CIVIL RULE.

Before Page J.

RAM SARAN MANDAL*

v.

RADHA RAMAN MANDAL.

1928

Jan. 12.

Withdrawal of suit, whether permissible after hearing and decision—Civil Procedure Code (Act V of 1908), s. 115, O. XXIII, r. 1.

A plaintiff should not be allowed to withdraw his suit with liberty to bring a fresh suit on the same cause of action on the ground that there was some formal defect in the frame of the suit after the suit has been heard and decided against him on the merits.

Watson & others v. *The Collector of Rajshahye and others* (1) *and Kharda Co., Ltd.* v. *Durga Charan Chandra* (2), referred to.

APPLICATION under section 115 of the Code of Civil Procedure.

Ram Saran Mandal and others, the defendants, obtained this rule to show cause why the order of the learned Subordinate Judge of Burdwan allowing the plaintiff to withdraw his suit should not be set aside.

Dr. Bijan Kumar Mukherji, for the petitioners

Babu Bhut Nath Chatterji, for the opposite party.

PAGE J. This rule was issued under section 115 of the Code of Civil Procedure on an application to set aside an order of the learned Subordinate Judge of Burdwan allowing the plaintiff to withdraw a suit. The suit was brought by the plaintiff who is one of sixteen *shebaits* of the deity Damodar Jiu, for possession of certain immoveable property to which he

*Civil Revision No. 1071 of 1927, against the order of Pratap Chandra Sen Gupta, Munsif of Burdwan, dated June 29, 1925.

(1) (1869) 12 W. R. 43. (2) (1909) 11 C. L. J. 45

1928

RAM SARAN MANDAL v. RADHA RAMAN MANDAL.

PAGE J.

claimed to be entitled, and of which he alleged that the other *shebaits* in collusion with a tenant of the land had dispossessed him. The land in suit had been purchased by the grandfather of the plaintiff in the name of the deity, but the plaintiff alleged that the land was secular and not *debatter* property the title to which had passed to him in his personal right. The suit was tried and determined on the merits, and in the event was dismissed upon the ground that the plaintiff had failed to prove his title or that the property was secular property. The learned trial Judge further held that inasmuch as one of the *shebaits* had not been impleaded and the heirs of another (who had died *pendente lite*) had not been substituted there was a defect of parties, and upon that ground also the suit failed. The plaintiff lodged an appeal and in the course of the hearing before the lower Appellate Court the plaintiff applied for permission to withdraw the suit with liberty to bring a fresh suit upon the same cause of action. The learned Subordinate Judge acceded to the plaintiff's prayer and passed an order allowing—

"the plaintiff to withdraw the suit with liberty to bring a fresh suit on "the same cause of action against the other *shebaits* (*i.e.*, other than the "plaintiff) in their character as *shebait* persons claiming under them as "such".

Whether or not, apart from the present suit, the plaintiff is at liberty to take further proceedings in this matter against the defendants need not now be considered. The question is whether this Court has jurisdiction to interfere with the order under review, and, if so, whether it ought to exercise its powers under section 115 of the Code of Civil Procedure in favour of the petitioners. Now, the object of the Legislature in enacting Order XXIII, rule 1, as I apprehend, was that where a suit must fail by reason of some formal defect or some other "sufficient ground"

was proved, the Court should be at liberty, in order that substantial justice might be done, to permit the plaintiff (on such terms, if any, as it thought fit) to withdraw the suit, and to recommence the proceedings in a suit duly framed according to law. But, in my opinion, it was never intended or contemplated that after a suit had been tried and dismissed on the merits the plaintiff should be permitted to start the proceedings all over again against the successful defendants merely because there was also a formal defect in the frame of the suit. *Watson and others* v. *The Collector of Rajshahye and others* (1), *Kharda Company Limited* v. *Durga Charan Chandra* (2). Otherwise, much hardship and prejudice might accrue to defendants who already had contested the suit, and had succeeded in defeating the plaintiff's claim on the merits.

Now, in this case, as I read the judgment of the learned Subordinate Judge, he was of opinion that so soon as it became apparent that there was a formal defect in the frame of the suit he ought to allow the plaintiff to withdraw the suit with liberty to bring a fresh suit on the same cause of action, without taking into consideration the fact that the suit had been heard and decided against the plaintiff on the merits. In my opinion, in adopting that view the learned Subordinate Judge misdirected himself as to the meaning and effect of Order XXIII, rule 1, and the order under review cannot stand.

The result is that the Rule will be made absolute, and the appeal remitted to the lower Appellate Court to be determined according to law. I assess the hearing fee at two gold mohurs.

B. M. S. *Rule absolute.*

(1) (1869) 12 W. R. 43. (2) (1909) 11 C. L. J. 45.