Privy Council Appeal No. 2 of 1928.

Julien Marret - - - - - - - - *Appellant*

v.

Mahomed Khaleel Shirazi and Sons and others - - *Respondents.*

FROM

THE HIGH COURT OF JUDICATURE AT MADRAS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL DELIVERED THE 15TH NOVEMBER, 1929.

Present at the Hearing :

LORD ATKIN.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD ATKIN.]

Their Lordships find it unnecessary to call upon Counsel for the respondents in this case.

This is an appeal from the High Court of Madras dismissing an appeal by the plaintiff, Mr. Marret. The suit arose out of a previous litigation, in which the first defendants in this case, who are the respondents here, Messrs. Shirazi & Sons, brought an action against a French company and against Mr. Marret in respect of contracts for the sale and delivery of hides. It appears that the French company carried on a tannery business in France and Mr. Marret had acted as their agent in Madras and in India generally. He also carried on business on his own account. In that suit Shirazi sued both the French company and Marret, alleging that Marret had acted as agent for the French company, and as soon as the plaint was issued, by the procedure which is provided in India, the plaintiffs proceeded to obtain attachment, before judgment, of property which they alleged belonged to the defendants, or either of them, and obtained, to begin with, a conditional order of attachment against a debt which they alleged

the defendants, or either of them, were owed by a company called the South Indian Export Company, and also against a current and a deposit account in respect of which they made a similar application that the defendants, or either of them, had in the National Bank of India. Eventually that conditional order was discharged and a final order was made on the 27th February, 1919, by which the attachment was limited to a fixed deposit of Rs. 50,500 then with the National Bank of India, and which is stated in the order to be standing to the credit of the first and second defendants, or either of them, and the said sum was to remain under attachment till the determination of the suit. In fact that sum stood in the Bank in the name of Marret, and it has now been decided and it must be assumed that the money was in fact the property of Marret, and was not the property of the French company. Nevertheless, it appears to be plain that the effect of that order of attachment was that it gave the plaintiff, if he succeeded in the action, an opportunity at a later stage of putting in issue the question whether or not that money belonged to the French company, if he got a decree against the French company, or to Marret if he got a decree against Marret. The effect of that order was undoubtedly to cause inconvenience to Marret. The fixed deposit was part of his assets in India, which he desired to retain, and he thereupon took steps to see whether he could not obtain some other form of security which would be a substitute for the attachment of the fixed deposit, and he arranged that there should be a security bond given by the South Indian Export Company, a company with which both defendants had had large dealings, a company of repute. Eventually, as stated on page 165 of the Record, an order was made by the Court on the 3rd July, 1919, the material terms of which are :

> " That upon the South Indian Export Company, Limited, Madras, executing a security bond in favour of the plaintiffs herein, for the sum of rupees fifty thousand and five hundred (Rs. 50,500) only, in place and stead of the attachment on the fixed deposit of the said sum of Rs. 50,500 now with the National Bank of India, Limited, Madras, standing to the credit of the first and second defendants herein, or either of them, effected in pursuance of the said order, dated the 27th day of February, 1919, the said attachment on the fixed deposit of the said sum of Rs. 50,500 only to be raised, and that the first and second defendants herein, or either of them, be at liberty to draw the said sum from the National Bank of India, Limited, Madras."

It is to be noticed that the security bond under the order is to be in place and stead of the attachment on the fixed deposit. The security bond was eventually drafted and it appears to have been drawn by Messrs. King & Partridge, who are made defendants to this suit, who were then acting as solicitors for the present plaintiff and in respect of whose action in this matter the plaintiff in this suit has made an alternative claim for damages for negligence. Now the bond, after saying that it is made between the South Indian Export Company and Shirazi & Sons and after reciting the suit which Shirazi had brought and reciting the

attachment against the moneys, both in current and fixed deposit with the National Bank of India belonging to Marret, the second defendant above named, recites the conditional order, and then it recites the modifications of it as to the sum of Rs. 50,500 on fixed deposit, and in the 3rd recital it is said that Shirazi obtained an interim attachment against the money both of the fixed and of the current deposit belonging to the second defendant above named.

