Iswar Bhai C. Patel & Bachu Bhai Patel vs Harihar Behera & Anr on 16 March, 1999

Equivalent citations: AIR 1999 SUPREME COURT 1341, 1999 (3) SCC 457, 1999 AIR SCW 1039, 1999 (2) LRI 36, (1999) 82 FACLR 504, 1999 (2) SCALE 108, 1999 (2) ADSC 418, 1999 SCFBRC 189, (1999) 1 LAB LN 779, (1999) 1 LABLJ 1009, 1999 (2) ALL CJ 1126, (1999) 1 CURLR 936, (1999) 2 JT 250 (SC), 1999 (4) SRJ 146, 1999 (2) JT 250, (1999) 3 MAD LJ 22, (1999) 88 CUT LT 308, (1999) 2 SCJ 158, (2000) 1 MAD LW 178, (1999) 2 CIVILCOURTC 1, (1999) 3 LANDLR 333, (1999) 2 ORISSA LR 42, (1999) 1 BANKCAS 580, (1999) 3 SUPREME 121, (1999) 2 ICC 670, (1999) 35 ALL LR 755, (1999) 1 ALL RENTCAS 670, (1999) 2 ANDHWR 258, (1999) 1 CAL HN 96, (1999) 2 CURCC 171, (1999) 2 CALLT 99, (1999) 2 SCALE 108, (1999) 3 CIVLJ 395

Author: S. Saghir Ahmad

Bench: S.Saghir Ahmad, M B Shah

PETITIONER:
ISWAR BHAI C. PATEL & BACHU BHAI PATEL

Vs.

RESPONDENT:
HARIHAR BEHERA & ANR.

DATE OF JUDGMENT: 16/03/1999

BENCH:
S.Saghir Ahmad, & M B Shah.

JUDGMENT:

S. Saghir Ahmad, J.

The appellant was defendant No. 1 in a suit filed by respondent No.1 for recovery of a sum of Rs.7,000/- together with damages (Rs.1400/-) in the trial court which was dismissed as against him but was decreed against the second defendant, namely, respondent No.2 who, incidentally, also is the natural father of respondent No.1 who was subsequently adopted by his maternal grandfather.

Respondent No.1 had a current account in the Central Bank of India Limited, Sambalpur Branch which was also operated by his natural father, namely, respondent No.2.

According to the facts set out in the plaint, respondent No.1 was registered as a money lender in October, 1958 and in that capacity he used to advance loan through his natural father to different persons out of his account in the Bank which, as pointed out above, was also operated by his natural father. On the expiry of the licence, he did not get it renewed but the authority of his natural father (defendant No.2) to operate the account continued and taking advantage of this authority, defendant (respondent) No.2, on the persuasion of the appellant, issued a cheque for Rs.7,000/- on the current account of respondent No.1 on 29.4.1964 which was encashed by the appellant. This amount was not paid back by the appellant in spite of repeated demands and, therefore, the suit was filed both against the appellant as also respondent No.2 who had issued the cheque to the appellant.

The appellant, in his written statement, pleaded that there was no relationship of debtor and creditor with respondent No.1 as the amount was advanced personally by defendant (respondent) No.2 and, therefore, respondent No.1 had no right to institute a suit against him specially when respondent No.2 while advancing the money to him had not acted as agent of respondent No.1. The appellant also raised the plea of Section 8 of the Orissa Money Lenders Act and contended that since respondent No.1 was not a registered money lender on the date on which the amount of Rs.7,000/- was advanced to him as loan, the suit was not maintainable as the amount was advanced in the course of regular money lending business. It was also pleaded that since some dispute had arisen between the appellant and defendant (respondent) No.2 with regard to the adjustment of the appellant's dues against respondent No.2, the latter, namely, respondent No.2 got the suit filed through his son on false pleas.

Respondent No.2, in his separate written statement, pleaded that he was very close to the appellant who dealt in tobacco business and whenever he was in need of money, he would approach respondent No.2 for financial help and respondent No.2 would lend him the money required by the appellant. It was pleaded that on 29th of April, 1964, the appellant had approached respondent No.2 for payment of a sum of Rs.7,000/- for a short period and, therefore, respondent No.2 issued a cheque for that amount in favour of the appellant on that day on the current account of respondent No.1 in the Central Bank of India Ltd., Sambalpur Branch. When respondent No.1 came to know of this transaction, he demanded repayment of the amount but the appellant instead of paying the amount to respondent No.1, proposed to set off his own dues against respondent No.2. It was pleaded that since the appellant had withdrawn the amount from respondent No.1's account through a cheque duly issued to him by respondent No.2, he was liable to pay the amount to respondent No.1.

