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not a device to divide it with the next reversioner, the giving of a small portion of it to the widow for her maintenance not being objectionable, and consequently that the transaction was valid under the principles laid down by the Board in *Rangasami Gounden v. Nachiappa Gounden* (1).

The so-called surrender in the present case was, as stated above, void in law, and was also void as being in contravention of section 60 of the Act.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellant: *Barrow, Rogers and Nevill*.

Solicitors for respondents: *Watkins and Hunter*.

APPELLATE CIVIL.

Before Multick and Kulwant Sahay, J.J.

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Code of Civil Procedure, 1908 (Act V of 1908), section 148—suit, withdrawal of, with liberty to bring a fresh suit on payment of costs within two months—whether time is of the essence of the order—Court, power of, to extend the period—condition precedent, failure—order inseparable.

Where a court permits the plaintiff to withdraw a suit with permission to institute a fresh suit on payment of costs within a prescribed period, payment of the costs is a condition precedent to the institution of a fresh suit and must be made within the prescribed period.

* Appeal from Appellate Decree no. 401 of 1925, and Civil Revision no. 510 of 1924, from a decision of Ashutosh Chatterji, Esq., Additional District Judge of Patna, dated the 19th March, 1925, confirming a decision of B. Jamini Mohan Mukherji, Munsif of Barh, dated the 18th February, 1923.

(1) (1918) I. L. R. 42 Mad. 523; L. B. 46 I. A. 72.

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Kuldip Singh v. Kuldip Chowdhury (1), distinguished.

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The court, however, has power under section 148 of the Code of Civil Procedure, 1908, to extend the prescribed time.

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Suranjan Singh v. Ram Bahal Lal (2), distinguished.

Where the plaintiff complies with the conditions on which a withdrawal is permitted, the withdrawal is complete and the suit is at an end. If he does not, the suit remains pending and the plaintiff may, if he chooses, elect to proceed with it; and in the latter case, the court must dispose of the suit according to law.

Shital Prasad Mandal v. Gaya Prasad Dingal (3) and *Deb Kumar Roy Choudhury v. Debnath Baran Bipra* (4), approved.

Hari Nath Bose v. Syed Hossainali (5), *Subal Chandra Chowdhury v. Mosaraf Ali* (6) and *Goolapudi Seshayya v. Nadendra Subbiah* (7), disapproved.

Appeal and application by the plaintiff.

On the 15th August, 1923, the Munsif of Barh made the following order in a suit:—

“I therefore permit the plaintiffs to withdraw this suit with permission to bring a fresh suit on condition that they pay all costs to defendants besides pleader's fee Rs. 32 within two months from the date of the decree.”

Subsequently the village in which the cause of action arose was transferred to the jurisdiction of the Munsif of Patna and, on the 12th September, 1923, a second suit on the same cause of action was lodged before the latter Munsif. But the costs directed to be deposited under the order of 15th August, 1923, were not deposited in the Court of the Munsif of Patna till the 1st February, 1924, and at the trial it was contended that the money not having been paid within the two months allowed by the order of the 15th August, 1923, the suit was not maintainable. The Munsif accepted this objection and dismissed the suit.

(1) (1918) 3 Pat. L. J. 63.

(2) (1913) I. L. R. 35 All. 582.

(3) (1914) 19 Cal. L. J. 529.

(4) (1921) 64 Ind. Cas. 738.

(5) (1905) 2 Cal. L. J. 480.

(6) (1917) 38 Ind. Cas. 476.

(7) (1924) 47 Mad. L. J. 646; 82 Ind. Cas. 499.

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In appeal the Additional District Judge of Patna agreed with this view and second appeal no. 401 of 1925 was preferred to the High Court against the District Judge's order.

After the suit was dismissed by the Munsif of Patna an application was made to the Munsif of Barh for an extension of the time allowed for the payment of the costs decreed by him. The Munsif held, first, that he had no jurisdiction to entertain the application, and, secondly, that on the merits no sufficient reason had been made out for allowing the plaintiff any extension of time, and he declined to extend the period of two months allowed by his order of the 15th August, 1923. Against this order of refusal the plaintiff moved the High Court under section 115 of the Civil Procedure Code in Civil Revision Case no. 510 of 1924.

Muhammad Hassan Jan and Sashi Sekhar Prashad Singh, for the appellant petitioner.

S. Dayal and Raghunandan Prasad, for the respondent opposite party.

MULLICK, J. (after stating the facts set out above, proceeded as follows):

The argument addressed to us by the learned advocate for the plaintiff-appellant is that time was not of the essence of the order of the 15th August, 1923, and that it is competent to the second Munsif of Patna to proceed with the suit provided the costs are paid any time before the disposal of the suit, and reference is made to *Kuldip Singh v. Kuldip Choudhury*⁽¹⁾.

But in that case the court did not fix any time within which the payment was to be made. The order in that suit was that the plaintiff might withdraw the suit and might bring a fresh suit if not otherwise barred, and that the payment of costs should be a condition precedent to the institution of a fresh suit. But in the present case a very

(1) (1916) 3 Pat. L. J. 63.

different state of things exists. Here a definite time was fixed for the payment of the costs and it was not open to the court in which the second suit was instituted to accept the costs.

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The question however is whether the present case comes within the rule laid down by Sir Lawrence Jenkins, C.J., in *Shital Prashad Mandal v. Gaya Prasad Dingal*(¹).

MULLICK, J.

