MYSORE HIGH COURT

Chikkahanuma

Vs

Venkatamma

Second Appeal No. 101 of 1965

(V.S. Malimath, J.)

18.11.1970

JUDGMENT

V.S. Malimath, J.

1. This is a Second Appeal by the 1st plaintiff against the Decree passed by the Civil Judge, Kolar, in R. A. No. 115/1961, modifying the decree passed by the Munsiff. Kolar, in O. S. No. 29/1960. Respondent 3 in the Second appeal has also filed his cross-objections in so far as the decree by the Civil Judge has gone against him.

2. The suit relates to three items of properties. The suit is for a declaration of the title of plaintiff-1 and possession in respect of items 2 and 3. In respect of item 1, the suit is for a declaration of title of both the plaintiffs and for possession. The plaintiffs had previously filed O. S. No. 351/1959 for declaration of title and for permanent injunction in respect of the first item of suit schedule property only. The plaintiffs sought permission to withdraw from the suit with liberty to institute a fresh suit in respect of the same subject-matter. The court granted permission on the 14th of December, 1959 subject to the condition that the plaintiffs pay half the costs to Gidda (defendant 1 in the present suit) before instituting a fresh suit. The relevant portion of the order reads as follows:

> "Plaintiff is permitted to withdraw and file a fresh suit. The suit is thus disposed of with half the costs to be paid to defendant 2 by the plaintiff. Plaintiff to pay the costs to defendant 2 before his taking out the said suit. ₹ 10-00 will be taxed against the plaintiff as Advocate's fee. No order as to costs as between plaintiff and defendant 1."

Defendant 2 referred to in the aforesaid order is Gidda, defendant-1, in the present suit. The entire amount of costs which the plaintiffs were required to pay to Gidda was not paid by the plaintiffs before the present suit was instituted on 13-1-1960 The defendants by their written statement resisted the suit on various grounds. They contended that the suit is incompetent so far as item No. 1 is concerned as the plaintiffs have not paid the entire costs which the plaintiffs were

directed to pay before the institution of a fresh suit. In substance, their contention is that the plaintiffs not having complied with the terms of the permission that was granted under Order 23, Rule 1 (2). Civil Procedure Code in O. S. No. 351/1959, the present suit is liable to be dismissed in so far as it relates to suit item No. 1. It is necessary to note that before the hearing of the suit was concluded, the plaintiffs have paid the entire costs as per the order passed in O. S. No. 351/1959. Therefore, though the terms of the order passed by the court under Order 23 Rule 1 (2), Civil Procedure Code in O. S. No. 351 of 1959 were not complied with on the date on which the present suit was instituted, the said terms were fully complied with before the hearing of the present suit was concluded. The learned Munsiff made a decree in favor of the plaintiffs as praved for. In view of the act that the entire costs were paid before the hearing of the suit was concluded, the learned Munsiff overruled the contention of the defendants that the suit is incompetent in so far as it relates to suit item No. 1.

3. Defendants No. I challenged the decree passed by the learned Munsiff in the court of the Civil Judge, Kolar. The learned Civil Judge confirmed the decree of the trial court in so far as suit items 2 and 3 are concerned. He. however, allowed the appeal of defendant 1 in regard to suit item No. 1 and dismissed the suit of the plaintiffs in regard to suit item No. 1. The learned Civil Judge came to the conclusion that as the costs were not paid by the plaintiffs before the institution of the present suit, the suit is not competent even though the costs have been subsequently paid.

4. Plaintiff-1 has challenged the decree passed by the learned Civil Judge in so far as suit item No. 1 is concerned. Respondent-3 has filed his cross-objections in so far as items 2 and 3 are concerned.

5. The learned counsel for the appellant firstly contended that the learned Civil Judge committed an error of law in dismissing the suit in regard to suit item No. 1 on the ground that the costs awarded in O. S. No. 351/1959 were not paid before the institution of the present suit. It was urged that though the costs were not deposited before the institution of the present suit, the entire costs were paid before the hearing of the suit was concluded. It was contended that even if the suit is deemed to have been instituted only on the date on which the entire costs were paid by the plaintiffs, the suit is still within the limitation. It was submitted that failure to pay costs before the institution of the present suit in this case was only a curable irregularity which irregularity was cured by subsequently paying the entire costs before the conclusion of the hearing of the suit.

