

## LETTERS PATENT APPEAL.

Before Nasim Ali and Remfry JJ.

ABDUL KHALEKH

1937

July 7, 16.

v.

SUSHEEL CHANDRA CHAUDHURI.\*

*Suit—Withdrawal of suit with leave to bring fresh suit on payment of costs—  
Time limited—Payment of costs after institution of fresh suit within  
time extended by Court, if bar to the fresh suit—Code of Civil Procedure  
(Act V of 1908), s. 148; O. XXIII, r. 1 (2).*

Where the Court grants permission to the plaintiff to withdraw his suit with liberty to bring a fresh suit by its order, namely, "The plaintiff be permitted to withdraw the suit with liberty to bring a fresh one unless barred as prayed for; the defendant will get costs which must be paid within one month as a condition precedent to a fresh suit"; and the plaintiff, after instituting the fresh suit on the same cause of action without paying the costs, gets the time for payment of costs extended by an order of Court and thereafter pays in the costs within the extended time which amount is withdrawn by the defendant without objection,

held that the Court having extended the time for payment of costs under s. 148 of the Code of Civil Procedure without any objection from the defendant, the fresh suit is maintainable.

*Deb Kumar Roy Choudhury v. Deb Nath Barna Bipra* (1) referred to.

APPEAL under cl. 15 of the Letters Patent preferred by the defendant.

The material facts of the case and the arguments in the appeal appear sufficiently from the judgment.

*Manmatha Nath Das Gupta* with him *Apoorba Charan Mukherji* for the appellants.

*Hemendra Kumar Das* and *Poornendu Bhooshan Chaudhuri* for the respondents.

*Surajit Chandra Lahiri* for the Deputy Registrar.

*Cur. adv. vult.*

\*Letters Patent Appeal, No. 2 of 1935, in Appeal from Appellate Decree, No. 101 of 1932.

1937

*Abdul Khalek*  
 v.  
*Susheel Chandra*  
*Chaudhuri.*

NASIM ALI J. The only point for determination in this Letters Patent Appeal by the defendants is whether the suit out of which this appeal arises is maintainable in view of the fact that the plaintiff respondents did not pay the costs of the defendants in a previous suit instituted by them on the same cause of action on which the present suit is based as directed by the Court in its order dated November 14, 1929. That order is in these terms:—

The plaintiff be permitted to withdraw the suit with liberty to bring a fresh one unless barred as prayed for. Defendant will get costs which must be paid within one month as a condition precedent to a fresh suit.

Plaintiffs did not pay the costs of the defendants within the time specified in the order. Neither did they pay the costs before they instituted the present suit on January 23, 1930. The appellant in his written statement did not object to the maintainability of the suit on the ground that his costs were not paid as directed by the Court in November, 1929. Before the commencement of the hearing of the suit plaintiff applied to the Court for permission to deposit the costs. This prayer was not opposed and was allowed. The costs were then deposited by the plaintiffs. The suit was then heard and decreed. Defendant thereafter withdrew the costs deposited from Court. The decree of the trial Court was affirmed on appeal by the lower appellate Court. Defendants preferred a Second Appeal to this Court. R. C. Mitter J. heard this Second Appeal. The learned Judge was inclined to hold that the suit was not maintainable and to allow the appeal but in view of the decision of a Division Bench of this Court in *Deb Kumar Roy Chowdhury v. Deb Nath Barna Bipra* (1), which is on all fours with the present case, he dismissed the appeal and gave leave to the defendant to appeal under s. 15 of the Letters Patent.

The order of November 14, 1929, allowing the plaintiffs to withdraw from the previous suit with liberty to institute a fresh suit on the same cause of

(1) [1920] A. I. R. (Cal.) 897.

action and directing them to pay the costs of the defendant within one month as a condition precedent to a fresh suit, was made on the application of the plaintiffs under O. XXIII, r. 1(2) of the Code of Civil Procedure.

1937

*Abdul Khalek*  
V.  
*Sushcol Chandra*  
*Chaudhuri.*

*Nasim Ali J.*

The question is whether the condition about the payment of costs is attached to the permission to withdraw with liberty to institute a fresh suit or to the permission to bring a fresh suit. If the condition attaches to the permission to withdraw until the costs are paid, the permission is not operative. There is no withdrawal with liberty to institute a fresh suit and the suit must be taken to be pending. If the condition attaches to the permission to bring a fresh suit, the suit is withdrawn and ceases to be pending immediately with order of withdrawal and the permission to bring a fresh suit is not operative until the costs are paid.

The reasons in support of the first view are:—

(i) The clause “or such terms as it think fit” in sub-r. (2) of r. 1, O. XXIII of the Code grammatically refers to the verb “may grant” and the terms imposed by the Court therefore refer to the permission to withdraw from suit with liberty to institute a fresh *suit*.

(ii) What the Court orders is not a withdrawal and institution separately, but a withdrawal and institution on certain conditions, the whole is one order and the one part cannot be severed from the other; when the plaintiff obtains leave to withdraw upon payment of costs, until they are paid there is no withdrawal with the permission of the Court and the suit remains pending.

