REVISIONAL CIVIL

Before I.D. Dua, J.

CHHINDO,—*Petitioner*

versus

MELA SINGH AND OTHERS,—*Respondents.*

Civil Revision No. 139 of 1966.

September 2, 1966.

Code of Civil Procedure (V of 1908)—O.XXIII—R. 1—Object of—Permission to withdraw suit with liberty to bring another suit—When to be granted Duty of the Court to act judicially stressed.

Held, that the object of Order XXIII, