MADHYA PRADESH HIGH COURT

Raja Traders

Vs.

Union of India

Civil Revision No.416 of 1973
(Shiv Dayal, C.J. and U.N. Bhachawat, J.)

27.08.1976

JUDGMENT

Shiv Dayal, C. J. (Opinion of Division Bench D/-21-8--1976)

1. The question referred to this Bench is

> "Whether non-payment of the costs, (which were directed to be paid by the plaintiff to the defendant when permission was granted under Order 23, Rule 1 (2) of the Civil Procedure Code for withdrawing from the suit with liberty to institute a fresh suit,) before filing of a fresh suit, renders the suit non-tenable, or whether the non-payment of the costs is a mere irregularity and does not affect the tenability of the suit irrespective of the fact whether the costs were paid before or after the period of limitation has expired." (Parenthesis is mine.)

2. The question is a composite one. While dealing with it we would endeavor to analyze and to give our answer with respect to each component.

3. M/s. Raja Traders instituted a suit (Civil Suit No. 6 of 1970) on the small cause side in the Court of the District Judge Jagdalpur. That suit was against the Union of India in respect of a transaction with the South Eastern Railway. The plaintiff realizing that a notice under Section 80 (b) of the Civil Procedure Code having not been given to the General Manager of the said Railway, but was given to the Chief Commercial Superintendent (Claims) of the said Railway, applied for permission of the Court to withdraw from the suit with liberty to institute a fresh suit on account of the above formal defect. The defendants opposed that application. The trial Court passed the

following order:-

> "The plaintiff is permitted to withdraw from this suit with liberty to institute a fresh suit in respect of the subject-matter of this suit. The plaintiff shall bear his own costs of this suit as well as that of the defendant so far incurred. The fresh suit of the plaintiff, if any, shall be maintainable only if the cost ordered above is paid up before filing of such suit. The suit of the plaintiff is dismissed as withdrawn."

That order was passed on September 2, 1971. On July 1, 1972, the fresh suit was instituted against (1) Union of India, and (2) M/s. Patny Transport and Company, Agent Transporters for South Eastern Railway, Jagdalpur, District Bastar, Madhya Pradesh. In paragraph 7 of the plaint the fact of withdrawal of the suit with permission to institute a fresh suit (Civil Suit No. 6 of 1970) is mentioned and it is also stated that the plaintiff served a legal notice to defendant No. 1, through the General Manager, South Eastern Railway and Central Railway and also to defendant No 2. However, costs were not paid to the defendant before or at the time of institution of the fresh suit. On September 22, 1972, the second defendant raised a preliminary objection and prayed for dismissal of the suit. His objection was that the plaintiff had not paid costs of the earlier Civil Suit No. 6 of 1970, which was a condition precedent for institution of the fresh suit. The fresh suit brought without payment of costs is void ab initio. Payment of costs after filing of the fresh suit does not save it. Moreover, now the payment of costs cannot be accepted as the time-limit has already passed and the suit will be barred by limitation on the date on which payment of costs will be made. This suit will be supposed to be presented in the Court on the date on which the costs will be paid and the time of limitation for the suit has already elapsed.

4. On October 28, 1972, the plaintiff applied for permission to deposit the costs and also applied for condonation of the delay. These applications were opposed by the second defendant. By its order, dated January 12, 1973, the trial Court accepted the objection and dismissed the suit. In the same order the trial Court rejected the plaintiff's application for permission to deposit the costs and for condonation of delay. It appears that defendant No. 1 was not served with notice of the fresh suit.

5. Aggrieved by dismissal of the suit, the plaintiff preferred this revision under Section 25 of the Small Cause Courts Act. It was placed before Bhave, J. for hearing. He

found that there was divergence of judicial opinion among different High Courts and he did not find the decision of Bose, J. in *Bhagirathi v. Babvo,* [1] as conclusive. He, therefore, referred the matter to a larger Bench.

6. Shri K. M. Agarwal, learned counsel for the plaintiff, contends that the fresh suit was not barred and the trial Court was in error in thinking that it has no jurisdiction to try it; secondly, the new suit is independent of the earlier one, as in the fresh suit another defendant has been joined, and thirdly, in the alternative the Court below ought to have given the plaintiff benefit of Section 14 of the Limitation Act. We are not concerned with the last two points, as the reference is limited to the first.