The reasons advanced in support of the second view are:—

(a) The latter part of O. XXIII, r. 1, cl. (2) must be read as referring not to the permission to withdraw

1937

*Abdul Khalekh*  
 V.  
*Sushcel Chandra*  
*Chaudhuri.*

*Nasim Ali J.*

a suit as the withdrawal of the suit does not require permission but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. The permission granted under the sub-rule refers only to the filing of the subsequent suit on certain conditions.

(b) The order allowing the withdrawal of a suit upon terms is separable in two parts: one allowing the withdrawal and the other allowing the institution of a suit upon complying with the condition laid down by the Court.

Now the consequences of withdrawal of a suit are laid down in sub-r. (3) of r. 1, O. XXIII. If that rule had not been in existence there would have been no provision of law by which a plaintiff after withdrawing a suit would be precluded from bringing a fresh suit in respect of the same cause of action. That rule contemplated withdrawal without leave to bring a fresh suit on the same cause of action. If the second view is correct, then on the plaintiff's failure to deposit the costs as directed by the Court the withdrawal becomes a withdrawal without leave and the second suit is hit by this sub-rule. If the first view is correct, there is no withdrawal at all when the condition is not complied with, as failure to withdraw with leave to institute a fresh suit does not put an end to the suit and the plaintiff is entitled to continue the suit in spite of his failure. The institution of the second suit would then be not hit by the sub-rule. The result then would be that two suits would be pending on the same cause of action. In such a case either the Court should stay the hearing of the second suit under s. 10 of the Code of Civil Procedure and direct the plaintiff to proceed with the first suit or direct the stay of the second suit until the costs are paid. See O. XXVI, r. 4 of the Rules of the Supreme Court.

The cases in which the terms of the order impose a time limit for payment of costs have sometimes been distinguished by Courts from the cases in which no such time limit is placed. The reasons for the distinction are these :—

1937  
*Abdul Khalek*  
 v.  
*Sustal Chandra*  
*Chowdhuri.*  
 Nasti Ali J.

(i) When the order of the Court directs payment of costs by a certain date and that date expires, it becomes impossible for the plaintiff to fulfil the condition imposed by the Court and a subsequent deposit would not comply with the conditions. Where no date is fixed, the non-payment of costs before the institution of the suit makes the suit premature and the Court can treat the plaint as being filed on the date on which the deposit is made provided no question of limitation arises.

(ii) The intention of the Court in fixing the time limit is to settle the position of the parties within a reasonable time and not to keep the defendant in suspense of a future attack on him indefinitely up to the last date of limitation.

(iii) When the Court attaches such a time limit to the permission, it is open to the plaintiff to say then and there that he does not accept the condition and to ask the Court to proceed with the suit. But if after such an order he takes no further steps for the prosecution of the suit, he must be taken to have accepted the conditional order with the consequences following from the non-compliance with the conditions mentioned in the order.

If the condition about the payment of costs attaches to the withdrawal of the suit with liberty to institute a fresh suit the distinction between the cases in which time limit is fixed and those in which there is no such time limit is not of much consequence inasmuch as in either case on default of payment of

1937

*Abdul Khaliq*

V.

*Susheel Chandra  
Chaudhuri.**Nasim Ali J.*

costs the suit remains pending. If the condition attaches to the filing of the second suit, after the fixed date expires, the Court can extend the time for paying the costs under s. 148 of the Code of Civil Procedure and therefore enable the plaintiff to comply with the condition imposed on him. Where the Court extends the time there is no difficulty but where time is not extended, there being no permission to sue afresh, the second suit must be dismissed.

Assuming that by fixing a time limit the Court intended to settle the position of the parties, the question still remains how did the Court settle the position? Where the order specifies the position, there is no difficulty. Where nothing is stated, the answer to the question depends on the answer to the question whether the condition attaches to the permission to withdraw or to the permission to bring a fresh suit.

Again assuming that the conditional order is accepted by the plaintiff what is the consequence of his acceptance? The answer here also depends on the answer to the same question.

Again it has been said that the decision in each case would depend upon the particular terms of the order in that case. Where the term of the order indicates what would happen on default of payment within the time fixed, no difficulty arises. Where no such directions are given the occasion for the conflicting views indicated above arises. The difference in the two views is fundamental. The views taken by the Courts below are in accordance with the later decision of this Court which seem to be supported by the grammatical sense of the words of sub-r. (2) of r. 1, O. XXIII. Whether the condition about payment of costs attaches to the permission to withdraw with liberty to institute a fresh suit or to the permission to file a fresh suit, the position in the

present case is this: the Court extended the time under s. 148 for payment of costs without any objection from the defendants in order to enable the plaintiff to comply with the conditions. The plaintiff then paid the costs: Even if the conditions are taken as attaching to the permission to bring a fresh suit, the conditional permission has now become final on payment of costs by the plaintiff. The first suit, therefore, must now be taken as withdrawn with leave. The defendants have withdrawn the costs without any protest; the suit has been fought out on merits and the plaintiffs have succeeded on the merits.

1937  
*Abdul Khalekh*  
 v.  
*Eusheel Chandra*  
*Chaudhuri.*  
*Nasim Ali J.*

In view of these facts and circumstances we dismiss the appeal. There will be no order for costs in this appeal.

REMFERY J. I agree.

*Appeal dismissed.*

A. K. D.