CIVIL REVISION.

Before Mr. Justice Mackney.

1937

Dec. 2.

DAW DWE AND ANOTHER v. U SAN HLA.*

Withdrawal of suit with liberty to file fresh suit—Suit for interest—Leave for fresh suit to include whole mortgage claim—"Formal defect"—"Other sufficient grounds"—Civil Procedure Code, O. 23, r. 1 (2) (a) and (b).

Clause (*b*) of O. 23, r. 1 (2) of the Civil Procedure Code is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. Clauses (*a*) and (*b*) are worded in a different manner and they are intended to cover different circumstances.

The plaintiff sued for interest alone due on a mortgage, but apprehending that when later he came to sue for the principal amount, the plea that the claim was barred under the provisions of Order 2, r. 2 of the Civil Procedure Code may be raised, he applied for leave to withdraw his suit with liberty to file a fresh suit in respect of the whole mortgage. *Held*, that under such circumstances it was proper for the Court to grant leave.

Bai Mahakor v. *Shah Bhikabhai*, I.L.R. 59 Bom. 114; *K.E.A.K.A. Sahib & Co.* v. *Adamsa*, I.L.R. 2 Ran. 66; *Venkata Shetti* v. *Ranga Nayak*, I.L.R. 10 Mad. 160, referred to.

Bhattacharya for the applicants.

Anklesaria for the respondent.

MACKNEY, J.—The plaintiff-respondent, U San Hla, sued the defendants-applicant, Daw Dwe and Peer Ahmed, in the Township Court of Insein for recovery of a sum of money being interest due on a mortgage by the defendants in his favour together with the amount of the municipal taxes paid by the mortgagee in order to prevent the land from being sold for default. The plaintiff announced in this plaint that at present he asked only for this relief reserving his claim to repayment of the principal of Rs. 500 to later date. In the course of the proceedings the plaintiff, who had originally not been represented by an advocate, engaged a lawyer and on his advice filed an application for leave to amend his plaint so as to include the recovery

* Civil Revision No. 158 of 1937 from the order of the Township Court of Insein in Civil Regular Suit No. 304 of 1936.

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of the amount due on the mortgage; that is to say, he wished to convert the suit into a mortgage suit. The learned Township Judge declined to allow an amendment because he thought that to do so would be to alter the nature of the suit entirely. He was of the opinion that the plaintiff's proper course was to obtain leave of the Court to withdraw his plaint with liberty to institute a fresh suit in respect of the mortgage in question. Accordingly the plaintiff prayed for such leave and the Court after hearing the parties granted leave to withdraw with liberty to file a fresh suit. In his order the learned Township Judge added the words "with costs." This was interpreted by the drawer of the decree to mean that it was the defendants that had to pay the costs of the plaintiff. This is obviously a mistake as is admitted by the learned counsel for the respondent. I am quite sure that the learned Township Judge intended that the plaintiff should pay the costs of the defendants. His order must be altered to make this clear.

The applicants object to the order of the Township Court on the ground that in granting leave to withdraw it exceeded its powers under Order 23, rule 1, sub-rule (2) of the Code of Civil Procedure, which reads as follows :

> "(2) Where the Court is satisfied—
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> (*a*) that a suit must fail by reason of some formal defect, or
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> (*b*) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim."

Learned counsel for the applicants argues that the weight of authority is in favour of the interpretation of

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the phrase "other sufficient grounds" in the sense of grounds *ejusdem generis* with a "formal defect." He argues that it cannot by any means be maintained that there was anything like a formal defect in the plaint as originally filed. I am myself inclined to doubt that the effect of this clause should be too rigorously restricted. The two sub-clauses (*a*) and (*b*) are worded in an entirely different manner and it seems to me that they are intended to cover different circumstances. With great respect I agree with the observations of the learned Chief Justice of the High Court of Bombay in *Bai Mahakor* v. *Shah Bhikabhai Sankalchand* (1). He points out that clause (*a*) says that the Court must be satisfied that the suit must fail by reason of some formal defect and clause (*b*) omits any reference to a failure of the suit. He observes :

> "I have no doubt whatever that clause (*b*) is not limited to cases in which the Court thinks that the suit must necessarily fail. There may be other sufficient grounds on which it is proper to allow the plaintiff to withdraw his suit. No doubt the two clauses must be read together, and one has in clause (*a*) an illustration of the sort of reason which the legislature thought would be sufficient, and in that way clause (*a*) may, to some extent, limit the generality of the words in clause (*b*), but I am not prepared to go further than that in limiting the very wide discretion which is conferred by clause (*b*)."

