

IN APPEAL FROM ORIGINAL CIVIL

Before Mr. M. C. Chagla, Chief Justice and Mr. Justice Gajendragadkar.

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July 1

DEWANCHAND AND SONS APPELLANTS (ORIGINAL DEFENDANTS) v.
MRS. DORA AMIYA FEW RESPONDENT (ORIGINAL PLAINTIFF).*

Bombay High Court Rules (Original Side), 1950, r. 211†—Summary suit—Affidavit in support of summons for judgment sworn by plaintiff's constituted attorney—Constituted attorney not in a position to swear to facts of his own personal knowledge—Whether affidavit complied with conditions of r. 211—Court whether competent to make any order on summons for judgment.

The affidavit under r. 211 of the Rules of the Bombay High Court (Original Side), 1950, if made by the plaintiff, can be on information and belief; but when it is made by any other person including the plaintiff's constituted attorney, it must be of his own personal knowledge.

In a summary suit on affidavit in support of a summons for judgment was sworn by the plaintiff's constituted attorney who was not in a position to swear to the facts of his own personal knowledge.

Held, that the summons for judgment was not properly taken out as the affidavit in support did not comply with the conditions of r. 211 and the Court was not competent to make any order on such summons.

Symon and Co. v. Palmer's Stores (1903) Ltd.⁽¹⁾; *Ashish Ardeshir Namdar v. F. Ruttonshaw*⁽²⁾; *Pathe Freres Cinema Ltd. v. United Electric Theatres Ltd.*⁽³⁾ referred to.

The plaintiff filed a summary suit against the defendants. The defendants having entered appearance the plaintiff took out a summons for judgment and the affidavit in support was made by the plaintiffs' constituted attorney who did not swear

* O. C. J. Appeal No. 45 of 1952. Summary Suit No. 888 of 1950.

† The rule runs as follows:—

211 (1) In a suit filed under Order XXXVII of the Code of Civil Procedure, if the defendant enters appearance, the plaintiff shall, on affidavit made by himself, or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action, and the amount claimed, and stating that in his belief there is no defence to the action, apply by summons for judgment returnable not less than ten clear days from the date of service to the Sitting Judge in Chambers for a decree for possession and/or for the amount claimed, together with interest (if any) and Costs. The Judge may thereupon, unless the defendant by affidavit or declaration shall satisfy him that he has a good defence to the action on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend, pass a decree for the plaintiff accordingly.

⁽¹⁾ [1912] 1 K. B. 259.

⁽²⁾ (1947) 50 Bom. L. R. 143.

⁽³⁾ [1914] 3 K. B. 1253.

to facts of his own personal knowledge. Coyaji J^c made an order granting leave to the defendants to defend on certain terms.

The defendants appealed against the order, contending, *inter alia*, that the summons for judgment was bound to fail as it did not comply with the conditions laid down in r. 211 of the Bombay High Court Rules (original side) 1950.

M. P. Amin, Advocate General, with R. L. Dalal, for the appellants.

A. A. Peerbhoy, for the respondent.

CHAGLA C. J. This appeal arises out of a summary suit filed by the plaintiff. On a summons for judgment taken out by her, the learned Judge made an order granting leave to the defendants to defend on certain conditions. In appeal it has been contended by the Advocate General that apart from the question of merits the summons for judgment is bound to fail as it does not comply with the provisions of r. 211. Rule 211 provides that if the defendant enters an appearance, the plaintiff shall, on affidavit made by himself, or by any other person who can swear to the facts of his own personal knowledge verifying the cause of action and the amount claimed, and stating that in his belief there is no defence to the action, apply by summons for judgment returnable within a certain period. Therefore, the application of the plaintiff for summons for judgment is conditional upon an affidavit being filed as laid down under r. 211. The affidavit can be by the plaintiff himself or it can be by the any other person but if it is by any other person then that other person must be in a position to swear to the facts of his own personal knowledge. In this case the affidavit contemplated by r. 211 is not by the plaintiff himself, nor is it by any other person who was in a position to swear to the facts of his own personal knowledge. The affidavit is by a constituted attorney of the plaintiff, and the very narrow question that arises for our determination on this appeal is whether when an affidavit is sworn not by the plaintiff himself but by his constituted attorney and that constituted attorney is not in a position to swear to the facts of his own personal knowledge, that affidavit satisfies the conditions laid down in r. 211.

