

UGANDA / JUDGMENT

Devji v Jinabhai (C.A. 6/1934.)

[1937] EACA 87 (1 January 1937)

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COURT

East African Court of Appeal

BEFORE

Lucie-Smith Ag CJ (Kenya), Sheridan CJ

CASE / FILE NUMBER

C.A. 6/1934.

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COURT OF APPEAL FOR EASTERN ARRICA.

Before Sir Joseph Sheridan, C. J. (Tanganyika), Lucie-Smith, Ag. C. J. (Kenya), and WILSON, Ag. J. (Uganda). KANJI DEVJI (Appellant) (Original Defendant) DAMODAR JINABHAI & Co. (Respondents) (Original Plaintiffs).

C. A. \$6/1934\$.

Failure to file defence within prescribed time or at all—Refusal of trial judge to enlarge time for filing defende-Uganda Civil Procedure Rules: Order XLV, Rule 5—Evidence in proof of plaintiff's claim heard forthwith—Refusal by trial judge to allow defendant or his counsel, though present, to cross-examine or offer evidence in rebuttal of plaintiff's claim.

- Held (21-3-34).—That the trial judge on the facts before him properly exercised the discretion given to him under O. XLV. r.5 Uganda Civil Procedure Rules in refusing the application to enlarge the
time for filing defence, made to him on the hearing date, no defence having been filed up till then.
- \$\overrightarrow{\text{Held}}\$ further.—That, having so exercised his discretion, the trial judge acted properly in proceeding forthwith to hear the plaintiff's evidence in support of his claim and giving judgment thereon without allowing defendant or his counsel (who were present) to cross-examine or offer evidence in rebuttal of the plaintiff's case.
- Held further.—That the decision on appeal in Ross v. Scriven \$(1916)\$ 43 Cal.: 1001, was no authority for impeaching the validity of the decree in the present case which, unlike that in Ross v. Scriven, was founded on the oral evidence of the plaintiff taken at the trial.
- K. C. Johnson Davies \$(H. B.\$ Williams with him) for Appellant.

- A. A. Baerlein for Respondent.

Johnson Davies.—Although appellant had some cogent reasons to account for his failure to file defence it is impossible to argue on the record that the trial judge improperly exercised his discretion under O. XLV. R.5. Main grounds of appeal are that the trial judge erred, after having so exercised his discretion, in proceeding to hear the suit **ex parte** without framing issues and denying to the appellant and his counsel, who were present in court, the right to cross-examine respondent on his evidence and to produce evidence in rebuttal. Judge ought to have framed issues on the statements of appellant in court (O. XIII R.1 (5) and 3 (a)) in spite of his failure to file Written Statement, and then proceeded to trial in the ordinary way hearing both sides. Though Written Statement is ordered to be filed by Court \$(O. VIII, R.1)\$ there is no penalty for failure to do so, as there is in the Uganda Civil Procedure Ordinance or Rules no section corresponding to O. VIII, R.10. Indian C. P. C.1908 or section 113, Indian C. P. C. 1882 (allowing judgment to be pronounced in

default of filing defence within prescribed time). Section 25 Civil Procedure Ordinance sets out the only two instances in which judgment can now be given by default, i.e. (i) on failure to enter an appearance, and (ii) on failure to obtain leave to appear and defend under the Summary Procedure (O. XXXIII) section 25, not applicable to this case on either ground.

Again failure to file written statement was improperly regarded by the trial judge as constituting (under O. VI, r. 5) an admission by the appellant of the respondents' claim in toto. O. V., r. 5 and O. VIII, r. 3 are rules of construction of pleadings in cssc and cannot apply when no defence at all has been filed. The decision on appeal in *Ross vs. Scrisen* (1916) 43 Cal: 1001 is authority for this.

Again under section 139 Evidence Ordinance cross-examination should always be allowed if desired—though of course this is dependent on defendant being taken to be present in Court—whereas the judge in this case regarded him as not having appeared, simply because he had not filed a defence.

