

ORIGINAL CIVIL.

*Before Mr. Justice Ba U.*MA SAN MYINT *v.* U TUN SEIN.*

1939

June 2.

Withdrawal of suit—Leave to file fresh suit—Leave granted on conditions—Payment of costs before filing fresh suit—Fresh suit filed without fulfilling condition—Suit void—Nature of permission granted—First suit withdrawn when order passed—Civil Procedure Code, O. 23, r. 1.

Where the plaintiff is allowed to withdraw his suit with liberty to file a fresh suit under O. 23, r. 1 (2) of the Civil Procedure Code on condition that on or before a specified date or before the institution of a fresh suit he pays the costs of the first suit to the defendant, then the payment of costs is a condition precedent and if he fails to fulfil the condition the second suit, if filed, is void *ab initio*.

The permission granted under O. 23, r. 1 (2) of the Code relates not to the withdrawal but to the right to bring a fresh suit. The withdrawal of a suit does not require the permission of the Court. The first suit is withdrawn when the order is passed, and is not kept pending till the costs are paid or till the second suit is filed.

Rachhpal Singh v. Sheo Ratan Singh, 118 I.C. 1929; *R. Fischer v. Mudaly*, I.L.R. 33 Mad. 258; *Shidramappa v. Nallappa*, I.L.R. 55 Bom. 206, followed.

Abdul Aziz v. Molla, I.L.R. 31 Cal. 965; *Nazir Hussain v. Nathu*, A.I.R. (1927) Lah. 159; *Shital Prosad v. Gaya Prosad*, 19 Cal. L.J. 528; *Syed Qazi v. Lachman Singh*, I.L.R. 5 Pat. 306, dissented from.

E Maung for the plaintiff.

Zeya for the defendant.

BA U, J.—This is a suit for a declaration that the plaintiff is the wife of the defendant and for partition and payment of her share out of the properties acquired by the defendant.

The plaintiff asked for a similar declaration against the defendant in Civil Regular No. 192 of 1937 of this Court; but subsequently her advocate asked for permission to withdraw the suit with liberty to file a fresh suit. In granting her the permission to withdraw the suit Sharpe J. passed the following order:

“ I dismiss the suit with costs, as being withdrawn, and give the plaintiff liberty to institute a fresh suit if she is so advised. I

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fix the advocate's fee at seven gold mohurs ; and I also make it a condition for the institution of a fresh suit that all the costs of the present suit must be paid to the defendant before the plaintiff is allowed to file a fresh suit."

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U E Maung on behalf of the plaintiff admits that the costs were not paid before the institution of the fresh suit and, in fact, according to U E Maung, the costs have not been paid up to date. Because of this one of the pleas now taken in defence is that the suit is void *ab initio*.

There is a conflict of decisions on this point. The Calcutta, Lahore and Patna High Courts hold one view, while the Madras, Bombay and Allahabad High Courts take another view.

In *Abdul Aziz Molla v. Ebrahim Molla* (1) Geidt and Mookerjee JJ. said :

" We may take it that the payment of costs was meant by the order to be a condition precedent to the bringing of a fresh suit.

But then the question arises, does that necessarily make the suit void *ab initio*, and will not the subsequent payment of the defendants' costs cure the undoubted irregularity ?

There is no express provision by the Indian Legislature as to the consequences of such a course of conduct. But we have referred to the rules of the Supreme Court, 1883. Order 26, rule 4, runs as follows : ' If any subsequent action shall be brought before payment of the costs of a discontinued action for the same, or substantially the same cause of action, the Court or a Judge may, if they or he think fit, order a stay of such subsequent action, until such costs shall have been paid.'

We think that the rule there laid down would be a fair rule for the Courts in this country to follow, in the absence of any statutory enactment in the matter, and that though a Court would be warranted in refusing to proceed with a suit like this when the facts are brought to its notice that the plaintiff had not complied with the order requiring payment of costs, yet there is nothing in the law to show that a suit instituted under such circumstances is

bad *ab initio* and must *ipso facto* be dismissed, if the payment ordered is made after its institution."

