

APPELLATE CIVIL

Before Bishan Narain and Grover, JJ.

GURAN DITTA AND OTHERS,—Plaintiffs-Appellants

versus

BANNA MALL AND OTHERS,—Defendants-Respondents

Code of Civil Procedure (V of 1908)—Order 23 Rules 1 and 2—Suit allowed to be withdrawn and permission granted to file fresh suit on condition of payment of costs—Second suit filed without payment of costs—Suit dismissed as not maintainable—Third suit instituted after payment of costs—Third suit whether competent—Procedural law—object of.

1958

March. 4th

Held, that there is no specific provision in the Code of Civil Procedure debaring a third suit after the dismissal of the second suit for non-compliance with the terms of the permission granted under Order XXIII Rule 1(2) (b) of the Code. A party may be estopped from obtaining a required relief because a competent tribunal has already adjudicated upon the matter or is deemed to have done so or because of the parties' conduct before or after the filing

of the suit. In such a case relief may be refused, but it does not mean that the institution of suit is debarred. There is no provision of statutory law nor is there any general principle which prevents a party from instituting any number of suits one after the other against the same party on the same matter or prevents a Court of law from entertaining them.

Held also, that the basic object and purpose of procedural law is to facilitate determination of disputes on merits and the provisions of the Code of Civil Procedure are intended to achieve this object.

Government of the Province of Bombay v. Pestonji Ardeshir Wadia and others (1), Bachchu Singh and another v. The Secretary of State for India in Council (2), Kishan Lal-Ramlal v. K. S. Abdul Ghafur Khan (3), Robert Watson & Co. v. The Collector of Zillah Raja Shahye (4), Mela and another v. Labhu and another (5), Cropper v. Smith (6), referred to, Ambubai Hanmantrao v. Shankarsa Nagosa, (7) dissented from.

Case referred by the Hon'ble Mr. Justice Bishan Narain on 24th December 1954 to the Division Bench for the decision of a legal point involved in the case and later on decided by the Division Bench consisting of the Hon'ble Mr. Justice Bishan Narain and the Hon'ble Mr. Justice Grover on 4th March, 1958.

Second appeal from the decree of Shri Sheo Parshad, Senior Sub-Judge, with enhanced appellate powers, Gurdaspur dated 21st March, 1951 reversing that of Shri Hira Lal Jain Sub-Judge, 1st Class, Batala, dated 9th August, 1950, and dismissing the suit of the plaintiffs.

SHAMAIR CHAND, P. C. JAIN AND GOKAL CHAND, for Appellants.

S. D. BAHRI, for Respondents.

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- (1) A.I.R. 1949 P.C. 143
 (2) I.L.R. 25 All. 187
 (3) I.L.R. 17 Lah. 275
 (4) 13, Moo. Ind. App. 160, 170
 (5) A.I.R. 1955 Punjab 97
 (6) (1884) 26 Ch. D. 700
 (7) A.I.R. 1925 Bom. 272 (F.B.)

JUDGMENT

BISHAN NARAIN, J. The plaintiffs claiming to be heirs of one Hira Nand filed a suit on 27th August, 1946, for joint possession of about 16 *kanals* of land situated in village Talwandi Bharth, Tehsil Batala. On 27th November, 1947, they were allowed to withdraw the suit with liberty to file a fresh suit on condition that Rs. 6 as costs were paid to the defendants. The plaintiffs then filed a second suit on 3rd October, 1949, for the same relief against the same defendants and on the same cause of action but without complying with the condition of payment of costs. This suit was dismissed on 20th January, 1950, on the ground that the plaintiffs had not paid the conditional costs before filing the suit. After depositing these costs the plaintiffs brought the present suit on 1st March, 1950, for the same relief on the same cause of action and against the same defendants. The defendants *inter alia* pleaded that the present suit was not maintainable in view of the dismissal of the second suit. The trial Court rejected the defence plea and on the merits decreed the suit. The defendants appealed and the lower appellate court upheld the plea of the defendants and without deciding other issues dismissed the suit. The plaintiffs have filed this second appeal in this Court. This appeal came up before me and considering the importance of the question involved I referred it to a larger Bench. It has now been fixed before us for decision.