6. Order 23, Rule 1. Civil Procedure Code reads as follows:

> "(1) At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim.
> (2) Where the Court is satisfied- (a) that a suit must fail by reason of some formal defect, or
> (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.

(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(4) Nothing in this rule shall be deemed to authorise the court to permit one of several plaintiffs to withdraw without the consent of the others.

(5) Where the plaintiff in a suit instituted or conducted under the provisions of Rule 8 of Order 1 of this Code or all plaintiffs therein if there are more plaintiffs than one, apply for permission to withdraw the suit, notice of such application shall be given in the manner prescribed by sub rule (3) of Rule 8 of Order 1 of this Code for issue of notice of institution of the suit, and the cost of such notice shall be borne by the plaintiff or the plaintiffs, as the case may be. If upon such application being made a defendant in the same suit haying the same interest as that of the plaintiffs applies for permission to be transposed as plaintiff to conduct the suit further, he shall be permitted to do so and the plaintiffs application dismissed."

It is clear from sub-rule (2) of Order 23, Rule 1, that the court may impose suitable terms for granting necessary permission to the plaintiff to institute a fresh suit in respect of the subject-matter of the said suit. When permission is granted on terms, the said terms must be fulfilled before a second suit is instituted on the basis of such a permission. The plaintiff can exercise his right of instituting a second suit only when he satisfies the conditions subject to which alone the permission was granted under Order 23, Rule 1 (2), Civil Procedure Code Order 23, Rule 2 lays down that if a fresh suit is instituted on permission granted under Order 23, Rule 1, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted. There is no provision in the Civil Procedure Code which, specifically lays down that if a suit is withdrawn with liberty to file a fresh suit, then the fresh will not be competent unless the terms on which the permission was granted under Order 23, Rule 1 (2), Civil Procedure Code have been complied with. It follows from the language of Order 23, Rule 1 (2) that the terms on which permission is granted must be complied with before instituting a fresh suit. Otherwise, the imposition of the terms for granting permission to withdraw from the suit with liberty to institute a fresh suit would become meaningless.

7. The important question for consideration, however, is as to what is the proper order that the court should pass if a fresh suit is instituted without complying with the terms imposed by the court for granting permission under Order 23, Rule 1 (2), Civil Procedure Code That in my opinion, depends to a great extent on the nature of the terms imposed for granting permission under Order 23, Rule 1 (2). If the court while granting permission under Order 23, Rule 1 (2) merely directs the plaintiff to pay the costs, then a fresh suit can be filed without paying the costs to the defendant, leaving it to the defendant to realise the costs in accordance with law. In such cases, the fresh suit filed without paying the costs can neither be rejected nor dismissed on the ground that the costs have not been paid. In such cases, the payment of costs is not a condition precedent to be fulfilled before instituting a fresh suit. If permission is granted under Order 23, Rule 1 (2) on condition that the plaintiff pays the costs to the defendant before a specified date and a fresh suit is filed after that date without paying the costs ordered, the fresh suit is clearly incompetent. This type of cases also do not therefore, confront any difficulty. The problem

however arises in case where permission is granted under Order 23, Rule 1 (2) permitting the plaintiff to withdraw from the suit with a liberty to institute a fresh suit in respect of the same subject matter on payment of costs before the institution of a fresh suit. The question to be considered is as to whether such a fresh suit is liable to be rejected or liable to be dismissed. Order 7, Rule 11, Civil Procedure Code which provides for rejection of plaints reads as follows:-

> "11. The plaint shall be rejected in the following cases.-
> (a) where it does not disclose a cause of action;
> (b) where the relief claimed is undervalued, and the plaintiff, on being required by the court to correct the valuation within a time to be fixed by the court, fails to do so;
> (c) Where the relief claimed is properly valued, but the court-fee actually paid is insufficient and the plaintiff does not make good the deficiency within the time, if any, granted by the court.
> (d) Where the suit appears from the statement in the plaint to be barred by any law."