Baerlein.—As proper exercise of discretion has not been contested no need to argue that point. As regards the refusal by the trial judge to allow appellant to raise issues orally on the day of hearing, having failed to do so by Written Statement as ordered by the Court, and to cross-examine respondent and produce evidence in rebuttal, any other course would have been greatly to the disadvantage of the respondent—the innocent party. Respondent would be forced to conduct his case without knowing what the defence relied on was, and would have lost his opportunities of getting admissions, discovery, etc. Defendant by his refusal to obey the order of the court would gain all the tactical advantages. That is opposed to all principles of justice.

No application was ever made at the trial that issues should be framed on oral statements. The submission, which the judge overruled, was that the case definitely could not proceed to trial in the absence of a Written Statement. Only when the trial was proceeding was the question raised of the right of defendant to cross-examine and give evidence in rebuttal. That would have unduly prejudiced the respondent and the judge refused to allow it.

As regards the admissions to be implied by a failure to file a defence and the result of such neglect (O. VIII, r.3, and O. XI, r.6) it would seem from the notes in the Annual Practice (1934) at p. 358 ("Admissions") and at p.547 ("Admissions actual and implied") and at p.548 ("Admissions of facts in the pleadings") that O. VIII, r.3 is not a mere rule of construction, in spite of the decision in *Ross v. Scriven*. In that case the facts were different as no Written Statement had been specifically ordered to be filed. The case of *Caroli v. Hirst* (Eng. & Emp. Dig., Vol. 40, No. 497 at p.428) is in favour of this view. But in any event the taking of evidence in the present case by the trial judge distinguishes it essentially from *Ross v. Scriven*.

In the absence of a provision such as is contained in the Indian Civil Code 1908 (O. VIII, r.10) the course taken by the trial judge was the only possible one if the whole of our procedure was not to be set at naught by defendant's failure to file defence.

Johnson Davies (in reply).—The penalty imposed on defendant for his neglect was too heavy. Costs would have been the proper remedy.

Sir Joseph Sheridan, C. J.—This is an appeal from an order and decree of the Chief Justice of Uganda.

On the failure of the appellant to file a written statement of defence by a prescribed date the learned judge passed judgment for the respondent for the amount claimed with costs; but not before he had evidence adduced in support of the respondent's claim. When the case was called at the Jinja Sessions, counsel for the appellant made an application for extension of time for filing a written statement of defence. This application was refused and in refusing it the learned judge properly exercised a discretion vested in him; indeed counsel for the appellant when the point was put to him by this court conceded that there was no improper exercise of discretion. This being the case it seems to me that the appeal must fail, but it has been argued for the appellant that on the authority of *Ross v. Scriven* XLIII Calc. (1916) 1001, the order and decree should be set aside. After studying this case I am of opinion that it is not an authority for this proposition. As I read the case it decided that where a written statement was ordered and not filed the trial judge was not justified in accepting the statements made in the plaint, even though verified, in lieu of evidence proving the claim. In the present case the learned judge was careful to record evidence in proof of the claim and so the case is distinguishable from *Ross v. Scriven* (supra). I do not wish to go so far as to say that had there been no evidence recorded, the order and decree must inevitably be reversed, for where there has been a failure to file a written statement by a prescribed date and the claim is for a liquidated amount the case of *Mahomed Moti v. Chenchal*bhai**, 6 E. A. I. R. 1, appears to me to be an authority for a judge entering judgment in favour of a plaintiff without recording evidence in proof of the claim. It was argued that the case was not an authority for the reason that the provisions of s. 113 of the Indian Civil Procedure Code, 1882 (precisely the same as O.8 r.10 of the Indian Civil Procedure Code, 1908) have not been included in the Uganda Civil Procedure Ordinance or Rules. S.113 reads: "If any party from whom a written statement is so required fails to present the same within the time fixed by the court, the court may pass a decree against him, or make