The suit was decreed by the trial court only against respondent No.2 for a sum of Rs.8,400/- but was dismissed as against the appellant on the ground that the appellant had not approached respondent No.1 nor had respondent No.1 advanced the amount of Rs.7,000/- to the appellant. The trial court was of the opinion that the case of agency was not made out and respondent No.2 could not be treated to be the agent of the appellant. It was found that the transaction in question was directly entered into by the appellant with respondent No.2 and respondent No.1 was in no way involved at

any stage in that transaction. The High Court, in appeal, modified the decree passed by the trial court and decreed the suit against both the defendants, namely, the present appellant as also respondent No.2. It is against this judgment that the present appeal has been filed.

The contention raised by the learned counsel for the appellant is that the respondent No.1 had no right to institute an appeal in the High Court as the trial court had already decreed the suit. It is contended that though the decree was passed only against respondent No.2 and not against the appellant, it was wholly in consonance with the prayer made by respondent No.1 himself in his plaint in which he had claimed a decree either against the present appellant or against respondent No.2. Since the suit was decreed against respondent No.2, there was no occasion to file an appeal against that decree in the High Court.

Para 9 of the plaint, a copy of which was placed before us, reads as under:-

> "9. Plaintiff prays for a decree of Rs. 8,400/- with costs of suit against both the defendants, to be realised - severally from either of the defendants, with interest pendentilite and future at the rate of 7 PC. per annum."

The relief clause of the plaint extracted above would show that respondent No.1 had claimed a decree for a sum of Rs.8,400/- against both the defendants so that it could be realised from both the defendants or from either of them. This was a legitimate and reasonable prayer. Since defendant (respondent) No.2 had advanced the amount in question to the appellant on the account of respondent No.1, both of them, namely, the appellant and respondent No.2 were jointly and severally liable to pay that amount to respondent No.1. Having claimed a decree against both the defendants, the plaintiff (respondent No.1) put it in the plaint that a decree be passed against both the defendants so that the decretal amount may be realised from either of the defendants.

Since the trial court had decreed the suit only against respondent No.2 and not against the appellant, it was open to respondent No.1, in this situation, to invoke the jurisdiction of the appellate court for decreeing the suit even against the appellant.

This can be viewed from another angle.

Order 1 Rule 3 provides as under:-

> "R.3. Who may be joined as defendants.
>
> All persons may be joined in one suit as defendants where-
>
> (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise."

This Rule requires all persons to be joined as defendants in a suit against whom any right to relief exists provided that such right is based on the same act or transaction or series of acts or transactions against those persons whether jointly, severally or in the alternative. The additional factor is that if separate suits were brought against such persons, common questions of law or fact would arise. The purpose of the Rule is to avoid multiplicity of suits.

This Rule, to some extent, also deals with the joinder of causes of action inasmuch as when the plaintiff frames his suit, he impleads persons as defendants against whom he claims to have a cause of action. Joinder of causes of action has been provided for in Order 2 Rule 3 which provides as under:-

"R.3. Joinder of causes of action.

(1) Save as otherwise provided, a plaintiff may unite in the same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit."

These two provisions, namely, Order 1 Rule 3 and Order 2 Rule 3 if read together indicate that the question of joinder of parties also involves the joinder of causes of action. The simple principle is that a person is made a party in a suit because there is a cause of action against him and when causes of action are joined, the parties are also joined.

Now, the respondent No.1 in his plaint had pleaded that from his current account in a bank which was authorised to be operated by his father, namely, respondent No.2 also, an amount of Rs.7,000/- was lent by a cheque to the appellant. Since the money had reached in the hands of the appellant, though not directly through respondent No.1 but via his father, he had a cause of action against both the defendants, namely, the appellant and respondent No.2 both of whom were, therefore, impleaded as defendants in the suit particularly as it was one transaction in which both were involved. In this situation, therefore, if the suit was dismissed against one of them by the trial court, respondent No.1 had the right to file an appeal against the person against whom the suit was dismissed, notwithstanding that it was decreed against the other.

Learned counsel for the appellant next contended that the trial court was justified in recording a finding that it was a transaction which had taken place directly and personally between respondent No.2 and the appellant in which respondent No.1 had, at no stage, figured and, therefore, the suit

was decreed only against defendant (respondent) No.2 and not against the appellant. It is also contended that the trial court was justified in recording a finding that the case of "agency" was not established and the High Court was not justified in upsetting that finding. This contention too has no merit.

Admittedly defendant No.1 had an account in the Central Bank of India Limited, Sambalpur Branch which his father, namely, respondent No.2, was authorised to operate. It is also an admitted fact that it was from this account that the amount was advanced to the appellant by respondent No.2. It has been given out in the statement of respondent No.2 that when the appellant had approached him for a loan of Rs.7,000/-, he had explicitly told him that he had no money to lend whereupon the appellant had himself suggested to advance the loan from the account of respondent No.1 and it was on his suggestion that the respondent No.2 issued the cheque to the appellant which the appellant, admittedly, encashed. This fact has not been controverted by the appellant who did not enter the witness box to make a statement on oath denying the statement of defendant (respondent) No.2 that it was at his instance that respondent No.2 had advanced the amount of Rs. 7,000/- to the appellant by issuing a cheque on the account of defendant (respondent) No.1. Having not entered into the witness box and having not presented himself for cross-examination, an adverse presumption has to be drawn against him on the basis of principles contained in illustration (g) of Section 114 of the Evidence Act.