The only case of this High Court which has been brought to my notice is the case of *K.E.A.K.A. Sahib & Co.* v. *K.M. Adamsa* (2). In this case the plaintiff had instituted two suits on the same date of such a nature that it was possible that if he were successful in the first suit he might be debarred under the provisions of Order 2 rule 2 of the Code of Civil Procedure from succeeding in the second suit. He applied to the

(1) (1934) I.L.R. 59 Bom. 114. (2) (1924) I.L.R. 2 Ran. 66.

Court for liberty to withdraw both suits and institute a fresh suit in respect of the subject-matter of the two suits. His applications were rejected and the plaintiff applied to this High Court to revise the order rejecting the applications. Mr. Justice Lentaigne observed :

" In my opinion the provisions of Order 23, rule 1 (2), are intended to authorize the granting of relief *inter alia* in cases in which the formal defects rendering the relief desirable are defects of legal formalities prescribed by the Code or other such legal defects, and that in suitable case relief should be granted whether the defects arise from a mistake of law or from a mistake of fact. I may also add that even if the plaintiff did in fact realise that there was a doubt as to his legal right to institute two suits instead of one, I do not think that it would be any ground for refusing to allow him to correct a *bona fide* mistake".

Mr. Justice Lentaigne further observed :

" The expression ' formal defect ' must be given a very wide and liberal meaning and presumably as connoting defects of various kinds which are not defects affecting the merits of the case on substantial questions (including equities and estoppels) reasonably arising between the parties. The expression, as used in this rule, appears to be capable of such a wide meaning, and it is difficult to fix on any more restricted meaning which could have been reasonably intended by the Legislature."

Mr. Justice Lentaigne then at page 78 dealt with the argument

" that though the second suit might fail by reason of a formal defect under Order 2, rule 2, the same formal defect does not apply to the first suit which could be decreed in full notwithstanding any defect alleged in the case. So far as clause (*a*) of Order 23, rule 1 (2), is concerned, that might appear to be correct as regards the claim as originally framed in such suit ; but I think that the case would come within clause (*b*), when it is admitted or contended by the defendant that the cause of action of the first suit includes the claim of the second suit and that such portion of the claim on such cause of action must fail if the plaintiff is not given relief under Order 23, rule 1 (2). An

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amendment of the plaint might save a portion of that wider claim but it would not save it all."

These remarks seem to be not inapplicable to the present case. Mr. Justice Lentaigne accordingly set aside the order of the lower Court refusing to grant leave to withdraw and institute a fresh suit.

In the course of his judgment Mr. Justice Lentaigne referred to *Venkata Shetti* v. *Ranga Nayak* (1). I notice that this was a suit brought to recover the principal and interest due on a mortgage, which had been instituted after a suit brought to recover the interest only had been withdrawn with permission to file a fresh suit. It was argued that in spite of leave to withdraw having been given the second suit was barred. With this aspect of the case we are of course not concerned, but it is clear from the observations of the learned Judges who decided the case that they approved of the order of the original Court in allowing the first suit to be withdrawn. They say :

"The obvious intention of the Court which made the order was to allow the respondent to sue for principal and interest instead of compelling him to proceed with his claim for interest alone, in which case any second suit for the principal would have been met by the plea that the suit is barred by s. 43 of the Code"; (now Order 2 rule 2) "and if the contention now raised were to prevail, the anomaly would be presented of an order made by a competent Court as to *a matter within its discretion* to which order no legal effect could be given."

"Section 373" (now Order 23 rule 1) "was presumably intended to allow of mistakes or omissions being corrected within the discretion of the courts concerned and we do not think it necessary to hold that section 43 is a bar to the entertainment of the present suit."

In the present case it is quite possible that the respondent's plaint might appear defective in its method of

(1) (1887) I.L.R. 10 Mad. 160.

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seeking to attain the plaintiff's desires. The plaintiff who wished to recover the interest due without losing his rights as mortgagee feared that to persevere in the suit might result in its becoming impossible for him to recover the principal amount. That is surely a circumstance which would justify the Court in allowing him to withdraw his suit with leave to bring a fresh suit including a prayer for recovery of interest as well as one for recovery of the principal. Having regard to the consequences which might ensue there is no doubt that his plaint might be held defective in form, and, adopting the interpretation approved by the learned Chief Justice of Bombay in the case cited above, I am of the opinion that the Township Court exercised its discretion properly in granting the leave.

This application therefore is disallowed. The order of the Township Court is confirmed save that it shall be altered so as to make it clear that it is the plaintiff who should pay the costs in the Township Court in any case and as a condition of availing himself of the leave. The applicants shall pay the costs in this Court, advocate's fee two gold mohurs.