such order in relation to the suit as it thinks fit". It seems to me that O. XI r.6 confers upon the court as much power as s.113 and that consequently the inclusion of the provisions of s.113 would be redundant. O. XI r.6 provides: "Any party may at any stage of a suit, where admission of facts has been made. either on the pleadings or otherwise apply to the court for such judgment or order as upon such admission he may be entitled to without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think This rule follows exactly 0.32 r.6 of the Rules of the just". Supreme Court. England, and from the notes to this rule in the Annual Practice (1932) at page 549 and 550 it would appear that an admission of facts pleaded in a plaint may be inferred where there has been default in filing a written statement. This would seem to be in conflict with the decision in *Ross v. Scriven* (supra) and for that reason I would leave it open for argument in an appropriate case as to whether on a failure to file a written statement in a claim for a liquidated amount judgment may be entered for the plaintiff in the absence of evidence in support of the claim. In this case the learned judge did take evidence and upon that evidence he passed judgment and by doing so followed the practice laid down by the Appellate Court in *Ross v. Scriven* After the proper exercise of his discretion to have \$(sunra)\$. allowed the defaulting defendant to take any part in the proceedings would have amounted to a stultification of his decision refusing the application for extension of time. I would dismiss the appeal with costs.

Lucie-Smith, \$Aq\$, \$C. J\$, This is an appeal from the Order and Decree of the learned Chief Justice of Uganda.

The appellant was sued for a liquidated amount and on the return day of the summons was ordered to file a written statement of defence within three weeks.

On the case being called for hearing on 12-2-34 the appellant appeared by advocate who stated that he had just been briefed and that no Statement of Defence had been filed—he then applied for a further seven days in which to file such defence. Certain reasons personal to the appellant were put forward as an excuse for not having obeyed the court's order—they appear to have no The learned Chief Justice after hearing argument substance. refused to grant the extension of time asked for and after taking evidence gave judgment for the respondent.

The learned advocate for the appellant admitted that the Chief Justice had a discretion and stated that he could not argue that such discretion was not judicially exercised. That being so I am of opinion that the appeal fails. The case of *Ross \$v\$. Scriven* to my mind is not applicable and in any event is not an authority binding on this court. In my opinion the appeal must be dismissed with costs.

Wilson, \$Aq\$. J.—This is an appeal from an Order and Decree of the Chief Justice of Uganda sitting at Jinja on the 12th February, 1934.

It appears from the record that the case was called for orders on 3rd January, 1934, before the District Registrar, Jinja, and an order was then made setting down the case for trial on 12th February, 1934, and defendant was given three weeks within which to file his defence. It was stated before this court and not denied that defendant was present in person on 3rd January,

1934. It is stated on the record that Mr. Ishmael of Kampala was representing him, but Mr. Ishmael did not actually appear and the application for time in which to file a defence was, by arrangement, in fact made on Mr. Ishmael's behalf by Mr. Baerlein of Jinja, who was also appearing for plaintiff.

Mr. Baerlein has satisfied this court that defendant was not only personally aware of the order made but that it was communicated by him to Mr. Ishmael's office forthwith and acknowledged in writing, and this is not denied. No written statement of defence was, however, filed within the period ordered or at all, but on the case being called for trial on 12-2-34 defendant appeared in court with another advocate, Mr. Williams, who forthwith applied for an enlargement of time within which to file a defence. He gave as his reasons the fact that defendant's original advocate had unaccountably failed to file a defence and that owing to the illness and impending confinement of defendant's wife he (defendant) had been unable to take any action in the matter until that day, when he had instructed Mr. Williams.

The application was opposed by Mr. Baerlein, plaintiff's counsel, on the ground that to grant it would be to cause undue delay to plaintiff in getting a decision, and he asked for judgment. In reply to this defendant's counsel contended that there was no power to give judgment in the absence of a written statement, since the Uganda Civil Procedure Code contained no specific provision to this effect such as is contained in O. VIII, r.10 of the Indian Civil Procedure Code, 1908.