As early as in 1927, the Privy Council in Sardar Gurbakhsh Singh v. Gurdial Singh and another, AIR 1927 Privy Council 230, took note of a practice prevalent in those days of not examining the parties as a witness in the case and leaving it to the other party to call that party so that the other party may be treated as the witness of the first party. Their Lordships of the Privy Council observed as under:-

> "Notice has frequently been taken by this Board of this style of procedure. It sometimes takes the form of a manoeuvre under which counsel does not call his own client, who is an essential witness, but endeavours to force the other party to call him, and so suffer the discomfiture of having him treated as his, the other party's, own witness.
>
> This is thought to be clever, but it is a bad and degrading practice. Lord Atkinson dealt with the subject in Lal Kunwar v. Chiranji Lal (1), calling it "a vicious practice, unworthy of a high-toned or reputable system of advocacy."

They further observed as under:-

> "But in any view her non-appearance as a witness, she being present in Court, would be the strongest possible circumstance going to discredit the truth of her case."

Their Lordships also took note of the High Court finding which was to the following effect:-

> "It is true that she has not gone into the witness box, but she made a full statement before Chaudhri Kesar Ram, and it does not seem likely that her evidence before the

> Subordinate Judge would have added materially to what she had said in the statement."

They observed:-

> "Their lordships disapprove of such reasoning. The true object to be achieved by a Court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attaching to it. The story can then be subjected in all its particulars to cross-examination."

This decision has since been relied upon practically by all the High Courts. The Lahore High Court in Kirpa Singh vs. Ajaipal Singh and others, AIR 1930 Lahore 1, observed as under:-

> "It is significant that while the plaintiffs put the defendant in the witness-box they themselves had not the courage to go into the witness-box. Plaintiffs were the best persons to give evidence as to the "interest" possessed by them in the institution and their failure to go into the witness-box must in the circumstances go strongly against them."

This decision was also relied upon by the Bombay High Court in Martand Pandharinath Chaudhari vs. Radhabai Krishnarao Deshmukh, AIR 1931 Bombay 97, which observed as under:-

> "It is the bounden duty of a party personally knowing the facts and circumstances, to give evidence on his own behalf and to submit to cross-examination and his non-appearance as a witness would be the strongest possible circumstance which will go to discredit the truth of his case."

The Lahore High Court in two other cases in 1934, namely, Bishan Das vs. Gurbakhsh Singh and another, AIR 1934 Lahore 63(2) and Puran Das Chela vs. Kartar Singh and others, AIR 1934 Lahore 398 took the same view.

A Divison Bench of the Patna High Court in Devji Shivji vs. Karsandas Ramji and another, AIR 1954 Patna 280, relying upon the decision of the Privy Council in Sardar Gurbakhsh Singh vs. Gurdial Singh and another (supra) and the Madhya Pradesh High Court in Gulla Kharagjit Carpenter vs. Narsingh Nandkishore Rawat, AIR 1970 Madhya Pradesh 225 have also taken the same view. The Madhya Pradesh High Court also relied upon the following observation of the Calcutta High Court in Pranballav Saha & Anr. vs. Sm. Tulsibala Dassi & Anr., AIR 1958 Cal. 713 :-

> "The very fact that the defendant neither came to the box herself nor called any witness to contradict evidence given on oath against her shows that these facts cannot be denied. What was prima facie against her became conclusive proof by her failure to deny.

" The Allahabad High Court in Arjun Singh vs. Virender Nath and another, AIR 1971 Allahabad 29, held that :-

"the explanation of any admission or conduct on the part of a party must, if the party is alive and capable of giving evidence, come from him and the court would not imagine an explanation which a party himself has not chosen to give."

It was further observed that:-

"If such a party abstains from entering the witness box it must give rise to an inference adverse against him.

A Division Bench of the Punjab & Haryana High Court also in Bhagwan Dass vs. Bhishan Chand and others, AIR 1974 Punjab & Haryana 7, drew a presumption under Section 114 of the Evidence Act that if a party does not enter into the witness box, an adverse presumption has to be drawn against that party.

Applying the principles stated above to the instant case, it would be found that in the instant case also the appellant had abstained from the witness box and had not made any statement on oath in support of his pleading set out in the written statement. An adverse inference has, therefore, to be drawn against him. Since it was specifically stated by respondent No.2 in his statement on oath that it was at the instance of the appellant that he had issued the cheque on the account of respondent No.1 in the Central Bank of India Ltd., Sambalpur Branch, and the appellant, admittedly, had encashed that cheque, an inference has to be drawn against the appellant that what he stated in the written statement was not correct. In these circumstances, the High Court was fully justified in decreeing the suit of respondent No.1 in its entirety and passing a decree against the appellant also.

For the reasons stated above, we find no merit in this appeal which is dismissed with costs.