7. It is clear from the scheme of Order 13. Rule 1 of the Code that the plaintiff can under sub-rule (1) as a matter of right, withdraw his suit without any permission of the Court. But, then he will be precluded from instituting any fresh suit in respect of the same subject-matter because of the bar enacted in sub-rule (3). The position of sub-rule (2) is different. Under this Rule the Court is empowered to grant permission to the plaintiff to withdraw from the suit with liberty to institute a fresh suit in respect of the same subject-matter. While doing so, the Court may impose "such terms as it thinks fit". However, it is not further enacted in this sub-rule that the plaintiff shall be precluded from instituting any fresh suit until the plaintiff fulfils those terms. The expression "on such terms as it thinks fit" merely empowers the Court to impose the terms which the plaintiff has to fulfill. The plaintiff is bound to fulfill those terms. Until and unless he complies with those terms, his suit will not proceed, but that is not the same thing as to say that he is precluded from instituting any fresh suit "in respect of such subject-matter" as is the language implied in sub-rule (3). In our opinion, this distinction is crucial.

8. Where the Court has inherent jurisdiction to try a suit, the plaintiff can be precluded from bringing the suit only by an express provision enacting the bar. In the case of withdrawal under sub-clause (1), the plaintiff could not be precluded from bringing a fresh suit if sub-rule (3) were not enacted. There is no other provision of law by which the plaintiff can be precluded from bringing a fresh suit in respect of the same cause of action.

9. The question is whether there is any bar to a suit, which is withdrawn under sub-rule (2)? No such provision has been placed before us, nor are we aware of any. Sub-

rule (2) does not provide that the plaintiff shall be precluded from bringing a fresh suit until he satisfies the terms on which he was permitted to withdraw from the suit under sub-rule (2) and, sub-rule (3) in terms applies only to sub-rule (1) but it has no application to sub-rule (2). On this analysis it must be said that it is only when the plaintiff withdraws his suit under sub-rule (1), i. e., without permission to bring a fresh suit, he is precluded from bringing a fresh suit.

10. In this context it is pertinent to turn to the provisions of Order 33, Rule 15 of the Code. It enacts

> "an order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the State Government and by the opposite party in opposing his application for leave to sue as a pauper."

(Underlined by us).
When this language is compared with that of sub-rule (2) of Order 23, Rule 1, the distinction becomes prominent enough. Under Order 33, Rule 15, the bar is imposed, which precludes the plaintiff from bringing a suit, unless he first pays the costs under the rigor of that rule. But, there is no such impediment to the institution of a fresh suit envisaged in Order 23, Rule 1 (2). Therefore, the jurisdiction of the Court is not affected. The non-fulfillment of the terms does not stand in the way of the Court's jurisdiction to entertain the suit. It follows from this that non-performance of the terms imposed by the Court in the earlier suit while granting permission, will be a mere "irregularity", the effect of which will be that the suit will not proceed further until and unless the irregularity is cured. i.e. unless and until the terms are complied with, but, the existence of such irregularity does not render the suit void *ab initio* and, consequently, if the fresh suit on the date of its institution is within the limitation prescribed by the law for institution of the fresh suit, it will not be dismissed as time barred merely because when the terms were complied with the limitation prescribed by the law had run out. The view we have taken was also taken as far back as in 1904 by Geidt and A. Mookerjee, JJ. in *Abdul Aziz Molla v. Ebrahim Molla,* [2] That decision was followed in *Narsingh v. Nathuji,* [3] The same view was taken in *Deb Kumar Roy Choudhary v. Debnath Bama Bipra,* [4] which was relied on in Mast *Ram Ram Charan*

v. Deputy Commissioner, Bahraich, [5] We respectfully concur in the view taken in these decisions. In our opinion the procedure suggested by Bishen Narain, J in *Mela v. Labhu,* [6] should be followed. It is in these terms. Therefore, if a suit is filed without payment of costs when liberty to file it has been given under Order 23 Rule 1 (2), then, in my opinion it merely amounts to an irregularity in the initial procedure which does not affect ale inherent jurisdiction and competence of the Court to entertain a suit. . . . . .