The decision in this case was supported by Chief Justice Sir Lawrence Jenkins in *Shital Prosad Mondal v. Gaya Prosad Dingal and others* (1) but on different grounds. The learned Chief Justice said :

"Though I agree with the results of the ruling in *Abdul Aziz Molla v. Ebrahim Molla* (2), I would base my decision in this case on somewhat different though not antagonistic reasons. The withdrawal was under section 373 of the Code of 1882 which provides that 'if at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff that the suit must fail by reason of some formal defect or that there are sufficient grounds for permitting him to withdraw from the suit with liberty to bring a fresh suit for the subject-matter of the suit, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit. If the plaintiff withdraw from the suit without such permission he shall be liable for such costs as the Court may award and shall be precluded from bringing a fresh suit for the same matter.' Here permission was given. Therefore, the last paragraph that I have read has no application, for it cannot be said that the plaintiff withdrew without such permission. He withdrew with the permission and the permission is under the section to withdraw from the suit with liberty to bring a fresh suit, that is to say, a permission with a sequel attached to it. The condition of such permission in this case was the payment of costs. Until the costs were paid the permission was not operative, and so there was no withdrawal with liberty to bring a fresh suit. The result was that until there was such withdrawal the former suit was still pending. This appears to me to be the literal meaning of the words of section 373 which is now reproduced in effect under Order XXIII, and is in accordance with the view of the English authorities on a cognate provision for, in *Edginton v. Proudman* (3) it was decided that where the plaintiff instead of paying costs went on with the original suit and obtained a verdict, the Court refused to set aside the verdict. When a plaintiff has obtained leave to withdraw upon payment of costs, it is his duty to pay the costs at once, for until they are paid there is no

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

(2) (1904) I.L.R. 31 Cal. 965.

(3) (1832) 1 Dowl. 152.

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withdrawal with the permission of the Court. In that view when the case came before the Munsiff he was not entitled to dismiss it. All he could do was to regard section 10 as a bar to his proceeding with the trial of the suit."

This decision was followed by the Patna and Lahore High Courts in *Syed Qazi Muhammad Afzal v. Lachman Singh* (1) and *Nazir Hussain v. Nathu* (2).

The point now under discussion came up for decision by the Madras High Court for the first time in *Robert Fischer and others v. Nagappa Mudaly and others* (3). At that time the only authority that was apparently available was the case of *Abdul Aziz Molla v. Ebrahim Molla* (4). Though they did not dissent from that decision, the learned Chief Justice White and Krishna-swami Ayyar J. observed that where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs on or before the specified date and he failed to do so, he was precluded from bringing a second suit and if such a suit was brought, it should be dismissed.

In a subsequent case, *Gollapudi Seshayya v. Nadendla Subbayya and another* (5), Phillips J. reviewing the cases cited above said :

"These cases all assume that the permission granted by the Court is not only permission to bring a fresh suit but also permission to withdraw the first suit, and that consequently until the condition is fulfilled the first suit is pending. This seems to me to overlook the provisions of Order 23, rule 1 (1) which gives a plaintiff power to withdraw his suit at any time without the permission of that Court. Consequently, I think that we must read the latter part of clause 2 (b) as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of

(1) (1925) I.L.R. 5 Pat. 306.

(3) (1909) I.L.R. 33 Mad. 258.

(2) A.I.R. (1927) Lah. 159.

(4) (1904) I.L.R. 31 Cal. 965.

(5) 47 Mad. L.J. 646.

the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers, only to the filing of the subsequent suit on certain conditions."

The view thus taken by the Madras High Court was followed by the Bombay and Allahabad High Courts in *Shidramappa Mutappa Biradar v. Mallaappa Ramchandrappa Biradar* (1) and *Rachhpal Singh v. Sheo Ratan Singh and others* (2). In the first case Patkar J. said :

"I am inclined to agree with the view of the Madras High Court and most respectfully dissent from the view of the Calcutta High Court. When once a suit has been withdrawn, it is no longer pending, and the permission given by the Court relates to the bringing of the fresh suit. * * *

The conditions attached to the permission to bring a fresh suit after the withdrawal of the first suit may fall under different categories according to decided cases, (1) that the plaintiff shall pay the costs before a certain date specified in the order, (2) that the plaintiff shall pay the costs before the institution of the second suit, and (3) that the plaintiff shall pay the costs without specifying the time of the payment. The present case falls under the second category as the condition imposed by the permission allowing the bringing of the second suit after the withdrawal of the first was to pay the costs before the institution of the second suit."