The only point that requires determination in this appeal is, whether or not the third suit is competent when it is filed after complying with the condition imposed upon the plaintiffs under Order 23, rule 1(2)(b), Civil Procedure Code, although the second suit filed without complying with the condition had been previously dismissed.

Guran Ditta and others Now Order XXIII, rule 1, reads—

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“1. (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) * * * *

And Order XXIII, rule 2 reads—

“2. In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the

law of limitation in the same manner as if the first suit had not been instituted."

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These two provisions of law completely lay down the law governing cases of withdrawal of suits and abandonment of claims. These provisions are exhaustive on the subject. Order XXIII, rule 1(1) states that the suit may be withdrawn or a claim may be abandoned. This sub-rule does not create any new right and merely recognizes the plaintiff's right to withdraw a suit or to abandon a claim (*vide* Mulla's Civil Procedure Code, page 968). Order XXIII rule 1(3) has no application to the present case as the first suit was withdrawn after obtaining permission under Order XXIII, rule 1(2)(b). In the present case we are concerned only with Order XXIII, rule 1(2)(b). This provision does not deal with any proceedings taken after the required permission, on certain terms, if any has been granted. This is in contrast with the provisions of order 23 rule 1(3), which specifically lays down that fresh suit would not be competent. It cannot be said that Order XXIII, rule 1(3), becomes applicable if the fresh suit when filed without complying with the conditions of the order made under Order XXIII, rule 1(2)(b) has been dismissed. It was not so argued before me, nor do I know of any case in which it has been so held. As Order XXIII rule 1(2) (b) does not specifically or by necessary implication deal with the situation like the one in the present case, it is necessary to look to some other principle of law for this purpose.

Now, the basic object and purpose of procedural law is to facilitate determination of disputes on merits. The provisions of the Civil Procedure Code are intended to achieve this object. If a party does not diligently prosecute the case,

Guran Ditta and then as a matter of public policy it is specifically
 others provided that the defaulter should be precluded
 v. Banna Mal and from getting his dispute decided by a Court of
 others law. Section 12 of the Civil Procedure Code deals
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“Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of such cause of action in any Court to which this Code applies.”

The rules debar a fresh suit only in four circumstances—

- (1) Order II, rule 2—omission to sue or relinquishment of part of a claim ;
- (2) Order IX, rule 9—dismissal of a suit in plaintiff's absence ;
- (3) Order XXII, rule 9—abatement ; and
- (4) Order XXIII, rule 1(3)—~~withdrawal of~~ abandonment without permission of the Court to file fresh suit.

The present case does not fall in any of these categories. Thus, there is no specific provision in the Civil Procedure Code debarring a third suit after the dismissal of the second suit for non-compliance with the terms of the permission. A party may be estopped from obtaining a required relief because a competent tribunal has already adjudicated upon the matter or is deemed to have done so (section 11, Civil Procedure Code) or because of the parties' conduct before or after the filing of the suit. In such cases relief may be refused, but it does not mean that the institution of

the suit is debarred. No provision of statutory law or general principle has been brought to my notice which prevents a party from instituting any number of suits one after the other against the same party on the same matter or prevents Court of law from entertaining them.

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There are, however, provisions in many statutes wherein it is laid down that no suit can be instituted unless the plaintiff previously complies with certain conditions, e.g., section 80, Civil Procedure Code, and section 69, Indian Partnership Act. These provisions bar the institution of a suit unless the condition precedent to its institution has been complied with. These provisions are analogous to the present case wherein an order had been made under Order XXIII, rule 1(2)(b) that a fresh suit could be filed only on payment of costs. It is well settled that if a suit is filed without notice under section 80, Civil Procedure Code, then it is not maintainable and the plaint must be rejected under Order VII, rule 11(d), Civil Procedure Code, *Government of the Province of Bombay v. Pestonji Ardeshir Wadia and others* (1), and *Bachchu Singh and another v. The Secretary of State for India in Council* (2). Similarly when a suit by a firm is dismissed on the ground that it is not registered, then a second suit is maintainable after getting the firm registered, *Krishan Lal—Ram Lal v. K. S. Abdul Ghafur Khan* (3). The dismissal of the suit in such circumstances amounts to non-suiting the plaintiff which does not bar his right to file a fresh suit. It has been held by the Judicial Committee of the Privy Council in *Robert Watson and Co. v. The Collector of Zillah Raja Shahye* (4), that there is a proceeding in Indian Courts called a 'nonsuit', which operates

