

BOMBAY HIGH COURT

Shidramappa Mutappa Biradar

Vs.

Mallappa Ramchandrappa Biradar

Appeal from Order No. 2 of 1929

(Patkar and Baker, JJ.)

09.09.1930

JUDGMENT

Patkar, J.

1. This appeal raises an important question as to the effect of non-observance of the condition under which a suit is allowed to be withdrawn with liberty to bring a fresh suit under Order 23, Rule 1, of the Civil Procedure Code.

2. On August 28, 1920, a suit based on substantially the same cause of action as the present one in which the second appeal arises, was allowed to be withdrawn. The order was as follows:--

The plaintiff is allowed to withdraw from the suit with liberty to bring a fresh suit in respect of the same cause of action. The plaintiff to pay the defendants costs. The plaintiff will not be allowed to bring a fresh suit unless he pays the defendants' costs of this suit.

3. On June 25, 1925, a second suit No. 354 of 1925 was brought on the same cause of action without payment of the costs, and, therefore, without fulfilling the condition attached to the permission given to bring a fresh suit. The order passed in that suit was as follows:--

The plaintiff is a minor. In view of this and the defects mainly formal which are apparent I order the plaintiff to withdraw with liberty to bring a fresh suit for the same cause of action, Plaintiff to pay the defendants costs, and bear his own.

Three days after the suit was withdrawn, that is, on June 24, 1926, the costs in the first suit were paid to the defendants, and, on June 29, 1926, the present suit was instituted without paying the costs of the second suit.

4. The learned Subordinate Judge held that the second suit, which was instituted without paying the costs of the first suit the payment of which was a condition precedent to the filing of the suit, was void ab initio, and that the permission granted to the plaintiff to bring a fresh suit upon which

the present suit was based was not valid in law.

5. On appeal, the learned District Judge, relying on the decision in the case of *Shital Prosad v. Gaya Prosad*¹ held that a suit which was instituted without fulfillment of the condition imposed by the withdrawal order could not be dismissed but ought to be stayed under Section 10 of the Civil Procedure Code in as much as the permission was not operative until the costs were paid and so there was no withdrawal with liberty to bring a fresh suit, and that until there was such withdrawal the former suit was still pending, and held that the second suit was not bad ab initio, and that the order of withdrawal in the second suit could not be disregarded, and that the plaintiff fulfilled the condition precedent in the first suit and its withdrawal was complete, and therefore set aside the order of dismissal and remanded the case for trial according to law.

6. There is conflict of decisions on the question as to the result of non-observance of the condition attached to the permission to bring a fresh suit under Order 23, Rule 1. In *Abdul Aziz Molla v. Ebrahim Molla*² it was held that where a suit was withdrawn under Section 873 of the Civil Procedure Code, corresponding to Order 23, Rule 1, of the present Code, with liberty to bring a fresh suit on payment of costs, a subsequent suit in respect of the same cause of action was not ab initio void if the costs were not paid before its institution, and that the subsequent payment of costs cured the irregularity. It was held that the only persons who were prima facie precluded from bringing a fresh suit were those who withdrew from the former suit without permission to bring a fresh suit. A reference was made to Order 26, Rule 4, of the Supreme Court Rules, 1883, and it was considered to be a fair rule for the Courts to follow in the absence of a statutory enactment in the matter. In *Shital Prosad v. Gaya Prosad*³ where a suit was allowed to be withdrawn by the plaintiff with liberty to bring a fresh suit on the same cause of action on condition of paying costs to the defendant, it was held that the second suit could not be dismissed for non-payment of the costs, and that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and therefore it must be deemed to be a pending suit which became disposed of as soon as the payment was made. It was observed (page 531):-

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 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.

The view of the Calcutta High Court was followed by the Patna High Court in *Syed Qazi Muhammad Afzal v. Lachman Singh*⁴

7. The High Court of Madras has in *Seshayya v. Subbaya*⁵, dissented from the view taken by the Calcutta High Court. Under Order 23, Rule 1, Sub-rule (1), a plaintiff may withdraw his suit at any time without the permission of the Court, and under Sub-rule (3) if the plaintiff withdraws from a suit without the permission given under Sub-rule (2), he would be precluded from instituting a fresh suit in respect of such subject-matter, and under Sub-rule (2) the Court may grant the plaintiff permission to withdraw from the suit

with liberty to institute a fresh suit in respect of the subject-matter of such suit, In

¹(1914) 19 C. L. J. 529

³(1914) 9 C. L. J. 529

²ILR (1904) Cal. 965

⁴ILR (1925) Pat. 306

Seshayya v. Subbayya it was held that 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, and that if the first suit was considered as pending, it would be open to the plaintiff, instead of complying with the condition of the permission, to go to the Court and demand that the trial on the first suit should be proceeded with however long the interval might be.