The learned Chief Justice thereupon wrote an order refusing to exercise in favour of defendant the discretion given to him by O. XLV, r.5 Civil Procedure Rules to enlarge the time for filing a defence and ordering the hearing to proceed. In this order the learned Chief Justice took into consideration the arguments put forward in support of the application and there can be no doubt that he exercised his judicial discretion in a proper manner. Indeed appellant's counsel has conceded as much before this court.

The plaintiff was then called on by the court to give evidence in support of his claim and did so. During the course of this evidence defendant's counsel asked whether he would be allowed to cross-examine the witness and to put forward such evidence

as he could in rebuttal. The learned Chief Justice ruled that he would not and it is difficult to see, once he had exercised his discretion as above, what other course he could have taken without stultifying himself, and unduly prejudicing the plaintiff, the innocent party. In effect the learned Chief Justice decided that the defendant having failed to file a defence as ordered had put himself out of court and no longer had any locus standi and could not be heard. To have allowed him to be heard would have been not only to put the plaintiff into the very disadvantageous position of making his case without knowing what case was to be put up in rebuttal, but also to give a definite and gratuitous advantage to the defendant, the guilty party. Such a decision would have been contrary to the elementary principles that a defendant must, if ordered, disclose his defence before the trial \$(O. VIII, r.1)\$ and be bound by his pleadings \$(O. VI, r.5)\$.

On the proof of his claim supplied by plaintiff in his evidence the learned Chief Justice thereafter passed a decree in favour of plaintiff for the full amount of his claim, with costs and interest.

Counsel for the appellant has cited to this court the case of *Ross v. Scriven* (1916) 43 Cal. 1001, as authority for impeaching the validity of this Order and Decree. I cannot agree with this submission. The decree appealed against in *Ross v. Scriven* was set aside because the trial judge had, on defendant's failure to file a defence, given judgment in default without hearing any evidence at all in support of the claim. In that appeal it was argued that under O. VIII, r.5 (Uganda O. VIII, r.3) default in filing a defence was tantamount to a complete admission of the pleadings, and that the statutory verification of the plaint made was evidence in support of the claim, and that by these two things the failure to take oral evidence was cured. The court, composed of Sanderson C. J. and Woodroffe and Mookerjee J. J., unanimously decided against both these submissions and that decision carries great weight. But it does not detrimentally affect the decision in the present case which, unlike that appealed against in *Ross v. Scriven*, was founded on the oral evidence of the plaintiff.

The taking of oral evidence was in fact the saving of the decision in the present case. Counsel for defendant has argued, rightly in my opinion, that on the authority of section 25, Civil Procedure Ordinance, there are only two instances in which it is open to the court to give judgment without hearing the case, that is cases in which there is no appearance by defendant and cases under the Summary Procedure (O. XXXIII). But by hearing such evidence in this case as it was open to him to hear, following on the exercise of his discretion as mentioned above, the learned Chief Justice complied with the provisions of section 25 Civil Procedure Ordinance.

Counsel for the respondent has argued that whether the dictum in *Ross v. Scriven*—that O. VIII r.5 (Uganda O. VIII, r.3) is a mere rule of construction—is correct or not, in any event O. XI, r.6, justifies the decision in this case. In support of this he has drawn attention to the comments in the Annual Practice \$(1934)\$ on the corresponding English O.32, r.6, at pp. 547 and 548 under the headings "Admissions actual and implied" and "Admissions of facts on the pleadings". Whilst these comments would seem to be generally favourable to his case and whilst some of the cases cited by him, notably *Caroli v. Hirst* (Mew's Digest Vol. 15 at p. 1119), of which a summarized report alone is available here (and which must therefore be treated with the utmost caution), would seem to lend colour to his submission that there can be constructive admission of a claim by failure to file a defence, it would in my opinion be unwise to ignore the differences between the English procedure and ours in regard to the mode of entering judgment and to base any decision upon this argument; and I think it is also unnecessary, for the reasons given above. .

I consider that this appeal should be dismissed with costs.

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