

Grindlays Bank Ltd. v. James

COURT OF APPEAL.

RATWATTE, J. AND ABDUL CABER, J.

C.A. (S.C.) 23/79—D.C., COLOMBO C/1373/M.

JULY 16, 1979.

Costs—Claim by successful plaintiff for inclusion in bill of costs of travelling expenses from abroad—Plaintiff an essential witness—Discretion of trial judge to decide such question—When will Appellate Court interfere—Civil Procedure Code, section 208.

The plea taken by the defendant and an issue raised on its behalf at the trial made it necessary that the plaintiff gave evidence. The plaintiff accordingly was called as a witness and she had to travel to Sri Lanka from Australia for this purpose. After trial judgment was given for the plaintiff as prayed for and in the bill of costs submitted by the plaintiff travelling expenses of the plaintiff from Australia were included. The defendant resisted this but after inquiry the learned District Judge held that the plaintiff was entitled to include travelling expenses in the bill of costs. The defendant appealed and it was submitted on his behalf that section 208 of the Civil Procedure Code does not provide for a party to the action claiming his or her travelling expenses.

Held

The learned District Judge had exercised his discretion correctly and the Appeal Court would not interfere. The plaintiff was an essential witness by reason of the plea taken in defence. The language of section 208 was wide enough to cover the inclusion of these expenses in the bill of costs.

Cases referred to

- (1) *Langley v. D'Arcy*. (1930) A.I.R.. (Bombay) 24.
- (2) *Howes v. Barbara*, (1856) Q.B. 591.
- (3) *Ansett v. Marshal and another*, 22 Q. B. 119.

APPEAL from the District Court, Colombo.

E. S. Amerasinghe, with *I. S. de Silva* and *Miss D. Guniyangoda*, for the defendant-petitioner.

K. Kanag Iswaran, with *K. V. Mahenthiran*, for the plaintiff-respondent.

Cur. adv. vult.

August 10, 1979.

ABDUL CADER, J.

The plaintiff opened an account with the defendant-bank and deposited Rs. 15,000 and it was agreed that the defendant would pay the said sum or any portion thereof to the plaintiff or to the order of the plaintiff. She filed plaint alleging that on 1st June, 1973, the defendant wrongfully paid out the said sum of Rs. 15,000 without the authority or the order of the plaintiff. In the answer, the defendant pleaded that the said sum of Rs. 15,000 was paid to Mr. Steve Joachim on authority from the plaintiff. In the annexure to the answer, it is stated that Mr. C. P. Gunawardena of the defendant-bank would testify to this fact.

On 18.3.77 admissions and issues were recorded and issue No. 6 is as follows :—

“6. Did Joachim receive the said amount on the authority of the plaintiff in view of the action of the plaintiff ?”

Attorney for the defendant then narrated the particulars relating to issue No. 6. (1) The plaintiff had come with Joachim at the time of depositing the money and had said that authority was given to him to act as the agent of the plaintiff. (2) The plaintiff stated to the defendant-bank that she had given Joachim the authority to remit money abroad and that he would bring and produce the necessary documents. The Attorney for the defendant agreed to furnish the name of the Bank officer within two weeks before the trial. The Attorney for the plaintiff moved that the case be fixed for August “as the plaintiff is away from Sri Lanka.” Thereby notice was given to the defendant that the plaintiff was not in the Island. In the caption to the plaint, the plaintiff's address is given as West Australia. Plaintiff gave evidence at the trial and judgment was delivered on 9.6.78, giving the plaintiff judgment as prayed for.

Bill of costs was submitted by the plaintiff and thereafter amended to include travelling expenses of the plaintiff amounting to Rs. 13,261.80. The defendant resisted this. The plaintiff urged

that the plaintiff had to attend Court to give evidence personally because the defendant put up the plea that plaintiff had "come with Joachim at the time the money was deposited" and stated that authority was given to him to act as agent of the plaintiff, and it was, therefore, necessary for the plaintiff to get into the witness box and contradict Gunawardena, who was to give evidence as stated by the defendant. The plaintiff did give evidence at the trial. Gunawardena also gave evidence for the defendant and the Judge had said of that evidence as follows :—

"Certainly, so far as Mr. Gunawardena is concerned and he is the only officer from the Bank who gave evidence for the defendant, he is not aware of any officer of the Bank to whom such statement had been made."

The Registrar allowed the travelling expenses of Rs. 13,261.80 as part of costs payable by the defendant against which the defendant appealed to the District Judge. The District Judge by his order dated 16.3.79 stated as follows :—

"If a party is present in Court without any necessity or if a party has come to Court to see whether his Attorney is carrying out his duties properly, then, there is no provision for him to claim the expenses incurred by him to come to Court. But according to the facts in this case, the plaintiff is an essential witness. Other than her, no other person could give evidence because of the answer produced by the defendant. Therefore, my conclusion is that the plaintiff in this case has a justifiable right to include his travelling expenses of Rs. 13,261.80 in the bill of costs."

It is against this order that the defendant has appealed.