Their Lordships only pause on that to call attention to the fact that in that security bond there is an express recital that this fixed deposit belonged to Marret and then it recites, as has been said, the order of the 27th February, 1919, which ordered that the attachment should continue until the trial, and then it recites an application that the attachment should be raised and the security bond should be executed in place and stead of the above-named attachment. Then the operative part of the deed is that it—

> "witnesseth that in pursuance of the said order, dated the 3rd day of July, 1919, and in consideration of the premises the company doth hereby covenant and agree with the said plaintiffs that the company will in the event of the plaintiffs obtaining a decree against the first and second defendants or either of them in the said C.S. No. 109 of 1919 on the file of the High Court at Madras in its Ordinary Original Civil Jurisdiction pay into Court to the credit of this suit the said sum of fifty thousand and five hundred rupees."

Now it appears to their Lordships quite plain on the construction of that document that the sole obligation imposed on the Export Company was in the event of a decree being made in favour of the plaintiffs against the defendants, or either of them, to pay the money into Court. In that way it precisely preserves the position that it was to be in place and stead of the attachment. The effect of the attachment had been that in the event of a decree being made against either or both of the defendants the question would eventually be raised and finally decided as to whether the money was the money of Marret or of the French company; and if the decree had been obtained against the French company, it is quite plain it would not be against Marret and that on Marret proving to the satisfaction of the Court that the money was his money, the plaintiff would have derived no advantage from the attachment. In their Lordships' opinion the effect of the bond was precisely and carefully to preserve the position that the money was to be paid into Court and as it was to take the place of the attachment it would be open to Marret if, as in fact it turned out, the decree was only against the French company—to satisfy the Court that the money which had taken the place of the attachment against his money was not to be paid out to the plaintiff but should be paid back to him. It appears to their Lordships that the bond is carefully drawn to effectuate that result and it contains a valuable recital in favour of Marret to the effect that the fixed deposit in the bond belonged to him—a matter which before that date might

have been open to dispute. Therefore it appears to their Lordships in respect of that which is an issue in the case, namely, the allegation of negligence against the solicitors that they negligently drew that bond so that Marret's interests suffered, that the allegation is not sustained. The suggestion of negligence is that the bond was so drawn that the plaintiff in the action became entitled to get that money out of Court as soon as he got a decree against the French company, or against Marret himself, and that in their Lordships' view is not the true construction of the deed. But unfortunately it appears to have been the construction put upon it at a certain stage of the subsequent proceedings. That order having been made and the security bond having been given, the action proceeded. It should be stated that before the security bond was given it had been arranged between Marret and the Export company that the Export company should be put in a position to indemnify themselves out of moneys of Marret in Europe and the power of attorney given to the Export company follows very closely the terms of the actual security bond. Eventually the case came to trial before Mr. Justice Phillips, and a decision was given by him in which he made a decree in favour of the plaintiff for Rs. 175,000 against the French company and he dismissed the suit against Marret. Also he made an order for costs against Marret which it is unnecessary to discuss further at the present moment, because that is not a question that arises now in this suit. Then, upon that decree being made the plaintiffs in the action took out a summons for payment into Court by the Export company of the sums which were mentioned in their security bond. It was necessary to take out a summons because the Registrar of the Court came to the conclusion, and no doubt correctly, that he could not receive money in Court without an order of the Court, and, therefore, a summons was taken out by Shirazi asking that all parties concerned should attend the sitting in Chambers on Monday, the 22nd day of November, 1920,

> "to show cause why the South Indian Export Company, Limited, should not be at liberty to pay into Court the sum of Rs. 50,500 or in the alternative why they should not be permitted to pay the sum to the plaintiffs in pursuance of their bond, dated 15th July, 1919, and why in the event of the money being paid into Court the Registrar should not be directed to pay the same out to the plaintiff in part satisfaction of the decree herein."