It is necessary to point out, as was observed by a very learned English Judge, that the procedure by a summary suit is a

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novel procedure. It constitutes a departure from the ordinary well established rules governing trial of suits. In an ordinary suit the plaintiff is entitled to a judgment only after a trial. In a summary suit he is entitled to a judgment without a trial. Therefore, the remedy is a very stringent remedy, the procedure is an extraordinary procedure, and therefore it has been pointed out that in order that the plaintiff should be entitled to avail himself of such a procedure he should strictly comply with the conditions laid down in r. 211. Moreover, the English Courts have gone to the length of observing that the jurisdiction of the Court to pass a decree in a summary suit depends upon the conditions laid down in r. 211 being complied with. It has also been said that the conditions laid down in r. 211 are conditions precedent to the jurisdiction of the Court to pass a decree in a summary suit. See the observations of Lord Justice Williams in *Symon & Co. v. Palmer's Stores (1903)*, *Limited*.⁽¹⁾

A similar question arose before Mr. Justice Tendolkar in *Ashish Namdar v. Ruttonshaw*.⁽²⁾ What was sought to be argued before the learned Judge was that even in the case of the plaintiff, if he makes an affidavit under r. 211, he must have knowledge of the facts deposed to in the affidavit. That argument was rejected by the learned Judge on a construction of r. 211 and the learned Judge took the view that under r. 211 every person making an affidavit must swear to the facts of his own personal knowledge, but the exception to that rule was the plaintiff himself. In the case of the plaintiff he could make an affidavit on his information and belief. Our attention has been drawn to the observations of Lord Justice Buckley in *Pathe Freres Cinema, Limited v. United Electric Treatres, Limited*,⁽³⁾ which are also relied upon by Mr. Justice Tendolkar in *Ashish Namdar v. Ruttonshaw*. Lord Justice Buckley construing the corresponding English rule, O. XIV, r. 1, observed as follows (p. 1255):

"...The question is whether the affidavit made on behalf of the plaintiffs under Order XIV, r. 1, is sufficient."

Then the learned Judge sets out the original rule. Then he proceeds to say (p. 1255):

"...The rule seems to assume that a plaintiff is qualified to make the affidavit simply because he is plaintiff; the other person who may make the affidavit must be able to swear positively to the facts."

⁽¹⁾ [1912] 1 K. B. 259, 263.

⁽²⁾ (1947) 50 Bom. L. R. 143.

⁽³⁾ [1914] 3 K. B. 1253.

Therefore, what Lord Justice Buckley emphasises is that the exception is made in the case of the plaintiff simply because he is the plaintiff.

Now, what has been urged before us by Mr. Peerbhoy is that a constituted attorney of the plaintiff can do what the plaintiff can do, and if r. 211 requires the plaintiff to make an affidavit, that condition can be complied with by his constituted attorney. The powers of agents and constituted attorneys *quae* pleadings and *quae* acts in Courts are dealt with in O. III, r. 1. That rule provides:

“Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a pleader appearing, applying or acting, as the case may be, on his behalf.”

Therefore, O. III, r. 1, lays down the ordinary rule which is that an agent can do what his principal can do. Then there is a proviso to that rule:

“Provided that any such appearance shall, if the Court so directs, be made by the party in person.”

Therefore, if r. 211 had provided that the plaintiff shall make an affidavit in certain terms, it is undoubtedly true that by reason of O. III, r. 1, such an affidavit could have been made by his constituted attorney. But it was competent for the farmers of the rule to have provided that as far as r. 211 was concerned the plaintiff in person and no agent should make the affidavit and the whole question resolves itself into this whether the expression “the plaintiff shall on affidavit made by himself” excludes the right of the agent to act on behalf of the plaintiff in this particular act or whether the expression “the plaintiff by himself” is not different than the expression “the plaintiff” which would permit an agent to act on his behalf. Now, whether a particular pronoun permits or excludes agency is a matter of construction dependent upon the context in which the pronoun is used and the particular legislation in which the pronoun is used. In this particular case it would have been perfectly grammatical for the rule to have stated “the plaintiff shall on affidavit made by him.” Instead of that the rule uses the more emphatic form of that pronoun “himself” and the reason for using that more emphatic form of that pronoun seems to us to be that the rule making authority was pointing out that this particular act, viz. the making of the affidavit, should

