Saleha Begum and ors. Vs. A. Hajee Abdul Rahim Sahib and Co. and ors.

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Court : Chennai

Decided On : Mar-14-1962

Reported in : AIR1963Mad97

Judge : Jagadisan, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 35(2) - Orders 22 and 30, Rule 4

Appeal No. : Appeal No. 109 of 1959

Appellant : Saleha Begum and ors.

Respondent : A. Hajee Abdul Rahim Sahib and Co. and ors.

Advocate for Def. : P.P. Selvarajan, Adv.

Advocate for Pet/Ap. : P.V. Chalapathi Rao and ;S. Vaidyanathan, Advs.

Disposition : Appeal allowed

Judgement :

Jagadisan, J.

1. This appeal relates to the question of costs disallowed by the learned City Civil Judge in his judgment and decree in O. S. No. 1735 of 1957 on his file.

2. The suit was filed by a firm called Messrs. A'. Hajzee Abdul Rahim Sahib and Co., represented toy partners (1) A. Hajee Abdul Rahim Sahib, (2) A. Jameel Ahmed Sahib and (3) S. Mohamed Ismail Sahib, praying for the recovery of a sum ofRs. 17,956-85 with interest thereon at 9 per cent per annum from the date of the plaint and for other reliefs from the defendants in the suit It is not necessary to refer to the averments in the plaint or in the written statement. One of the objections raised on behalf of the defendants was that the suit was not maintainable, as the plaint firm was not registered as required by the provisions of the Indian Partnership Act. This question of the maintainability of the suit was tried as a preliminary issue by the learned City Civil Judge, as the issue raised the fundamental question of the maintainability of the suit itself. The learned City Civil Judge, held after hearing the arguments on both sides and after trying the issue as a preliminary issue, that the suitwas not maintainable. He accordingly dismissed the suit but did not award any costs in favour of the successful defendants. The reason, why no costs were awarded to the defendants, can be gathered only from paragraph 11 of his judgment,

'It is undoubtedly unfortunate that a very substantial claim has to go uninvestigated and relief refused to the plaintiffs on a technical ground. In the position of law, as it appears to me, this hasbecome inevitable. The objection taken by the defendants is therefore sustained. The preliminary issue is answered in their favour, and the suit is dismissed, but under the circumstances, without costs.'

This appeal has been preferred by defendants who take exception to that portion of the judgment which negatived costs in their favour.

3. On behalf of the respondent (the plaintiff-firm) Mr. Selvaraj, learned counsel, has raised the preliminary objection that the appeal has abated. The learned counsel submits that two of the partners died in a car accident early in September, 1960 and that the legal representatives of the deceased partners have not been brought on record as respondents in this appeal. This objection cannot be sustained in view of the provisions of Order 30, Rule 4, C. P. C. It is in these terms:

'4 (1) Notwithstanding anything contained in Section 45 of the Indian Contract Act, 1872, where two or more persons may sue or be sued in the name of a firm under the foregoing provisions and any of such persons dies, whether before the institution or during the pendency of any suit it shall not be necessary to join the legal representative of the deceased as a party to the suit.'

A firm has been recognised by the Civil Procedure Code, as a unit or entity for the purpose of civil actions. It is conceded that one of the partners it still alive and though the other partners are dead there is no disability on the part of the appellants in continuing this appeal against the firm which is now represented by the surviving partner. The preliminary objection is therefore overruled.

4. Mr. Chalapathi Rao, learned counsel for the appellants, contends that the learned City Civil Judge has not given any reason to deprive the successful defendants of the costs legitimately due to the defendants, inasmuch as the suit itself was dismissed. Learned counsel points out that costs must follow the event and there are no grounds upon which the defendants should lose their costs for having succeeded in the action. It cannot be said that the learned Judge has not given any reason but it seems to me that the reason gives by him is not sufficient to disallow costs in favour of the defendants. The fact, that the defendants raised a plea, which is a legal one, in bar to the maintainability of the suit does not mean that it is an unjust contention. Technical objections are certainly as good as objections on the merits and it 'would be a dangerous doctrine to fey down that a person succeeding on a technical contention should not get his costs. The normal rule that costs should follow the event, i.e., the result, can be departed1 from in cases where the successful party is guilty of misconduct, negligence or wilful and needless protraction of the trial of the action. There is an element of punishment in deprivation of costs to the victorious party. It is not proper that a party should suffer from penal consequences because he was successful in raising a sound legal plea. The Court should avoid the fallacy that a point of law, albeit technical and harsh, is so unethical, unreasonable or unjust to merit disallowance of costs.

5. In Rajabapaya v. D. Basavayya AIR 1942 Mad 713, King, J. observed thus:

'A full discretion is vested in the trial court with reference to the matter of the costs. But Section 35 lays down that if the court does not follow the regular rule that costs

shall follow the event, it must state its reasons in writing. We are unable to hold that a mere reference to the circumstances' of the case with no further detail mentioned is a sufficient compliance with provisions of Section 35(2), C.P.C. When we examine the circumstances of this case all that appeals is this, that upon the issue of limitation the plaintiff has failed and the defendants have succeeded. There has been no trial OB the other issues. The plea of limitation is in no sense an unjust plea. Limitation is provided for by the laws of the land just as any other plea is provided for, and we cannot subscribe to the doctrine that because a defendant has succeeded on a plea of limitation he should not be granted his costs.'

6. I respectfully agree. I also wish to refer to the following observation in Radhe Shiam v. Biharilal, ILR 40 All 558 : AIR 1919 All 453:

'It has been held by the English Court of appeal that the mere fact that a defendant relies open a right which a statute gives him is not a sufficientground for depriving him ot his costs. Some people think that in the ordinary sense of the word it is a shabby thing to rely upon a statute of limitation or the Gaming Act or a defence of infancy but it has been distinctly held that neither of these matters is good ground for depriving a defendant of his costs.'

7. The result of upholding the technical objection no doubt was that the plaintiffs' claim could not be investigated on the merits. But that is not the fault of the defendants. It must be pointed out that though the defendants raised the plea in their written statement, the plaintiffs persisted in maintaining that the suit was properly laid and actually had the issue tried as a preliminary issue. The defendants were therefore compelled to incur costs in substantiating their objections. Before a successful party in an action can be deprived of costs, he must be found guilty of something in the nature of a misconduct, which alone can justify the Court to hold that the costs should not follow the event. I am clearly of the opinion that the learned City Civil Judge has quite improperly and illegally deprived the defendants of their costs as the reasons given by him are wholly inadequate to disentitle the defendants of their costs.

8. The appeal succeeds and it follows thatthere will be an order in favour of the defendantsfor costs of the trial of the suit. Mr. ChalapathiRao, learned counsel for the appellants, fairly concedes that he is not pressing for costs in this appeal.There will be no order as to costs in this appeal.