In the same case Baker J. said :

"Under Order 23, rule 1, clause (1), the plaintiff has an absolute right to withdraw his suit if he likes, and the permission granted under Order 23, rule 1, clause (2), relates not to the withdrawal but to the right to bring a fresh suit. With respect, I am unable to follow the reasoning in *Shital Prasad v. Gaya Prasad* (3). I do not see how where permission is given to withdraw from the suit with liberty to bring a fresh suit on condition of payment of costs, the former suit can be held to be pending until the costs are paid. In my opinion the permission relates not to the withdrawal but to the bringing of the fresh suit, and with respect I agree with the view of the Madras High Court in *Seshayya v. Subbayya* (4) that the latter part of Order 23, rule 1, clause (2) (b), must be read as referring not to permission to withdraw a suit as well as permission to institute a fresh suit, but merely as allowing the

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(1) (1930) I.L.R. 55 Bom. 206.

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

(2) 118 I.C. 929.

(4) 47 Mad. L.J. 646.

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Court to give permission to institute a fresh suit in place of the one which has been withdrawn. Inasmuch as the withdrawal of the suit does not require the permission of the Court, it must be taken that the first suit is withdrawn when the order is passed and that the permission granted refers only to the filing of the subsequent suit on certain conditions. In my opinion, it would be inconvenient to consider a suit which has been withdrawn as still pending, and with respect, the reasoning in the Madras cases commends itself to me rather than the reasoning in the Calcutta case."

In the second case Boys J. said :

"Once a plaintiff who has applied for the withdrawal of his suit has accepted the terms imposed by the Court, the case is withdrawn and is no longer pending and the plaintiff cannot institute a fresh suit without strictly complying with those terms."

With respect I am of opinion that the view taken by the Madras, Bombay and Allahabad High Courts is the correct view of the law.

As pointed out by Baker J. under rule 1 of Order 23, a plaintiff can withdraw a suit as a matter of right without the permission of the Court; but if he does it, he is then precluded from filing a fresh suit on the same cause of action. If he wants to withdraw the suit and at the same time wants to file a fresh suit on the same cause of action, he must resort to rule 2. Under the said rule he must ask for permission to withdraw with liberty to file a fresh suit. The Court may grant the permission asked for on "such terms as it thinks fit." The terms may be of any kind. They might be, as pointed out by Patkar J., "(1) that the plaintiff shall pay the costs before a certain date specified in the order, or (2) that the plaintiff shall pay the costs before the institution of the second suit, or (3) that the plaintiff shall pay the costs without specifying the time of the payment."

If the terms imposed are as in illustration (1) or (2), they then obviously refer not to the withdrawal of the suit but to the institution of a fresh suit. Once permission is granted to withdraw, the suit can no longer be regarded to be still existing. If in spite of the permission to withdraw being granted the suit were to be regarded as still pending, the position would be intolerable. The plaintiff would be able to keep the case pending as long as he likes and use it to the annoyance and prejudice of the defendant, and the defendant would be simply helpless. This, I do not think, could have been the intention of the Legislature in enacting rule 2, Order 23. The terms imposed in illustrations (1) and (2) are somewhat analogous to what clause 10 of our Letters Patent and clause 12 of the Letters Patent of the Calcutta, Madras and Bombay High Courts say.

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Where a part of the cause of action arises within the local limits of the ordinary original jurisdiction of any of the said High Courts, leave to institute a suit must first be obtained. Where leave is not first obtained and a suit is instituted, the suit is void. Leave to sue is a condition precedent to jurisdiction : *DeSouza and another v. Coles* (1).

Where, therefore, leave to bring a fresh suit on the same cause of action as in the first case is granted on payment of costs on or before a specified date or before the institution of a fresh suit, payment must be made before the specified date or before the institution of a fresh suit. If no payment is made, the second suit is void *ab initio*. The payment of costs is a condition precedent to the institution of a fresh suit. Where no time is fixed for payment of costs, then different considerations may arise. In the present case the

(1) 3 Mad. H.C. Rep. 384.

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order of Sharpe J. definitely stated that the costs of the plaintiff should be paid before the institution of the second suit and as no costs were paid before the institution, the present suit is, in my opinion, void.

For these reasons I dismiss the suit.

The question of costs is postponed till Monday at the request of the counsel for the defendant.