On behalf of the defendant-respondents reliance is placed upon *Hari Nath Dass v. Syed Hossainali*(²). There it was held that when a plaintiff fails to pay the costs within the time prescribed he cannot be permitted to bring a fresh suit upon the same cause of action because the withdrawal in that case was a withdrawal without permission which, for practical purposes, was a dismissal of the suit. Reliance is also placed upon *Goolapudi Seshayya v. Nadendla Subbiah*(³). There Phillips, J., of the Madras High Court, put the argument in a somewhat different form. He held that the order allowing the withdrawal of a suit upon terms was separable into two parts, one allowing the withdrawal which ipso facto carried a dismissal of the suit and the other allowing the institution of a fresh suit upon complying with the conditions laid down by the court, and, that the withdrawal being complete, the plaintiff could not, upon failure to comply with the conditions prescribed, elect to treat the suit as still pending. The learned Judge dissented from the view taken by Sir Lawrence Jenkins, C. J., in *Shital Prasad Mondal's* case(¹). Now the reasoning of Sir Lawrence Jenkins appears to us to be conclusive. He observes that what the court allows is not a withdrawal and an 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. It seems to us that this is the correct view

(1) (1914) 19 Cal. L. J. 529.

(2) (1905) 2 Cal. L. J. 480.

(3) (1924) 47 Mad. L. J. 476; 82 Ind. Cas. 499.

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of the order. It is open to a court to say to a plaintiff 'Your suit is defective and I give you leave to institute a fresh suit on conditions.' If then the plaintiff complies with the conditions the withdrawal is complete and the suit is at an end. If he does not, he may, if he chooses, elect to go on and the court must dispose of the suit according to law. If the court directs that on failure to comply with the conditions by a certain date the suit shall stand dismissed and the plaintiff defaults the suit is at an end from the date prescribed. It follows, therefore, in the present case, that the Munsif before whom the second suit was instituted was not entitled to dismiss the suit outright but was bound, under section 10 of the Civil Procedure Code, to stay the trial of the second suit on the ground that the first suit was still pending.

The same view has been taken by the Calcutta High Court in *Deb Kumar Roy Choudhury v. Debnath Barna Bipra* (1). But in *Subal Chandra Chaudhury v. Mosaraf Ali* (2), the learned Judges, while approving of Sir Lawrence Jenkins' judgment in *Shital Prasad Mondal's case* (3) appeared to have made an order which was not consistent with the view that the previous suit was still pending. They observed that the permission to withdraw with liberty to bring a fresh suit must be construed in accordance with the wording of the order in each particular case, and that where the order was that the payment of costs was a condition precedent to the institution of the second suit failure to pay the amount before the institution of such suit effected a dismissal of the first suit. Upon the reasoning in *Shital Prasad Mondal's case* (3) we prefer to hold that until the conditions are complied with, the original suit still remains pending and the second suit though maintainable cannot be proceeded with by reason of section 10 of the Civil Procedure Code.

(1) (1921) 64 Ind. Cas. 738.

(2) (1917) 38 Ind. Cas. 476.

(3) (1914) 19 Cal. L. J. 529.

In this view of the case the order of the District Judge in second appeal 401 of 1925 cannot be supported. The suit was maintainable, but as the first suit was still pending the proper direction was that it be stayed. The appeal therefore succeeds.

There remains the application under section 115 of the Civil Procedure Code. The Munsif of Barh before whom the first suit must be still considered to be pending had jurisdiction under section 148 to extend the time for depositing the costs. In our view the order of the 15th August, 1923, merely meant "I give you time to pay within two months from this date and if you pay before that date you will be entitled to institute a fresh suit upon the same cause of action but if you fail then from the expiry of the time so granted this suit will stand dismissed." This was an order he was entitled to make under the Civil Procedure Code and, therefore, he was entitled to give an extension of time under section 148. The argument on the other side is that it was not an order to which section 148 applies and the authority of *Suranjan Singh v. Ram Bahal Lal*⁽¹⁾ was invoked. But in that case it was held that where a preliminary decree in a pre-emption suit fixed the time for payment, it was not open to the Court to resort to section 148, for the purpose of extending the time. It was observed that the extension of time effected a variation of the decree in the suit and that section 148 could not be called in aid. That, however, is not the case before us and we think that under the Civil Procedure Code time could have been extended by the Munsif if he had chosen to do so. Now although we are told that owing to the negligence of the karpardaz and the pleader's clerk the money could not be deposited within the time allowed, it does not appear that any evidence to that effect was given before the Munsif and we think that having regard to the fact that the sum was only Rs. 32 and that no attempt to pay was made

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till the 1st February following, the Munsif was justified in holding that no proper reason had been shown for the delay and in refusing to extend time to authorize the institution of the suit.

Therefore the only thing that remains for the plaintiff to do is to prosecute the suit as framed in the court where it was originally lodged or in such other court as is competent to try it. It will be that court's duty to continue the suit from the stage at which it was on the 15th August, 1923, and to dispose of it according to law.

The order in Civil Revision no. 510 of 1924 is modified. The declaration that the suit stands dismissed is set aside but the decision that no further time be allowed to the plaintiff to pay the costs incidental to the institution of a fresh suit is affirmed.

Each party will pay his costs both in the revision and in the second appeal. All orders as regards costs in the lower courts will stand.

KULWANT SAHAY, J.—I agree.

Appeal allowed.

Application allowed in part.

PRIVY COUNCIL.*

LALCHAND MARWARI

v.

MAHANTH RAMRUP GIR.

1925.

Dec., 5.

Evidence Act, 1872 (Act I of 1872), section 108—Presumption of date of death—Disappearance for over seven years—Hindu Law—Religious Institution—Suit by Mahanth to recover alienated properties of Math—Limitation—Indian Limitation Act, 1908 (Act IX of 1908), Schedule I, Article 144.

The mahanth of a math brought, on November 30, 1916, four suits to recover properties of the math alienated by his

* PRESENT: Lord Phillimore, Lord Blanesburgh, and Sir John Edge.