If a plaint is rejected under Order 7, Rule 11, Civil Procedure Code the same shall not preclude the plaintiff from presenting a fresh suit in respect of the same cause of action in view of Order 7, Rule 13, Civil Procedure Code Order 7, Rule 13 will not apply to cases where the suit is dismissed, but not rejected. Order 7, Rule 11 enumerates four categories of cases when the plaint shall be rejected. The conditions specified in Order 7, Rule 11 are all in the nature of conditions precedent which have to be satisfied before the institution of a suit. The said provision is, however, not exhaustive. The plaints can be rejected if circumstances analogous to those enumerated under Order 7 Rule 11, Civil Procedure Code exist. There is an essential difference between the rejection of a plaint and the dismissal of a suit, which difference has been throughout maintained in the Code of Civil Procedure. Rejection takes away the very basis of the suit. The effect of rejection is as though the suit was never filed at all. In the case of dismissal of a suit, the existence of the suit is recognized and the termination of such a suit is indicated by the order of dismissal. As already mentioned, if certain terms are imposed while granting permission under Order 23 Rule 1 (2), those terms have to be complied with before a fresh suit is instituted on the basis of such a permission. The fulfilling of those conditions is a condition precedent; the fulfillment of which alone entitles the plaintiff to institute a fresh suit. If a suit is instituted without fulfilling the conditions precedent for the institution of a suit, it cannot be deemed that there is an institution of any suit. If there is no suit instituted, the question of dismissing the suit does not arise. In such cases, the only proper order that the court can therefore pass is to reject the plaint on the ground that the condition precedent for instituting the suit has not been fulfilled. If a plaint is presented without fulfilling the conditions precedent for the institution of the suit, there is no institution of the suit in law. In such cases, the plaint presented has to be rejected. Similar view has been taken in dealing with suits presented without issuing the notice required to be given under Section 80, Civil Procedure Code Section 80, Civil Procedure Code provides that no suit shall be Instituted against the Government or against a public officer in respect of any act purporting to be done by such an officer in his official capacity, until the expiration of two months next after notice in writing has been given. It is clear from Section 80 that giving of the notice contemplated under Section 80 is a condition precedent which has to be fulfilled before the institution of a suit against the Government or a public servant. The same is also the position, in the present case, which required the plaintiffs to pay the costs of the defendant before

instituting a fresh suit. *In Bhagchand Daodusa Gujarathi v. Secy, of State for India*[1], the Privy Council while dealing with a suit instituted against the Secretary of State for India without issuing a notice under Section 80, Civil Procedure Code observed as follows:

> "The consequence is that the appellants' present position in regard to the taxes imposed on them is as if their action had never been brought. It was unsustainable in limine. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise." It is clear from the observation of the Privy Council that if a plaint is presented without the requisite notice under Section 80, it is as though there is really no institution of the suit at all, the condition precedent for instituting the suit not having been complied with. The principle laid down by the Privy Council was applied by the Andhra Pradesh High Court *in Mohd, Hasham v. Hyderabad Municipal Corpn*[2]. to a case governed by Section 447 of the Hyderabad Municipal Corporation Act, which section is substantially similar to Section 80 of the Code of Civil Procedure . Their Lordships relying on the Privy Council judgment held that if a suit is brought without issuing the requisite notice, the only proper order which the court can pass is to reject the plaint and not to dismiss the suit.