At the hearing before us, counsel raised the same objection that he raised before the District Judge, namely, that section 208 of the Civil Procedure Code does not provide for a party to the action claiming his or her travelling expenses. After counsel for the plaintiff drew our attention to the case of *Langley v. D'Arcy* (1), counsel for defendant appeared to concede that a party would be entitled to travelling expenses but only if his evidence was necessary and material for the purpose of his case. In that case, reference was made to O.65 r. 27 of the Rules of the Supreme Court of India :—

"As to evidence, such just and reasonable charges and expenses as appear to have been properly incurred in procuring evidence and the attendance of witnesses are to be allowed."

The words "procuring evidence" was considered sufficient to extend to the evidence of the party himself, though in common usage procuring evidence would normally refer to witnesses who have been procured by the party concerned. But in our Code, the following additional provision occurs—

" and all other expenses of procuring and adducing necessary evidence."

So that in addition to "procuring" the word "adduce", too, occurs. In *Howes v. Barbara* (2) Lord Campbell C. J. stated :—

"No doubt, the practice of allowing costs to the successful party in respect of his having been a witness for himself may lead to inconvenient consequences ; but we do not think we can lay down a rule that such costs can never be allowed. The party is now by law admitted as witness ; he may be a material and necessary witness ;"

It would suffice to point out that in some of the cases cited in the Indian case referred to earlier, costs were allowed to a party in much less favourable circumstances than in the case before us. We are satisfied that a party to the action would be entitled to travelling expenses where the evidence of that party was necessary and proper.

One principle that courts of appeal have consistently followed both in England and India has been set down in the Indian case :—

"It is true, as pointed out in some of the cases that the question as to how far attendance of a witness was necessary and material, is one for the Master to decide. But that discretion must be exercised in a fair and reasonable way according to the usual and established practice and allowance in respect of such matters. Otherwise, the Court or a Judge will interfere and review the discretion of the Master who has not so exercised it. If the Court is satisfied that the Master has so exercised his discretion as to produce injustice or thrown an unreasonable burden on a party, I think the Court is always disposed to interfere."

With respect, we adopt this principle as true and proper. This same principle was expressed in the case of *Howes v. Barbara* (2). In that case, the dictum of Lord Lyndhurst C. B. was adopted :—

"It is frequently very desirable that a party should be able to have his witness examined viva voce. It appears to us, that the allowance of such witnesses is still a matter in the discretion of the Master,"

In the case of *Ansett v. Marshall and Another* (3), Crompton J. stated as follows :—

“If the Master acts on a wrong principle, the Court will interfere, but it will not review the mere exercise of his discretion.”

And he went on to say :—

“Whether the plaintiff, in this instance, ought to have been examined on interrogatories is a question for the Master’s consideration.”

The question that we have to decide in this case is whether the District Judge has exercised his discretion correctly. We answer this question in the affirmative. The District Judge has said, as I have quoted earlier, “According to the facts in this case, the plaintiff is an essential witness.” We are in agreement with the view expressed by the learned District Judge. Issue No. 6 raised by the defendant put in issue that Joachim was an agent of the plaintiff and in clarification, the Attorney for the defendant went on to say that the plaintiff had gone with Joachim at the time of depositing the money and had stated that authority was given to him to act as the agent of the plaintiff. It became, therefore, necessary for the plaintiff to get into the witness box and give evidence that she did not give any such authority to Joachim in the presence of any officer of the Bank.

Counsel for the defendant urged that this evidence would have become necessary only after Gunawardena had given evidence that the plaintiff had given such authority. When the defendant framed this issue and in addition named the particular officer who would give that evidence, the plaintiff was entitled to presume that the defendant had that evidence in its possession and, therefore, the plaintiff was obliged to contradict it by giving evidence herself. Having created a situation of this nature, it is not open now to the defendant to state that since Gunawardena did not give the evidence expected of him, there was no need for the plaintiff to have given evidence herself. The defendant gave cause for these travelling expenses to be incurred by the plaintiff for what now appears to be no reason and it would be unjustifiable and improper for the plaintiff to be called upon to bear these expenses which is, in fact, more than the decretal amount.

It was brought to the knowledge of the defendant that the plaintiff was in Australia when the Attorney for the plaintiff moved that the case be fixed for August “as the plaintiff is away

from Sri Lanka." We are of the opinion that the learned District Judge has exercised his discretion very properly and there is no reason to interfere with his order.

Counsel for the defendant then urged that the plaintiff's Counsel should have awaited the evidence of the defendant who, in fact, had to prove the agency before the plaintiff would be called upon to rebut it and if such evidence was placed, then, he could have moved Court for a postponement to get down the plaintiff from Australia to give evidence. There is no reason for the plaintiff to have awaited such a contingency; she could not have known that Gunawardena would give evidence contrary to what was expected of him by the defendant; nor could she have taken for granted that the Court would grant an adjournment under these circumstances. It is not unknown that in such circumstances, the defendant would have objected to a postponement on the ground that the plaintiff should have been ready at the very commencement of the trial by being present in Court, having known in advance that the defendant had raised issue No. 6 and that the plaintiff had to meet that evidence.

Counsel for the defendant also complained that there had been no investigation whether the plaintiff could not have come to Sri Lanka by a cheaper mode of transport. This is a matter which the defendant should have urged before the taxing officer, which the defendant had failed to do at the appropriate stage.

We, therefore, dismiss the appeal with costs.

RATWATTE, J.—I agree.

Appeal dismissed.

S. Mahenthiran,
Attorney-at-law.