APPELLATE CIVIL

Before Sir Shah Muhammad Sulaiman, Chief Justice, and Justice Sir Lal Gopal Mukerji

1933
August, 4

JADU TELI (DEFENDANT) *v.* MAHBOOB RAZA KHAN (PLAINTIFF)*

Civil Procedure Code, order XXIII, rule 1—Withdrawal of suit with liberty to file a fresh suit—Order granting permission directed the costs to be deposited before filing fresh suit—Condition not complied with but costs deposited subsequently—Whether suit maintainable.

A plaintiff was permitted to withdraw a suit with liberty to file a fresh suit, on the terms that the costs of the defendant amounting to Rs.20 were to be deposited in court before filing the fresh suit. A fresh suit was filed without the plaintiff having first deposited the costs; subsequently, in the course of the suit, and before any objection on this score had been raised by the defendants, the plaintiff deposited the said costs. On the question whether, by reason of non-compliance with the terms of the order, the suit was maintainable,—

Held that as the second suit was filed without the condition having been fulfilled, the suit was, no doubt, defective, and it would be open to the court to take a very strict view of the non-compliance. At the same time there was nothing to prevent the court from allowing the plaintiff to fulfil that condition by depositing the costs subsequently, so long as no question of limitation arose. When the costs were deposited and the condition was fulfilled, the suit could, at any rate, be deemed to have been instituted on the date when the condition was fulfilled, unless limitation was a bar to the claim. In view of the facts that the plaintiff did not appear to have deliberately defied or concealed the order; that the order had not fixed any definite date and it was not quite clear how and where the money could be deposited before filing the second suit; that the evidence in the case had been recorded; and that if the non-payment before the institution of the suit was considered to be a fatal defect, the plaintiff could apparently withdraw this suit and file a third suit, the court's discretion should be exercised in favour of the plaintiff and it should be regarded that the terms of the order had been substantially complied with.

*First Appeal No. 31 of 1932, from an order of Rup Kishen Agha, District Judge of Azamgarh, dated the 20th of January, 1932.

But where the order of the court is that the amount should be deposited by a certain date fixed, and that date expires, it becomes impossible for the plaintiff to fulfil the condition by making a subsequent deposit. No question of extending the time fixed by the first court can arise.

Mr. *K. L. Misra,* for the appellant.

Mr. *K. Verma,* for the respondent.

SULAIMAN, C. J.:—This is a defendant's appeal from an order remanding a suit. It appears that the plaintiff at first brought a suit in July, 1930, and then applied to withdraw the suit with liberty to file a fresh suit. The court granted the application in the following terms: "The suit be withdrawn and be filed afresh. But before filing fresh suit costs of defendant amounting to Rs.20 will be deposited in the court if the same have not been recovered by the defendant earlier."

In August, 1930, the plaintiff filed a fresh suit without having first deposited the costs of the previous suit. Some written statements were filed in which no objection as to this defect was taken. On the 3rd of December, 1930, the plaintiff deposited the amount in court. Then a written statement was filed on the 5th of December, 1930, in which the point was raised that the amount not having been deposited before the institution of the suit, the suit was not maintainable. The court, however, did not dismiss the suit forthwith. After this objection it framed issues and recorded evidence. Later on in May, 1931, the plaintiff's vakil, on seeing a case of this Court in *Rachhpal Singh* v. *Sheo Ratan Singh* (1), applied to the court that the suit had been filed under the impression that the costs could be deposited after the institution, but in view of that reported case there was an apprehension that the suit would fail. It was therefore prayed that permission should be granted to withdraw the suit with liberty to bring a fresh suit. On the 23rd of May, 1931, the court passed the following order: "I, therefore, allow the

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plaintiff to withdraw the suit with permission to bring a fresh suit on payment of Rs.20 that had been already ordered by the court in a previous suit and on payment also of Rs.50 as costs before filing the fresh suit." Next day the plaintiff replied that he was unable to pay all these costs and prayed that the suit be tried on its merits. The court ordered that the case be put up in the presence of the vakils for the parties on the 8th of June. On that date the defendants' vakil said that they had no objection to the case being restored and disposed of on its merits. The case was then restored.

The court of first instance, however, dismissed the suit on the ground that the costs had not been deposited before filing the suit. On appeal the learned Judge remanded the case for trial on the merits. He was under the impression that he had power to extend the time inasmuch as no date for payment of the costs had been fixed in the first suit. Accordingly he fixed the 3rd of December as the date by which the deposit should have been made.