The same view is taken by the Allahabad High Court in *Bachchu Singh v. The Secy, of State for India in Council*[3] wherein it is held that non-compliance with the provisions similar to Section 80, Civil Procedure Code involves the rejection of the plaint and not dismissal of the suit. The principle of law to be gathered from these decisions is that if a condition precedent for the institution of the suit is not satisfied before the presentation of the plaint, there is no institution of a suit in law, which can be dismissed. The only proper order, therefore, in such cases is to reject the plaint. As in law there is no suit instituted, the question of dismissing the suit does not arise. The said principle equally applies to the present case. In the present case, the plaintiffs were required to pay the costs of the defendant before instituting a fresh suit on the same cause of action. The plaintiffs instituted the suit without fulfilling the condition imposed for the institution of a fresh suit. Though there is a presentation of a plaint, there is in law, no institution of a suit. Therefore, the proper order that could be passed in such a case is one of rejecting the plaint and not of dismissing the suit.

8. As the plaintiffs in the present case instituted the suit without paying the costs ordered, which was a condition precedent for the institution of the suit, the court could have rejected the plaint. But, as a matter of fact, the court did not reject the plaint. Before the conclusion of the hearing the plaintiffs paid the entire costs ordered

[1] AIR 1927 PC 176 [3](1903) ILR 25 All 187

[2] AIR 1958 And Pra 102

and fulfilled the condition which they were required to fulfill before the institution of a fresh suit. If the learned Munsiff had rejected the plaint in this case, the plaintiffs would have paid the entire costs and thereafter instituted a suit. The rejection of the plaint on the ground that they had not paid the costs ordered could not have come in the way of their instituting a fresh suit in view of the provisions contained in order 7, Rule 13, Civil Procedure Code, which clearly states that a mere rejection of a plaint under Order 7 Rule 11, Civil Procedure Code does not by itself preclude the presentation of a fresh plaint in respect of the same cause of action. As, before any

action could be taken by the court for rejecting the plaint, the plaintiffs fulfilled the condition precedent by paying the entire costs ordered, it would have been an idle formality for the learned Munsiff to reject the plaint in as much as the very next moment the plaintiffs could have presented a fresh plaint. That plaint, it is obvious, that the court could not have rejected on the ground that the costs ordered were not paid. There was, therefore, no difficulty for the learned Munsiff in treating the suit as having been instituted on the date on which the condition precedent was fulfilled by the payment of the entire costs ordered while granting permission in the previous suit under Order 21 Rule 1 (2), Civil Procedure Code particularly when the suit was not barred by limitation on the date on which the entire costs were paid. The rules of procedure must be so construed and applied as to advance the cause of justice and not to defeat the same. If the plaint is rejected, then a fresh plaint can be presented after fulfilling the required conditions. Therefore, if before the plaint is rejected, the plaintiff pays the costs ordered and thereby fulfils the required conditions subject to which permission was granted under Order 23, Rule 1 (2), Civil Procedure Code it would not be proper to reject the plaint. The court should treat the plaint as having been presented on the date on which the costs were paid.

9. The view I have taken accords with the view taken by Justice Bishan Narain *in, Mela v. Labhu*[1]. The Allahabad, Nagpur and Calcutta High Courts have also come to similar conclusions though for different reasons. *In Jadu Teli v. Mahboob*[2], Chief Justice Sulaiman has expressed a similar view as follows:-

> "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."

In Bhagirthi v. Babvo Vivian Bose[3], A. J. C. has laid down as follows:

> "Where a plaintiff has been allowed to withdraw a suit under Order 23 Rule 1 with liberty to bring a fresh suit on condition that he pays the defendant's costs, but the order fixes no date of payment of costs to the defendant, it is an irregularity not affecting the merits and not resulting in prejudice or injustice and as such curable under Section 99, Civil Procedure Code or the principles underlying it. But the second suit must be treated as having been instituted on the day the money is paid and if the money is paid after the period of

[1] AIR 1955 Pun 97
[2] AIR 1933 All 810
[3] AIR 1935 Nag 56

> limitation for the suit expires, the suit must be dismissed. This does not however mean that the court is bound to keep the second suit pending until the period of limitation expires."