8. 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 Court relates to the bringing of the fresh suit.

9. In *Shivappa Hannappa v. Balappa Mallappa*⁶ decided by Patkar and Murphy JJ., on November 8, 1928 (Unrep.) and *Shivappa Hanmappa v. Andaneppa Basappa*⁷ decided by Patkar and Murphy JJ., on November 8, 1928 (Unrep) the condition in the order allowing the suit to be withdrawn with liberty to bring a fresh suit was to pay the costs of the defendant without specifying the time within which the payment was to be made, and it was held that the payment of costs during the pendency of the second suit was not in contravention of the condition imposed by the first suit as the same Subordinate Judge who ordered the withdrawal held that the payment of costs before the institution of the second suit was not a condition precedent to the filing of the second suit, and it was not necessary to go into the question whether the view in the case of *Seshayya v. Subbayya*, or that in the case of *Shital Prosad v. Gaya Prosad*, was the correct view to take.

10. 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 *Fischer v. Nagappa Mudaly*⁸ 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, it was held that he was precluded from bringing a second suit and if such a suit is brought it should be dismissed. The case of *Abdul Aziz Molla v. Ebrahim Holla* was distinguished but was not dissented from, and reference was made to *Peria Muthirian v. Karappanna Muthirian*⁹ where time for payment was extended by the Court which made the order for payment. In *Seshayya v. Subhayya*, where leave was granted to bring a fresh suit on payment of the defendant's costs without specification of any date and therefore full under the third category, the plaintiff was held precluded from bringing a second suit unless the costs were paid before the institution of the second suit. In *Abdul Aziz Molla v. Ebrahim Molla*

⁶(1928) Civ. Rev. Appln. No. S 3 of 1928

⁸ ILR (1909) Mad. 258

⁷(1928) Civ. Rev. Appln. No. 54 of 1928

⁹ ILR (1906) Mad. 370

where the payment of costs was not expressly made but was assumed to be a condition precedent

to the institution of the second suit, it was held that the non-payment of costs before the institution of the second suit did not render the fresh suit bad ab initio, and the payment of costs before the trial of the fresh suit cured the irregularity. In *Ambubai v. Shankarsa*¹⁰ where the plaintiff was allowed to withdraw his suit with liberty to (sic) a fresh suit on payment of the defendant's costs before (sic) of the fresh suit, and filed a second suit which was dismissed on the ground of his failure to fulfill the condition on which liberty was given to bring a fresh suit, and brought a third suit after fulfilling the condition, it was held that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit and not to the filing of any number of fresh suits which might be dismissed each in its turn without any trial on the actual merits of the case between the parties for failure to pay the costs of the first suit. The ground of the decision in *Ambubai's* case would be opposed to the view taken by the Calcutta High Court in *Shital Prosad v. Gaya Prosad*. The present case would be clearly governed by the decision in *Ambubai v. Shankarsa* but for the fact that the second suit was not dismissed but permission was given therein to bring a fresh suit.

11. The decisions in the case of *Hriday Nath Roy v. Ram Chandra Barna Sarma*¹¹ and *Raj Kumar Mahton v. Ram Khelawan Singh*¹² support the proposition that an order for withdrawal of a suit with leave to institute a fresh suit but in circumstances not within the scope of the rule cannot be treated as an order made without jurisdiction, and a fresh suit instituted upon leave so granted is act incompetent, but do not bear on the point under consideration. The order in the second suit allowing with-drawl of the suit with liberty to bring a fresh suit cannot be considered to affect the order in the first suit which imposed the condition that the costs of the first suit were to be paid before the institution of the fresh suit. The question, therefore, in this case is whether that condition has been fulfilled. The order in the first suit was that the plaintiff would not be allowed to bring a fresh suit unless he paid the defendants' costs in the first suit. The coats were not paid before the institution of the second suit as it was incumbent on the plaintiff to do according to the condition imposed in the first suit, and they were not paid even during the pendency of the second suit. It is difficult to hold that the payment of the costs before the institution of the third suit and after the withdrawal of the second suit fulfilled the condition, imposed by the order passed in the first suit, as a condition precedent to the filing of the second suit. The question has been considered in the case of *Rachhpal Singh v. Sheo Ratan Singh*,¹³ in which the view of the Calcutta High Court in *Shital Prosad's* case was not accepted, and it was held that once the plaintiff has accepted the terms imposed by the Court, the case is declared to be withdrawn and is no longer pending, and the plaintiff must comply with those terms strictly or take the consequences of being barred from filing a second suit.