The defendant comes up in appeal before us and it is urged on his behalf that the suit is not maintainable. Undoubtedly there is a clear judgment of a single Judge of this Court in *Rachhpal Singh* v. *Sheo Ratan Singh* (1) in his favour. That case discusses the rulings of the various High Courts on this point. It seems that there has been some difference of opinion. The view which has prevailed in Bombay and Madras is that the subsequent deposit would not cure the defect; whereas it has been held in Calcutta and also in Lahore and Patna that such a defect can be cured. It is not necessary to discuss all these rulings, because they have been carefully summarised in the judgment of the learned Judge of this Court.

The learned Judge has thought "that the permission given" under order XXIII, rule 1, sub-rule (2), "does not really apply to the withdrawal at all but to

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the right to file a second suit. A plaintiff can always withdraw without permission . . ." But the two sub-rules are distinctly separate. Under sub-rule (2) the court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit with liberty to institute a fresh suit. If the plaintiff does not offer to withdraw the suit unconditionally, there is one prayer before the court, namely, to withdraw the suit with liberty to institute a fresh suit. The court may either refuse to grant such a prayer or may impose terms. The terms that can be imposed are with regard to the prayer to withdraw the suit with liberty to institute a fresh suit. Examining the sub-rule grammatically it is equally clear that the clause "on such terms as it thinks fit" must refer to the verb "may grant".

But the learned Judge is perfectly right in holding that after such an order has been passed the former suit cannot be deemed to be still pending. This has been the view expressed in at least one of the cases of the Calcutta High Court. It seems to me that the question whether the former suit remains pending or not is one depending on the interpretation of the order passed. If the court intended that the condition should be fulfilled before the suit is finally struck off, the suit would, of course, remain pending. On the other hand, if the court intended that the suit should be disposed of and struck off from the file and the condition is to be fulfilled after that suit and before the filing of the fresh suit, then it is impossible to say that the suit nevertheless is still pending.

It may be more convenient for a court imposing terms to specify a fixed date within which such condition is to be fulfilled. But there seems to be nothing illegal in saying that the condition should be fulfilled before the fresh suit is instituted.

If the second suit is filed without the condition having been fulfilled, undoubtedly the suit is premature and is

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defective. It is open to a court to be very strict and to refuse to hear it on the ground that such condition has not been fulfilled. This option may be exercised where it appears that the plaintiff has deliberately defied the order of the court or has concealed it from the court, and time has not yet been spent in recording evidence. At the same time there is nothing to prevent the court from allowing the plaintiff to fulfil that condition by depositing the costs when no question of limitation arises. It seems to me that as soon as the costs are deposited and the condition is fulfilled, the suit must be deemed to have been instituted on the date when such condition is fulfilled, unless, of course, limitation is a bar to the claim.

There seems to be no serious difficulty as contemplated by the learned Judge that the plaintiff would be allowed to wait till he can forecast the probable result of the suit and pay or not pay as he thinks best. Ordinarily, the defendant will at once file a written statement and bring it to the notice of the court that the previous order has not been fulfilled, and it may be taken for granted that the court would take that matter into its consideration.

The learned Judge has also considered that the distinction drawn in Calcutta between cases in which a named date has been fixed and cases in which there was no such date is without foundation and that it is immaterial whether a date is named or not. It seems to me that there is a clear distinction between these two classes of cases. Where the order of the court is that the amount should be deposited by a certain date and that date expires, it becomes impossible for the plaintiff to fulfil the condition imposed upon him by the court. A subsequent deposit would in no way comply with the order of depositing the amount by that date. On the other hand, where no date is fixed and the amount is to be deposited before the institution of the suit, it is open to the plaintiff to delay the institution of the suit and

make a deposit whenever it is convenient to him to do so. It also seems that if the non-payment of the amount before the institution of the suit is considered to be a defect so as to make the suit premature, the plaintiff may file another suit after he has made the deposit. In any case, the court can certainly treat the plaint as having been filed on the date on which the deposit was made. This discretion might very properly be exercised in a case where all the evidence has been recorded and, as pointed out by the lower appellate court, the evidence is voluminous, for the result of dismissing the suit would be merely to drive the plaintiff to file another suit. It has been held in the case of *Ambubai Hanmantrao* v *Shankarsa Nagosa* (1) that on dismissal of the second suit on the ground of his not having complied with the condition on which the permission to bring it had been granted, the plaintiff was not entitled to bring a third suit. The point does not directly arise in this case, and the Bombay case may have to be considered when such a question arises.