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be made by, only the plaintiff and by no other person. We do not accept the contention that the emphasis placed on this pronoun is unintentional and that no effect is to be given to that emphasis. Further, the reason of the rule also seems to support the construction we are putting upon r. 211. The reason of the rule is that ordinarily where a judgment is to be obtained without a trial, the affidavit should only be made by a party who has knowledge of the facts. But an exception was made only in the case of the plaintiff. The reason for making that exception was obvious because, as we have observed before, he was the plaintiff. He had filed a plaint setting out the facts and in the affidavit ordinarily he would set out those very facts. But when it came to supporting the summons by somebody other than the plaintiff, the rule insisted that such other person should have knowledge of the facts. What Mr. Peerbhoy is really attempting to do is to extend the exception which is made only in favour of the plaintiff, to his agent, and we do not think that the principle underlying the rule justifies the extension of the exception. Therefore, in our opinion, both on construction and on principle the affidavit contemplated to be made under r. 211 is either by the plaintiff himself, in which case it can be on information and belief, or in the case of any other person including his constituted attorney, in which case it must be of his own personal knowledge with regard to the facts to which he swears.

The result, therefore, is that the summons for judgment was not properly taken out and it was not competent to the Court to make any order on the summons for judgment which did not comply with the conditions of r. 211. In fairness to the learned Judge below it may be pointed out that this point was not taken in the affidavit before him and therefore there is no discussion of this point in the judgment of the learned Judge which is before us.

On the question of costs, as far as the costs of the summons for judgment is concerned, as the summons is misconceived it would be ordinarily liable to be dismissed with costs. But we must take into consideration the fact that this point which has now prevailed was not taken in the affidavit in reply by the defendants, and therefore the proper order for costs as far as the summons for judgment is concerned is that the summons for judgment will be dismissed; no order as to costs. With regard to the costs of the appeal, the point on which the appeal has succeeded has been taken in the memorandum of appeal.

As a matter of fact it is in the forefront of the memorandum. Notwithstanding this point having been taken in the memorandum of appeal, the appeal has been strenuously resisted by the respondent. Mr. Peerbhoy says that it is a matter of indulgence that the appellants have been allowed to argue this point. That is not the correct position. This is not a case where an appellant comes to the appeal Court on a particular case set out in his memo. of appeal and then at the hearing of the appeal he springs a new point on the other side and succeeds on the other point. In those circumstances the Court of appeal ordinarily would not give the successful appellant the costs of the appeal. But this is a case where the appellant, after giving full notice to the other side, succeeds on a point which has been taken in the memo. of appeal. It is a question of law, it is a question of jurisdiction, and the party is entitled to take that point in appeal although it was not taken in the lower Court. Therefore, in our opinion the appellants are entitled to get the costs of the appeal. The appeal will, therefore, be allowed with costs.

Attorneys for appellants: *Thakordas & Co.*

Attorneys for respondent: *Crawford, Bayley & Co.*

Appeal allowed.

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APPELLATE CIVIL

Before Mr. M. C. Chagla, Chief Justice.

HUSSAIN SAB WALLAD HUSAN SAB GAIMA, (ORIGINAL DEFENDANT)
PETITIONER v. SITARAM VIGHNESHWAR BHADTI (ORIGINAL PLAINTIFF), OPPONENT.*

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Civil Procedure Code (Act V of 1908) s. 152—Application for amendment of decree—Appeal summarily dismissed by High Court—Whether application for amendment of decree lies to High Court—Decree of trial Court confirmed by District Court in appeal—Whether application for amendment of decree made to the District Court is competent.

A decree passed by the trial Court was confirmed in appeal by the District Court. A second appeal to the High Court was summarily dismissed under O. XLI, r. 11 of the Civil Procedure Code, 1908. On the question whether an application to the District Court for amendment of the decree was competent.

* Civil Revision Application No. 681 of 1951.