Now that is a threefold summons. It asks, first of all, that the South Indian Export Company should be at liberty to pay into Court Rs. 50,500. That, it would appear, was a matter of course, because that was their obligation. Then it asks in the alternative that they should be permitted to pay the sum to the plaintiffs in pursuance of their bond. That seems not to have been in accordance with the bond and to be a relief to which the plaintiffs were clearly not entitled. Then it proceeds to ask, in the event of the money being paid into Court, that the Registrar should be permitted to pay the money out in part satisfaction of

the decree to the plaintiff. That was a proper relief to ask if the plaintiffs were entitled to it, and on that part of the summons which asks for payment out, it was, in their Lordships' view, the duty of the learned Judge if the question was raised before him, to determine the question whether or not the plaintiffs were entitled to have the money paid out to them and in view of the admitted fact of the money representing the deposit being Marret's property, it seems quite plain—quite plain at the present moment—that the proper order was to have refused payment out to the plaintiffs of that sum.

However, the summons came on for hearing before the learned Judge in Chambers and in the record there is his indorsement on the summons. The indorsement is: "This is not opposed by the South Indian Export Company but Mr. Srinivasa Ayyangar for defendants 1 and 2 asks for adjournment to get further and better instructions from his clients. They can have no good ground for opposing this application which is granted. The money will be received in Court and will be available for payment out to the plaintiff." That appears to have been an unfortunate decision of the learned Judge, because it seems quite plain to their Lordships that the second defendant, Mr. Marret, was entitled to appear and to oppose, and to successfully oppose, the request for payment out of this money to the plaintiffs. Indeed, on the face of the minute it might have been doubtful whether or not the Judge meant more than to say that the money was to be paid into Court and would be available for payment out if a subsequent order was made. But that does not appear to have been the construction put on the document and no such contention ever was raised in the Court below, because at page 285 in the record, on the same day, the 22nd November, is found the formal order carrying into effect the minute of the Judge, and it recites that upon hearing the attorneys for the plaintiff and of *vakil* for the first and second defendants and of attorneys for the garnishees, the South Indian Export Company, it is ordered "that the South Indian Export Company do pay into Court to the credit of the suit the sum of Rs. 50,500 only; and (2) that upon payment into Court as aforesaid the Registrar of this Court do pay the said sum of Rs. 50,500 only to Messrs. Mahomed Khaleel Shirazi & Sons the plaintiffs herein in part satisfaction of the decree in their favour made herein and dated the 20th day of October, 1920. The result is that the plaintiffs have received that sum of money under an order made by a Judge of competent jurisdiction, after hearing the representatives of all parties concerned, and no appeal was made from that order."

It appears to their Lordships that the difficulty that arises in this case has arisen entirely by reason of that order, but that that order remaining unappealed must be treated as effective. There can be little doubt but that the learned Judge took the view of the construction of the document which has not commended itself to their Lordships, and he must have assumed the

statement as to the obligation of the parties made in the affidavit before him that the security bond provided that if the plaintiff succeeded in getting a decree, the Export company's money was to be available, whether the decree was against the first or the second defendant. Now there was no appeal from that order by the plaintiffs in the action. There was an appeal from the main decree to the High Court, and on the 14th March, 1922, the High Court reduced the claim of the plaintiffs to Rs. 30,000 and thereupon, some months afterwards in September, 1922, the defendant made an application for a restitution of the money that had been paid to the plaintiffs. He put it on two grounds : first of all, he claimed the whole sum, and, secondly, in the alternative, he claimed a smaller sum, namely, the difference between the Rs. 50,500 received and the Rs. 30,000 which they had been ordered to get. Now the learned Judge before whom that application came took the view that it was not a claim for restitution at all, because the money had been paid, not by the defendants or either of them but by a surety, and that it had not been paid in satisfaction of the decree. This view, however, overlooks the fact that, as already recited, the order for payment out orders the Registrar to pay the sum of Rs. 50,500 to the plaintiffs in part satisfaction of the decree. Moreover, the learned Judge proceeded on the view, that the proper construction of the security bond was that it imposed an obligation upon the Export company to pay the sum to the plaintiffs, or into Court for the benefit of the plaintiffs, whether they obtained a decree against the French company or whether they obtained a decree against Marret. That construction appears to be wrong, but the order in question is not of particular relevance otherwise, for on a further appeal to the Privy Council, which was heard in 1926, they allowed the plaintiffs' appeal and restored the original Order of Mr. Justice Phillips and, therefore, of course no further question of restitution could arise.