In Amir Hushen v. Abdul Bari Khan[4], Justice Mukherjee also took a similar view. In that case, the plaintiff was permitted to withdraw from the suit with liberty to sue afresh in respect of the same cause of action, if not otherwise barred by limitation. The contesting defendants were to get costs which was made condition precedent to the institution of a fresh suit. The second suit was filed

on the 13th of January, 1939 and both the parties adduced whatever evidence they had to adduce on 9th May, 1939. On the 12th of May, 1939, the plaintiff deposited the costs in Court when the arguments were heard. On these facts Justice Mukherjee held that the new suit must be taken to be instituted only on the day when the condition of the payment of costs was complied with.

10. The learned counsel for the 3rd respondent relied upon a decision of the Bombay High Court reported *in Ramkrishna Timmappa Shetti v. Hanumant Patgavi*[5] and contended that the Bombay High Court has taken the opposite view in the said decision. I find it difficult to accede to this contention in view of what has been observed by the Bombay High Court in para. 10 of its judgment which reads as follows:

> "(10) But the position is somewhat complicated in the present instance by the fact that while the appeal against the dismissal of the suit was pending in the District Court, the learned pleader for the plaintiff offered and the learned pleader for the defendant accepted the payment of the costs and filed a purshis to the effect:
> "That the plaintiff had fulfilled the conditions laid down as a precedent of his being entitled to file the suit and that therefore the suit may now be taken as competent from this date."

The question is what is the effect of this purshis which was jointly submitted to the court by the pleaders on both sides. We do not wish to express any opinion as to the effect of the payment of costs after the institution of the suit, although it was held by Divatia, J. in the case of *Ramabai v. Shripad Balwant*[6], referred to above, that in a case arising under Order 33, Rule 15, nonpayment of costs before the institution of the second suit was fatal to the jurisdiction of the court to proceed with the suit and that subsequent payment would not cure the defect. But we desire to confine ourselves to the position as it arises in this case viz. as to what is the effect on the second suit, if the costs are paid and accepted by the defendant in fulfillment of the conditions imposed for the institution of the second suit. In our view such action on the part of the defendant removes the bar for the institution of the second suit, a bar which was imposed in his interest and for his benefit. It is open to a party to renounce the benefit that a law or a contract confer upon him provided such renunciation is not opposed to the principles of public policy." On the facts of that case, the Bombay High Court did not consider it necessary to express any opinion as to the effect of the

[4] AIR 1943 Cal 560 [6] ILR 59 Bom 733 : AIR 1935 Bom 421
[5] AIR 1950 Bom 113

payment of costs after the presentation of the plaint. Therefore, this decision is not of assistance for the 3rd respondent in the present case. The learned counsel for the 3rd respondent next relied upon a decision of the Rangoon High Court *in Ma San Myint v. U Tun Sein*[6], Justice Ba U held in that case that where leave to bring a fresh suit on the same cause of action is granted on payment of the costs on or before a specified date or before the institution of a fresh suit, such payment of costs is a condition precedent to the institution of a fresh suit. If no payment is made, the second suit is void ab initio. To the same effect is the view taken by the Madras High Court in the case reported *in Gollapuri Seshayya v. Nadendla Subbavya*[7], relied upon by the learned counsel for the 3rd respondent. Justice Phillips of the Madras High Court held that where a suit was withdrawn with leave to bring a fresh suit on condition of paying costs to the defendant, but the costs were not paid until after the trial of the second suit, the second suit was barred. The next