(1) A.I.R. 1949 P.C. 143

(2) I.L.R. 25 All. 187

(3) I.L.R. 17 Lah. 275

(4) 13 Moo. Ind. App. 160, 170

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as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit ; but that seems to be limited to cases where the suit fails by reason of some point of form. Order VII, rules 11 and 13, give statutory recognition to such proceedings. There is no reason why the same consequences of non-suit should not follow when the second suit is filed without complying with the terms on which permission under Order XXIII, rule 1(2)(b), Civil Procedure Code, was granted. I expressed this view in *Mela and another v. Labhu and another* (1), and nothing has been urged before me to persuade me to change this view.

The learned counsel for the respondents, however, while arguing that the third suit was not competent, relied on *Ambubai Hanmantrao v. Shankarsa Nagosa* (1). This is a Full Bench decision and fully applies to the present case. The learned Judges observed—

“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.”

and supported this conclusion on the ground that otherwise it would be open to a party to harass his opponent with a succession of suits. With great respect I find myself unable to subscribe to the view expressed in the Bombay decision. I fail to see how a party is deprived of the permission of the Court for filing a fresh suit if the second suit has been dismissed as not competent on the ground

(1) A.I.R. 1955 Punjab 97

(2) A.I.R. 1925 Bom. 272.

that it had been filed in contravention of the terms on which the permission was granted. Order XXIII, rule 1(2)(b), is silent on the matter, and there is no authority for saying that permission once granted exhausts itself if the plaintiff files a suit in contravention of the terms on which the permission was granted. It is to be noticed that there is no statutory provision excepting the provision noticed in the earlier part of the judgment which debars filing of succession of suits. It cannot be said that any general principle of law is violated if a party is allowed to institute a third suit because the first suit was withdrawn conditionally and the second suit did not comply with that condition. It may be that a litigious plaintiff may harass a defendant by filing suits one after another, but it is likely to be very expensive for the plaintiff because at the time of dismissal of each suit the plaintiff will lose court-fee, etc., and the defendant will be awarded costs. I, therefore, do not see any real danger on this score. After all, as observed by Bowen, L.J., in *Cropper v. Smith* (1) there is one panacea which heals every sore in litigation, and that is costs.

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It was then urged on behalf of the respondents that the third suit is barred by the principle of *res judicata*. In my opinion, section 11, Civil Procedure Code, has no application to such a case as the previous suit cannot be said to have been finally determined and decided. The Privy Council in *Okusanya and another v. Akanwo and another* (2), dealt with a case where a claim was included in the previous suit but later on the plaintiff elected not to proceed with that suit and there was no judicial decision upon it. The plaintiff then filed another suit making a claim for the same relief and it was held that the claim was not barred by

(1) (1884) 26 Ch. D. 700, 711

(2) 197 I.C. 27

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res judicata. The same principle was accepted in *Abdullah Asghar Ali Khan v. Ganesh Das* (1), and *Ram Lal v. Upendra Datt and another* (2).

Bishan Narain, J.

In my opinion, there is no provision of law or equity which debars a third suit filed in the circumstances of the present case. I would, therefore, accept this appeal and remand the case to the Senior Subordinate Judge, Gurdaspur, for disposal of the appeal in accordance with law.

Parties are directed to appear before the Senior Subordinate Judge on 31st March, 1958. Parties will bear their own costs in this appeal.

Grover, J.

GROVER, J.—I agree.
K.S.K.