12. The costs ordered to be paid in the first suit ought to have been paid before the institution of the second suit, and it cannot be said that the condition imposed in the first suit is fulfilled by payment of the costs after the disposal of the second suit when the costs ought to have been paid before the institution of the second suit.

13. I think, therefore, that the view taken by the learned District Judge based on the

¹⁰(1924) 27 Bom. L. R. 243

¹² ILR (1921) Pat. 90

¹¹ ILR (1920) Cal. 138

¹³ AIR 1929 All 692 : 118 Ind. Cas. 584

decision in *Shital Prosad's* case is not correct.

14. I would, therefore, reverse, the order of the lower appellate Court and restore that of the

Subordinate Judge with costs throughout on the respondent.

Baker, J.

15. This appeal raises a point of law on which the rulings of the various High Courts are conflicting and which does not appear to have been decided in Bombay. The facts, which are simple, are that the plaintiff brought a suit on June 11, 1919, and withdrew it in 1920 with permission to bring a fresh suit on condition of paying the costs of the defendant. The plaintiff did not pay the costs, but he brought a fresh suit in 1925, which he withdrew on June 21, 1926, also with permission to bring a fresh suit. On June 24, 1926, he paid the costs of the first suit, and on June 29, 1926, he brought the present suit. The Joint Subordinate Judge of Bijapur held that the second suit of 1925, which was brought without paying the defendants' costs of the previous suit as required by the order in the first suit, was bad, and the second suit was barred. This being so, the permission granted to the plaintiff in that suit to bring a fresh suit was not valid. The suit was, therefore, untenable, and was dismissed. On appeal, the District Judge of Bijapur, relying on *Shital Prosad v. Gaya Prosad*¹⁴ held that the Judge was wrong in holding that the suit was bad ab initio and held that the second suit was good, and that the order of withdrawal in that suit, which was binding on the parties, could not be disregarded in these proceedings. The plaintiff had fulfilled the condition precedent in the first suit, and therefore its withdrawal was complete. He, therefore, set aside the order of dismissal and remanded the suit for trial on the merits. Defendants make this second appeal.

16. The view of the Calcutta High Court in *Shital Prosad v. Gaya Prosad* (1914) 19 C. L. J. 529(Supra) has been dissented from by the Madras High Court in *Seshayya v. Subbayya*¹⁵, and *Fischer v. Nagappa Mudaly*¹⁶ The Calcutta High Court view was followed by the Patna High Court in *Syed Qazi Muhammad Afzal v. Lachman Singh*¹⁷, and the Madras view has been followed in the recent case reported in *Rachhpal Singh v. Sheo Ratan Singh*, AIR 1929 Allahabad 692 : 118 Ind. Cas. 584(Supra), in which all the decisions are reviewed. The question is discussed in Mulla's Code of Civil Procedure, 9th Edition, page 812, in which the position is summarized as follows :-

The High Court of Madras has held that where leave is granted to a plaintiff to bring a fresh suit on payment of the defendant's costs on or before a specified date, and he fails to do so, he is precluded from bringing a second suit, and if such suit is brought, it should be dismissed.

That is the ruling in *Fischer v. Nagappa Mudaly*, but that will not apply to the facts of the present case, as no date was fixed for payment of the costs in the order of the first suit allowing its withdrawal. In *Seshayya v. Subbayya* the Madras High Court held that if leave is granted to bring a fresh suit on payment of the defendant's costs (without specifying any date), the plaintiff is precluded from bringing a second suit unless the costs are paid before the institution of the second suit. The payment of the costs after the close of the trial in the second suit is not a

¹⁴(1914) 19 C. L. J. 529

¹⁶ ILR (1909) Mad. 258

¹⁵ AIR 1924 Mad 877 : AIR 1924 Mad 900 : (1924) 47 MLJ 646 : 1924-20-LW 642

¹⁷ ILR (1925) Pat. 306

compliance with the condition. The Calcutta High Court has taken a different view in *Abdul Aziz Molla v. Ebrahim Molla*¹⁸ where leave was granted to the plaintiff to bring a fresh suit on payment of the defendant's costs, and it was held that though the payment of costs was a condition precedent to the institution of a second suit, non-payment of costs before the institution of the second suit did not render the fresh suit bad ab initio, and, further, that payment of costs before the trial of the fresh suit cured the irregularity. In *Shital Prosad v. Gay a Prosad (1914) 19 C. L. J. 529(Supra)*, Sir Lawrence Jenkins, while agreeing with the result of the ruling in *Abdul Aziz Molla v. Ebrahim Molla*, based his decision on somewhat different grounds. In that case also permission was granted to the plaintiff to institute a fresh suit on payment of the defendant's costs. The plaintiff did not pay the costs and brought a second suit. The suit was dismissed by the Munsiff for non-payment of costs. The plaintiff appealed to the Subordinate Judge. Pending the appeal the plaintiff paid the defendant's costs. The Subordinate Judge thereupon sent back the case to the Munsiff for trial on the merits. It was held that inasmuch as the permission to withdraw and bring a fresh suit was made conditional on a certain payment, the original suit could not be deemed to be withdrawn until those costs were paid, and it must, therefore, be deemed to be a pending suit which became disposed of as soon as payment was made. In the judgment it is stated (page 531):