Now comes the present suit, which was commenced in the interval, and that present suit is commenced upon the footing that the security bond was drawn in a wrong form ; that it did in fact involve an obligation upon the Export company to make the money available for the plaintiffs, whether they wanted to use it against the French company or against Marret, and the relief claimed is a declaration that the bond was brought about by a mistake and a decree directing the rectification of the security bond and a repayment by Shirazi to Marret of Rs. 50,500, with interest ; and then, alternatively, in the event of the bond not being rectified and the plaintiff not being able to recover his money against Shirazi—it claims against the solicitors the sums lost by way of damages for negligence.

Now it appears to their Lordships plain, on the true construction of the bond, that the plaintiff entirely fails to show that there was any mistake in the execution of the bond, or any right to have

it rectified. The bond appears to have expressed quite accurately the intention of the parties. It provided simply that the money provided by the Export company was to be in truth in place and in stead of the money that had been attached and it in no way gave greater rights to the plaintiffs than they would have possessed in respect of the money which was attached. Indeed, so far as the bond varied the position, it did so in favour of Marret because it contained an express recital that the deposit belonged to Marret, whereas that matter had been left in doubt, so far as the attachment was concerned, and it seems to follow, therefore, that no claim exists for rectification. There has been no mistake and the foundation of the suit fails.

But quite apart from that, there seems to be another answer to the case, and that is, that, by Section 47 of the Civil Procedure Code, all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution and satisfaction of the decree shall be decided by the Court executing the decree. It is plain to their Lordships that the question in this case arises between the parties to the suit and relates to the satisfaction of the decree. So far as the order for payment out is concerned it is expressed to be in satisfaction of the decree, it has no other meaning, and that in itself precludes any cause of action by the present plaintiff in the present suit.

The result of their Lordships' decision disposes of the claim on the ground of negligence because that claim, as pleaded, is entirely based on the allegation that the solicitors negligently drafted a bond with the meaning which their Lordships have decided is not properly to be put upon the bond. It seems desirable that their Lordships should state, so far as the case has been put before them, that they can see no ground whatever for any claim in respect of negligence on the part of the solicitors. At the time they seem to have protected his interest with assiduity and with considerable success. They seem to have carried through this negotiation which undoubtedly was of great moment to Marret in which this bond was substituted for the attachment and in doing it they seem to have succeeded in procuring for Marret a recital that the deposit belonged to Marret, and that was clearly a considerable advantage. They ceased before any questions of the payment into Court arose to represent Marret, and, therefore, they are not responsible for any difficulty arising by reason of the order made for payment out.

Their Lordships must deal with the case as it has been framed, and as in fact they come to the conclusion that the plaintiff has entirely failed to establish any ground for the relief which he asks, they must advise that the suit be dismissed with costs to both respondents.

Their Lordships, however, cannot leave the case without saying that, on the facts of the case, it would appear that the plaintiff, Mr. Marret, had the misfortune, owing to a wrong

construction being put upon this document, to have had his own money applied in payment of a debt due by somebody else. Whether he has any, and what, other relief against anybody in connection with that unfortunate position their Lordships express no opinion ; but while they feel bound to say this is an unfortunate result, yet it appears to their Lordships quite plain that it cannot be remedied by the procedure the plaintiff has adopted in the present case. Therefore, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

In the Privy Council.

JULIEN MARRET

v.

MAHOMED KHALEEL SHIRAZI AND SONS AND OTHERS.

DELIVERED BY LORD ATKIN.

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