decision relied upon by the learned counsel for the 3rd respondent is the one reported in *Sajeed Gul v. Mashal*[8], Justice Ram Labhaya of the Peshawar High Court held that where the plaintiff has been allowed to withdraw his suit and is permitted to bring a fresh suit on condition of his paying the costs of the suit to the defendant before the institution of the fresh suit, the second suit would not be competent if the condition precedent to the institution of such a suit has not been fulfilled. In the aforesaid decisions of the Rangoon, Madras and Peshwar High Courts, their Lordships have not considered the question as to whether the plaint is liable to be rejected or as to whether the suit is liable to be dismissed if the costs ordered while granting permission under Order 23, Rule 1 (2), have not been paid before the institution of a fresh suit. The question as to whether a plaint in those circumstances is liable to be rejected under Order 7, Rule 11, in which case a fresh plaint can be presented after complying with the conditions has not been considered in all those cases. It is also clear from the facts in those cases that their Lordships did not consider the effect of the payment of costs and the fulfillment of the conditions thereby, though not before the presentation of the plaint, but during the pendency of the suit and before the suit was either rejected or dismissed. I am clearly of the opinion that it the condition precedent for the institution of the suit has not been fulfilled by payment of the costs ordered, the only consequence that would follow is of a rejection of a plaint and not of a dismissal of a suit. If the consequence is only of a rejection of a plaint, the same does not bar presentation of a fresh plaint after fulfilling the requisite conditions in view of the clear provisions of Order 7, Rule 13, Civil Procedure Code If the consequence is only of a rejection, which does not bar presentation of a fresh plaint. I am of opinion that it would be a mere idle formality to reject the plaint if, during the pendency of the suit and before the termination of the proceedings, the entire costs are paid thereby fulfilling the requisite conditions for the institution of the fresh suit. The decisions of the Bombay, Rangoon, Madras and Peshwar High Courts are therefore clearly distinguishable. For the reasons stated above, I find it difficult to agree with the contention of the learned counsel for the 3rd respondent.

11. In this case, the costs ordered by the learned Munsiff while granting permission to withdraw from the suit with liberty to institute a fresh suit were not paid before the institution of the present suit. The costs were, however, paid before the termination of

[6] AIR 1939 Ran 378 [8] AIR 1947 Pesh 43
[7] AIR 1924 Mad 877

the present suit before the learned Munsiff. On the date on which the costs were paid,
the suit was well within the limitation. The learned Munsiff was therefore right in not rejecting the plaint or dismissing the suit on the ground that the costs ordered were not deposited before the institution of the suit. The learned appellate Judge was clearly in error in holding that the condition precedent for the institution of the suit not having been fulfilled by payment of the costs ordered, the suit was liable to be dismissed notwithstanding the fact that the costs ordered were paid in the trial court, before the conclusion of the hearing of the suit.

12. It was next urged that though plaintiffs 1 and 2 together have claimed title in respect of suit item No. 1, the present second appeal having been filed only by plaintiff 1, the appeal of the 1st plaintiff is not entitled to succeed in regard to suit item No. 1. It is necessary to note that plaintiff 2 has been impleaded as respondent 1 in this second appeal. Merely because plaintiff. 2 has not joined in preferring the second appeal along with plaintiff No. 1, the appeal of plaintiff 1 cannot be dismissed. It is clear from the provisions of Order 41 Rule 33, Civil Procedure Code that this

court can grant a decree declaring the title of plaintiff 1 (appellant 1) and plaintiff 2 (respondent 2) in respect of suit item No. 1 and also for possession. There is therefore no substance in this contention of the learned counsel for respondent 3.

13. Respondent 3 has filed his cross-objections in regard to the decree passed by the court below in respect of suit items 2 and 3. Both the courts, after proper assessment of the evidence on record have concurrently held that plaintiff 1 has established his title in respect of these two items of properties. The complaint of the learned counsel for respondent 3 is that the burden of proof has been wrongly placed. Both the parties have led evidence in support of their respective contentions. No complaint was made in the two courts below in regard to the placing of the burden of proof. In these circumstances, the complaint of the learned counsel for respondent 3 about placing of the burden of proof cannot be entertained for the first time in second appeal particularly when no prejudice has been caused, both the parties having led evidence in support of their respective cases. The finding recorded by the learned Civil Judge in regard to title is a finding of fact which is not liable for interference in Second appeal. The cross-objections filed by respondent 3 in regard to suit items 2 and 3 are therefore liable to be dismissed.

14. For the reasons stated above, R. S. A. No. 101/65 is allowed. The decree passed by the learned Civil Judge in regard to suit item No. 1 is set aside and the decree of the learned Munsiff is restored. The cross-objections filed by respondent 3 fail and the same are dismissed. The parties shall bear their respective costs in the appeal and the cross-objections in this Court.

Appeal allowed.