

KONKAN TRADING COMPANY
v.
SURESH GOVIND KAMAT TARKAR & ORS.

APRIL 4, 1986

[E.S. VENKATARAMIAH AND M.P. THAKKAR, JJ.]

Civil Procedure Code, 1908, s.148 and Order 23 Rule 1(3) - Withdrawal of suit with liberty to file fresh suit - Permission granted on payment of 'costs' - Whether 'Costs' to be deposited 'after' or 'before' institution of fresh suit.

A suit instituted by the appellant-firm against the respondents was allowed to be withdrawn but on payment of costs of Rs. 100 with liberty to file a fresh suit on the same cause of action under sub-rule (3) of rule 1 of Order XXIII of the Code of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. The appellant-firm filed a fresh suit, which was opposed by the respondents contending that the suit was not maintainable because the appellant-firm had failed to pay the costs of Rs. 100 'before' the filing of the suit. The appellant offered to pay the costs but the respondents refused to accept the same. Consequently, the appellant-firm, with permission, deposited the costs in the Trial Court, which held that the suit was maintainable.

The High Court allowed the revision petition filed by the respondents holding that the suit was void ab initio since the costs had not been deposited before the institution of the suit.

Allowing the appeal of the appellant-firm to this Court,

HELD : 1. The judgment of the High Court is set aside and the order of the Trial Court is restored. [186 F]

2. While granting permission under sub-rule (3) of Rule 1 of Order XXIII of the Code of Civil Procedure, 1908, it is 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 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 cost is paid within the time fixed or extended by the Court, the suit shall be deemed to have been instituted validly on the date on which it was presented. This view is in consonance with justice and the spirit of section 148 of the Code of Civil Procedure. [185 F-H; 186 A-B]

Gollapudi Seshavva v. Nadendla Subbayaya & Anr., A.I.R. 1924 Madras 877., Shidramappa Mutappa Biradar v. Mallappa Ramachandrappa Biradar, A.I.R. 1931 Bombay 257, Rama Krishna Timappa Shetti v. Hanuman Patgavi, A.I.R. 1950 Bombay 113, Mast Ram Ramcharan & Ors. v. Deputy Commissioner, Bahraich and Anr., A.I.R. 1968 Allahabad 321, Binod Naik & Anr. v. Chandrasekhar Padhi & Ors., A.I.R. 1969 Orissa 134, Chikkahanna v. Smt. Venkatamma & Ors., A.I.R. 1971 Mysore 167 and M/s. Raja Traders v. Union of India & Anr., A.I.R. 1977 M.P. 55 cited.

3. In the instant case the costs of Rs. 100 had not been ordered to be deposited as a condition precedent before the institution of the next suit. The plaintiff was only 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 be construed as imposing a condition precedent for the filing of fresh suit. There is no warrant for taking a hypertechanical 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. [186 C-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1205 of 1986.

From the Judgment and Order dated 27.9.1985 of the Bombay High Court Panaji Bench in Civil Revision Application No. 87 of 1985.

Dr. Y.S. Chitale and K.R. Nambiar for the Appellant.

R.F. Nariman, R. Karanjawala, H.S. Anand and Mrs. M. Karanjawala for the Respondents.

A The Judgment of the Court was delivered by

B VENKATARAMIAH, J. Has justice become the lip-aim of
C 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?

D 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 :-

E "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."

F 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'
G 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 applicaton was made before the trial court for
H 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 No. 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.

We have heard the learned counsel for the parties. Parties have cited before us a number of decisions : **Gollapudi Seshayya v. Nadendla Subbayaya & Anr.**, A.I.R. 1984 Madras 877, **Shidramappa Mutappa Biradar v. Mallappa Ramachandrappa Biradar**, A.I.R. 1931 Bombay 257, **Rama-krishna Timappa Shetti v. Hanumant Patgavi**, A.I.R. 1950 Bombay 113, **Mast Ram Ram Charan & Ors. v. Deputy Commissioner, Bahraich and Anr.**, A.I.R. 1968 Allahabad 321, **Binod Naik and Anr. v. Chandrasekhar Padhi & Ors.**, A.I.R. 1969 Orissa 134, **Chikkahanuma v. Smt. Venkatamma & Ors.**, A.I.R. 1971 Mysore 167 and **M/s. Raja Traders v. Union of India & Anr.**, A.I.R. 1977 M.P. 55. 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

A 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 of 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.

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 obeisance to this principle repelled the unjust plea urged by the defendant. But alas, the High Court, in exercise of revisional jurisdiction tripped into reversing the justice oriented conclusion reached by the trial court.

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.