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I am therefore of the opinion that in such circumstances the Court should exercise its discretion and stay the proceedings till the plaintiff fulfils the required conditions instead of rejecting the plaint immediately. Of course if the plaintiff fails to fulfill the conditions within a reasonable time, then the Court must reject the plaint leaving it open to the Plaintiff to file a fresh suit within limitation if so advised after fulfilling the conditions, but the Court cannot dismiss the suit which would bar a fresh suit." See also the principle underlying in (Kunwar) *Jang Bahadur v. Bank of Upper India Ltd. Lucknow,* [7] A somewhat different view was taken in *Syed Qazi Muhammad Afzal v. Lachman Singh,* [8] where it was held that until the terms are complied with, the first suit remains pending.

11. It was an argument that since in the operative part of the earlier suit, the Court had specifically ordered that the fresh suit would be maintainable only if the costs ordered above are paid up before the filing of a fresh suit. The Court had no jurisdiction to entertain the suit unless costs were paid. We are of undoubted opinion that no order of a Court can take away the jurisdiction of the Court just as no order of the Court can either curtail or extend the limitation prescribed by the law. Therefore, the effect of the bar imposed by the Court will be merely to the proceeding with the suit further, but not to its institution. That is the only reasonable way in which the last part of the order passed in the earlier suit can be reconciled; otherwise if it is read as taking away or curtailing the jurisdiction of the Court, to that extent that order itself will be without jurisdiction.

12. On the above discussion, we answer the question referred to us as follows:

> "where the plaintiff is permitted to withdraw from a suit with liberty to institute a fresh suit within the meaning of Order 23, Rule 1 (2) of the Civil Procedure

Code on certain terms, the plaintiff's suit, although instituted without complying with the terms, will not be *ab initio* void. The non- compliance with the terms will be an irregularity, for which the suit will not proceed further until the irregularity is cured, i. e. until the terms are complied with. However, the date of institution of the suit will be that on which it was instituted and not the date on which the irregularity is cured. The Court should exercise its discretion and stay the proceedings till the plaintiff fulfils the required conditions instead of rejecting the plaint immediately. Of course, if the plaintiff fails to fulfil the conditions within a reasonable time, then the Court must reject the plaint leaving it open to the plaintiff to file a fresh suit within limitation if so advised after fulfilling the conditions, but the Court cannot dismiss the suit which would bar a fresh suit."

Let the case be laid before the Single Bench for disposal.
(Final Order of Court D/-27-8-1976)

13. **Shiv Dayal, C. J.**

Opinion of the Division Bench has been received, according to which the plaintiff's suit was within time on the date of the institution and the Small Cause Court had jurisdiction. Amount of costs has been deposited. Hence, trial of the suit is now necessary.

14. The contention of Sri Pande, learned Counsel for the non-applicants, is that on the day on which the Small Cause Court had dismissed the suit, the decision in *Mst. Kavatika Bai v. Bachraj Jamnalal.* [9] was operative and following that decision the Judgment and decree passed by the Small Cause Court cannot be said to be erroneous in any way although the Division Bench may have now expressed a different opinion on the question of law.

15. Obviously, there is no substance whatsoever in Sri Pande's contention. When any provision of law is interpreted by this Court, it cannot be said that thereby this Court has framed any new law, which shall be effective from the date of the said interpretation. When any provision of law is interpreted by this Court, its effect is that the said provision was only according to the said interpretation, that is to say, the meaning and the effect of that provision was only as has been interpreted by the Court. Therefore it has to be said that the meaning of Order 23, Rule 1 (2) of the Civil Procedure Code is the same as has now been given by the Division Bench of this

Court in this case, and the meaning of the said provision was not that which is contrary to it.

16. Therefore, this revision is allowed and the judgment and decree of the small Cause Court are set aside. The record of the case shall be sent back with the direction that the trial Court shall decide the suit according to law. Looking to the circumstances of the case, it is ordered that both the parties shall bear their own costs of this revision.

Revision allowed.

Cases Referred.

1. 31Nag LR 266
2. (1904) ILR 31 Cal 965
3. AIR 1929 Nag 135
4. AIR 1920 Cal 897
5. AIR 1968 All 321
6. AIR 1955 Pun 97
7. AIR 1928 PC 162
8. AIR 1926 Pat 409
9. AIR 1934 Nag 147