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 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 (of the Code) as a bar to his proceeding with the trial of the suit...on the payment of those costs there was the withdrawal complete under Section 373 of the Code or Order 23. Reference has been made by the learned counsel for the appellant to *Ambubai v. Shankarsa (1924) 27 Bom. L. R. 243(Supra)*. The facts of that case, however, are different. There the plaintiff withdrew the suit with permission of the Court and was ordered to pay defendant's costs before filing a fresh suit, Without paying the defendant's costs he filed a fresh suit. He paid the costs three days before the day fixed for the hearing of evidence. The Court dismissed the suit on the ground that the suit being filed without previous costs having been paid was bad ab initio. The plaintiff, however, considering the permission given him by the Court in the original suit as still surviving in spite of the second suit being dismissed, filed this third suit on the same cause of action. It was held that the permission granted by the Court in the original suit would only extend to the filing of one fresh suit, and not to the filing of any number of fresh suits, which might be dismissed each in its turn, without any trial on the actual merits of the case between the parties, for failure to pay the costs of the first suit. When the plaintiff had refused to comply with the condition on which alone he could file a second suit, he could not avail himself of the original permission of the Court for filing a third suit. That permission no longer remained in force. If the decisions of the lower Courts were upheld, it would be illegally extending the provisions of Order 23,

Rule 1, in favor of the plaintiff, who would thus be allowed to harass the defendants with a succession of suits. The point, therefore, in that case was whether the permission originally granted to withdraw and file a fresh suit on payment of the costs would

¹⁸ ILR (1904) Cal. 965

extend only to the subsequent suit filed or to a third suit, and the second suit in that case was dismissed. In the present case the second suit was not dismissed, but was allowed to be withdrawn with permission to file another suit. The case, however, is an authority for the proposition that permission granted under Order 23, Rule 1, extends only to the filing of one suit, and not to a succession of suits, and it is admitted in the present case that the plaintiff relies not on the permission originally given in the first suit, but on the permission given in the second suit filed in 1925. The question, therefore, is whether we should adopt the view taken by the Calcutta High Court in *Shital Prosad v. Gaya Prosad*, or the view of the Madras High Court in *Seshayya v. Subbayya*. 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 Prosad v. Gaya Prosad*. 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*, AIR 1924 Madras 877 : AIR 1924 Mad 900 : (1924) 47 MLJ 646 : 1924-20-LW 642(Supra) 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 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. The whole question has been discussed in detail in *Rachhpal Singh v. Sheo Ratan Singh*, AIR 1929 Allahabad 692 : 118 Ind. Cas. 584(Supra), and I agree with the view taken in that case as to the suit being withdrawn and ceasing to be a pending suit, and with respect, I agree with the view of the learned Judge who tried that case that there is no reason why if the permission to file a second suit had been granted subject to a condition, the plaintiff should not be held strictly to that condition and his second suit dismissed if he attempts to file it without having fulfilled the condition on which he secured permission. That judgment refers to all the authorities, and his conclusion, with which I agree, is that once the plaintiff has accepted the terms imposed by the Court the case is declared to be withdrawn and is no longer pending, and

the plaintiff must comply with those terms strictly or take the consequences by being barred from filing a second suit. No doubt, it is desirable, as has been laid down in most of these cases, that a date should be fixed within which the costs should be paid, but in the present case the order was in effect that the costs should be paid before a second suit was filed, and this condition was not complied with, the costs not being paid until the second suit had been withdrawn. It has been argued by the learned counsel for the appellant that his client did not accept the costs which were paid into Court. I do not think there is anything in this point, as if the defendant had the right to refuse to accept the costs, he could, even if they were paid in time, prevent the plaintiff from bringing a fresh suit.

17. However, in the present case, I am of opinion that the condition on which the plaintiff was allowed to bring a second suit not having been complied with, the plaintiff had no right to bring a second suit, which should have been dismissed, and therefore the permission in that suit is of no avail.

18. I would, therefore, restore the decree of the first Court and set aside the order of the lower appellate Court, with costs throughout on the plaintiff.

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