Small Cause Court, in which this case was admittedly gone into thoroughly and considered. The decision was given there, and with that decision they express themselves dissatisfied, and come to this Court for a re-hearing under s. 38 of the Small Causes Court Act. The learned Judge below was willing to state a case on the various points of law involved if the plaintiffs desired it, but this the plaintiffs, by their pleader, expressly declined. Mr. Inverarity now contends that it was at the plaintiffs' option whether they should take a case under s. 69 of the Act, or apply to this Court, as they have done, under s. 38.

Now s. 38 requires that the party asking for a rehearing must make out that there has been "a miscarriage of justice" or "other grounds for a re-hearing." Mr. Inverarity's argument amounts to this, that the Judge was wrong in the view he took of the law as applicable to the facts of the case. It is possible that that might prove to be so if the case were thoroughly considered, but is that what s. 38 means by "a miscarriage or failure of justice?" I do not think it is, and, therefore, in my opinion, this application should be refused.

[22] FARRAN, J.—I concur. The argument of Mr. Inverarity, though pressed with much emphasis, has not caused me to be of opinion that there has been a miscarriage or failure of justice in this case, or even an error in law, nor do I see that there are other good grounds for a re-hearing. Speaking for myself I am inclined to think that a re-hearing should not be granted under this section when the parties have been contented to take the opinion of the Small Cause Court on nice points of law, or on delicate questions as to the proper inference to be drawn from written documents and undisputed facts, merely because the High Court may incline to entertain, on an *ex parte* argument, a view different from that which the Judge of the Small Cause Court has arrived at. The Legislature has not given an appeal from the Small Cause Court to the High Court on questions of law, but has provided by s. 69, for parties who prefer to have the opinion of the High Court rather than that of the Small Cause Court Judge, on such questions, the means of obtaining it. It is difficult to see how

there can be said to be a " miscarriage or failure of justice," when a party, instead of taking the opinion of the High Court, as he has the means of doing, voluntarily elects to have the law applicable to this case decided by the Small Cause Court. A mistake in law and a miscarriage or failure of justice are not, in my opinion, convertible terms. It is not, however, necessary so to decide in the present circumstance. I merely suggest this question, feeling how excessively inconvenient it is to have nice questions of law argued *ex parte* before us; and entertaining, as I do, a serious doubt whether the Legislature intended to submit us to such an ordeal.

Attorneys for the plaintiffs :—Messrs. *Ardesir, Hormasji and Dinsha.*

---

17 B. 23.

[23] APPELLATE CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Telang.

MUKUND HARSHET, DECEASED (*Original Plaintiff*), *Appellant v.* HARIDAS KHEMJI AND ANOTHER (*Original Defendants*), *Respondents.** [11th January, 1892.]

Decree—Execution—Agreement not to execute a decree—Suit to restrain execution—Civil Procedure Code (Act XIV of 1882), *s.* 244—Res judicata—*Agreement not to execute regarded as satisfaction of decree—Civil Procedure Code (Act XIV of* 1882), *ss.* 257*a*, 258, 373.

Mukund and Antaji were partners, and, as such, were indebted to Haridas. Antaji died, and subsequently the debt was settled between Haridas on one side and Mukund and Antaji's widow, as guardian of her minor sons, on the other. For a moiety of the debt a bond was passed by Mukund to Haridas and for the other moiety by the widow of Antaji. Haridas filed a suit against Mukund and got a decree, which was satisfied. Haridas then sued the widow on her bond. The Court allowed her objection that she was not competent to give a bond binding her sons personally, and of its own accord made Mukund a defendant, and passed a decree against Mukund and Antaji's estate. Haridas assigned this decree to Ramchandra, who applied for execution against Mukund. Mukund thereupon filed this suit against Haridas and Ramchandra praying for an injunction against the execution of the said decree and for damages against Haridas. He alleged that during the pendency of the suit in which the said decree had been passed, Haridas had agreed that he would not obtain a decree against him, and that, if such a decree were passed, he would not execute it. The lower appeal Court rejected the plaint, holding (1) that as between the plaintiff Mukund and the defendant Ramchandra the question in issue was *res judicata*, and (2) that there was no cause of action against the defendant Haridas. On appeal to the High Court,

Held, that, as between Mukund and Ramchandra, the suit was not *res judicata*. The alleged agreement by its very terms provided for the event of the decree being passed, and was only intended to prevent its being executed.

Chenvirappa v. *Puttappa* (1) distinguished.

It having been urged that the question was one which could be decided in execution, and that under s. 244 of the Civil Procedure Code (Act XIV of 1882) the present suit would not lie.

Held, that the words " relating to execution " in s. 244 must be restricted to " the contents of the order made, or to how far it has been carried out," and do not, therefore, include an agreement not to execute the decree.

It being further contended that the agreement raised a question as to the " satisfaction " of the decree, and was, therefore, void without the sanction of the Court.

---

* Second Appeal, No. 819 of 1890.

(1) 11 B. 708.