

Konkan Trading Company

Vs

Suresh Govind Kamat Tarkar and Others

Civil Appeal No. 1205 of 1986

(E. S. Venkataramiah, M. P. Thakkar JJ)

04.04.1986

JUDGMENT

VENKATARAMIAH, J. -

1. Has justice become the lip-aim of courts instead of their life aim ? Instead of dispensing justice is justice being dispensed with ? Is it a fact that only the spelling of the word (justice) is remembered and the content of the concept is forgotten ? Were it not so, would a court in its professed anxiety to do justice, dismiss a suit as incompetent on the ground that a sum of Rs 100 ordered to be paid as costs whilst granting leave to withdraw the earlier suit with liberty to file a fresh suit was deposited 'after' the institution of the fresh suit and not 'before' the institution thereof ?

2. Appellant-firm instituted a suit against the respondents. On the date of the institution of the said suit the appellant-firm had not been registered under Section 69 of the Indian Partnership Act, 1932, and the suit was liable to fail on this technical ground. The appellant-firm, therefore, prayed for permission to withdraw the said suit with liberty to file a fresh suit on the same cause of action under sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908. That application was granted by the court. The operative part of the order dated September 4, 1984 passed on that application read as under :

Under such circumstances this application is granted but on payment of costs of Rs 100 by the plaintiffs to the defendants. Suit is dismissed as withdrawn, with liberty to file a fresh suit.

3. The present suit, out of which this appeal by special leave arises, was filed subsequently on October 5, 1984. The appellant filed an application in that suit for an order of temporary injunction against the respondents. When that application came up for hearing it was pointed out that the appellant had failed to pay the costs of Rs 100 'before' filing the suit and so the suit was not maintainable. At that stage the appellant offered to pay the costs of Rs 100 which it was liable to pay under the order of the court dated September 4, 1984. On the respondents refusing to receive the costs an application was made before the trial court for permission to deposit it in the court by extending the time up to that date. The appellant deposited the costs of Rs 100 in the trial court on that date. That application was allowed by the trial court on April 12, 1985 by extending the time till January 16, 1985 and holding that the suit was maintainable. Aggrieved by the said just and fair order passed by the trial court, the respondents filed a revision petition before the High Court of Bombay, Panaji Bench (Goa) in Civil Revision Application 87 of 1985 questioning its correctness. The High Court exercising revisional jurisdiction, after hearing both the parties allowed the petition

holding that the suit was void ab initio since the costs of Rs 100 which had to be paid under the order dated September 4, 1984 had not been deposited before its institution. This appeal by special leave is directed against the said order of the High Court.

4. We have heard the learned counsel for the parties. Parties have cited before us a number of decisions : Gollapudi Seshayya v. Nadendla Subbayya (AIR 1924 Mad 877 : 47 MLJ 646), Shidramappa Mutappa Biradar v. Mallappa Ramachandrappa Biradar (AIR 1931 Bom 257 : 33 Bom LR 278 : ILR 55 Bom 206), Ramkrishna Timmappa Shetti v. Hanumant Patgavi (AIR 1950 Bom 113 : 51 Bom LR 757 : ILR 1949 Bom 426), Mast Ram Ram Charan v. Deputy Commissioner (AIR 1968 All 321), Binod Naik v. Chandrasekhar Padhi (AIR 1969 Ori 134 : 34 Cut LT 1305 : ILR 1968 Cut 802), Chikkahanuma v. Smt. Venkatamma (AIR 1971 Mys 167 : (1971) 1 Mys LJ 145) and Raja Traders v. Union of India (AIR 1977 MP 54 : 1976 MPLJ 713). We have carefully considered all the above decisions. Sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908 provides that where a court is satisfied that a suit must fail by reason of some formal defect or that there are 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 such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. While granting such permission, it is, therefore, open to a court to direct the plaintiff to pay the costs of the defendants. Even if the order for costs in a given case is construed as directing payment of costs as a condition precedent for filing a fresh suit, the defect, if any, may be cured by depositing in court or paying to the defendants concerned the costs within a reasonable time to be fixed by the court before which the second suit is filed. If the plaintiff fails to comply with the said direction, then it will be open to the court to reject the plaint, but if the amount of costs is paid within the time fixed or extended by the court the suit should be deemed to have been instituted validly on the date on which it was presented. This view appears to be in consonance with justice whatever may have been the views expressed on the subject by the various High Courts so far. It does not militate against any express provision of law but on the other hand it advances the cause of justice. This view is also in accord with the spirit behind Section 148 of the Code of Civil Procedure, 1908. All contrary views expressed by the various High Courts, therefore, stand overruled.

5. In the instant case, however, a reading of the order passed on September 4, 1984 does not even suggest that the costs of Rs 100 had to be deposited as a condition precedent before the institution of the next suit. It only means that the application for withdrawal of the suit had been granted and the plaintiff was liable to pay a sum of Rs 100 by way of costs. The word 'but' in the clause 'this application is granted but on payment of costs of Rs 100...' in the order permitting the withdrawal of the suit cannot in the circumstances be construed as imposing a condition precedent for the filing of the fresh suit. There is no warrant for taking a hypertechnical rigid view which results in denying to a person access to justice and deprives him of his legal rights more so when it is possible to take a liberal view which promotes the ends of justice. The trial court in obedience to this principle repelled the unjust plea urged by the defendants. But alas, the High Court, in exercise of revisional jurisdiction tripped into reversing the justice oriented conclusion reached by the trial court.

6. We, therefore, allow this appeal, set aside the judgment of the High Court and restore the order of the trial court. The trial court will now proceed to dispose of the suit in accordance with law. There will be no order as to costs.

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