The view held in Calcutta appeals to me, and there is no difficulty whatsoever in treating the plaint as having been filed on the subsequent date, when the date of the institution is quite immaterial so far as limitation is concerned. Nor do I see any difficulty in treating the proceedings which have preceded such a date as part of the proceedings in the suit. They can be regarded as having been taken after the plaint was properly filed. I am, therefore, of opinion that the view taken by the lower appellate court that the first court was not bound to dismiss the suit on a technical ground is correct. At the same time it must be conceded that there is no question of extending the time fixed by the first court. As a matter of fact, if there were such a question, the court which had fixed the time would have jurisdiction to extend it and not the court which comes to hear the subsequent suit.

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The second point urged is that the court had no jurisdiction to restore the suit after it had ordered it to be withdrawn with liberty to file a fresh suit on certain other conditions. It is unnecessary to consider this point, because the application for restoration can be treated as one for review, and the defendants gave their consent to the suit being restored. The order was passed with their consent and such a consent order cannot now be challenged by the defendants on the ground that the court should not have restored the suit.

I would, therefore, dismiss the appeal with costs.

MUKERJI, J.:—In view of the fact that there is, in *Rachhpal Singh* v. *Sheo Ratan Singh* (1), a decision of a learned Judge of this Court in favour of the appellant and we are going to differ from him, I think it necessary to state my reasons separately.

The facts of the case have been given in detail in the judgment of the learned CHIEF JUSTICE and they are very briefly as follows. The respondent, Mahboob Raza Khan, brought a suit for partition and possession of property, being suit No. 588 of 1929. He made an application for withdrawal of the suit with grant of permission to sue again. On the 31st of July, 1930, this application succeeded. The court passed an order which contained the following sentence: "But before filing fresh suit costs of the defendant Rs.20 will be deposited in the court if the same has not been already realised." On the 25th of August, 1930, the plaintiff filed the suit out of which this appeal has arisen without depositing the sum of Rs.20 as ordered on the 31st of July, 1930, in suit No. 588 of 1929. Some of the defendants filed written statements; but they did not take any exception to the institution of the suit on the ground that no deposit of the sum of Rs.20 had been made. On the 3rd of December, 1930, the plaintiff deposited the sum of Rs.20 in court. On the 5th of December, 1930, the appellant before us filed his written statement and took

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an objection to the institution of the suit on the ground of non-deposit of the costs of the previous litigation. In spite of the objection being taken the learned Judge did not take notice of it and the suit was allowed to proceed. Evidence was recorded and the case came on for arguments. The plaintiff's counsel then, on the 23rd of May, 1931, made an application under order XXIII of the Civil Procedure Code seeking to withdraw the suit with permission to sue again. He gave the reason that when he had advised the institution of the suit he was under the impression that the costs ordered to be paid in the previous suit might be deposited at any time, but, having regard to the single Judge ruling of this Court which he mentioned, he found that his suit was likely to fail, and therefore he made the application. The learned Munsif thereupon directed that the suit might be withdrawn with liberty to sue again, provided the plaintiff paid two sums of money as costs, namely, Rs.20 previously ordered and Rs.50 costs of the second litigation, both the sums being payable before the institution of the third suit. The plaintiff, however, resiled from this position and made an application to the court to hear the case, because he said that he was not in a position to pay the sum of Rs.50. The defendant's counsel agreed and accordingly the suit was restored and it was heard.

The learned Munsif dismissed the suit on the preliminary point that it was badly instituted without the previous deposit of costs. The plaintiff appealed and the learned District Judge set aside the decree of the Munsif and remanded the suit for trial on the merits.

There can be no doubt that the grounds on which the learned District Judge has proceeded cannot be all maintained. It seems to me that the question before us, namely, whether the learned Judge was right or not in directing that the suit should be heard on the merits, is one of interpretation of the order of the 31st of July

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1930. I have already quoted that order. The question is whether that order has been sufficiently complied with by deposit of the sum of Rs.20 on the 3rd of December, 1930. The order does not make it clear whether the money was to be paid into the court in which the suit No. 588 of 1929 was pending, and, if so, whether in the suit or in execution department, or whether it was to be paid in the court in which the second suit was to be instituted. A sum of money can be deposited only in a suit, in an execution proceeding or in a miscellaneous proceeding like one provided for in section 83 of the Transfer of Property Act. If the condition was that the money should be deposited in the court in which the second suit was to be instituted before the suit was filed, this would be practically impossible, for unless there is a suit nothing can be put in to the credit of any party. The money, therefore, could be deposited only after the plaint had been filed. But in such a case it might be argued that the order had not been complied with.

The order of the 31st of July, 1930, does not fix a date within which the money is to be deposited. It was, therefore, at the option of the plaintiff when he would deposit the money, so long as he deposited it before the institution of the second suit. I have already pointed out that it was not clear where the money was to be deposited if it was not to be deposited in the second suit. If the money could be deposited in the second suit, it makes no difference whether it is deposited on the day the plaint is filed or 20 days later, provided that it is deposited before a suit, properly instituted after compliance with the order of the 31st of July, 1930, is barred by limitation or the suit is tried out. In this view, no exception can be properly taken to the deposit of the money after the institution of the second suit.

There are several other aspects of the case. One is this. If the second suit out of which this appeal has arisen, namely, suit No. 447 of 1930, had been dismissed

by the court on the ground that money was not deposited, there would have been nothing to bar the plaintiff from filing a fresh suit on the 3rd of December, 1930, the date on which he did deposit the money in court. A Bombay case, *Ambubai Hanmantrao* v. *Shankarsa Nagosa* (1), has been cited to us as an authority for the proposition that if a second suit is dismissed on the ground that the costs had not been deposited, no third suit would lie. I have read the judgment of the Bombay Court, and, with all respect, I am unable to see any cogent ground given for the opinion expressed. Suppose that the second suit complied with the condition as to payment of costs but was dismissed for non-payment of court-fees. Could it be said that a third suit on payment of full court-fees could not be maintained after deposit of the costs ordered by the first decree? I suppose no such argument would prevail. The learned Judges say that permission was granted to institute one suit and one suit only. But no such condition is to be found in the order passed by the first court. If, therefore, a third suit was maintainable on the 3rd of December, 1930, I do not see why the plaintiff's present suit should be dismissed and he should be forced to file a third suit.

As I have said, it is a matter of interpretation of a particular order and the question is whether the condition imposed has been *substantially* complied with. There is no rule of law which says that a particular order is to be interpreted in a particular way. Therefore, we have to read it in a way just and in consonance with our sense of equity and good conscience. The law has provided, by enacting sections 114 and 114A of the Transfer of Property Act, that in the case of forfeiture on non-payment of rent at the proper time, relief can be granted to the tenant. This shows that the courts should make an attempt to relieve all hard cases where this can be done without prejudice to the other

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party. In this particular case the appellant would not be in a better position by having a third litigation being forced on him. For these reasons I am of opinion that the condition imposed on the 31st of July, 1930, has been sufficiently complied with.

Mukerji, J.

Coming to the second point, it was certainly open to the court to restore the suit with the consent of the parties. The application of the plaintiff to restore the suit might be treated as an application for review of judgment, and such an application could certainly be granted by the consent of the contesting defendant.

The result is that the order passed by the court below is good.

I have not considered it necessary to discuss the several rulings cited before us in detail. Some of these cases have been decided on the peculiar facts involved in them. Others show a sharp distinction of opinion. It may, therefore, be definitely said that much can be said on both sides. But I am of opinion that more can be said on behalf of the respondent in this case than on behalf of the appellant.

I, therefore, agree in dismissing the appeal.

Before Mr. Justice Niamat-ullah and Mr. Justice Rachhpal Singh

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BENI PRASAD (APPLICANT) *v.* PARBATI (OPPOSITE PARTY)*

Guardians and Wards Act (VIII of 1890), sections 9 and 39(h) —Application for guardianship—Jurisdiction—Where minor resides or his property is situate—Not necessary that the applicant must be a resident within the jurisdiction of the court.

Under section 9 of the Guardians and Wards Act an application for guardianship cannot be entertained by a court within whose jurisdiction neither the minor resides nor any part of the property of the minor is situate.

There is nothing in the Guardians and Wards Act which debars a court from appointing as guardian a person who is not residing within the jurisdiction of the court, and an

*First Appeal No. 140 of 1932, from an order of Ganga Nath, District Judge of Aligarh, dated the 9th of April, 1932.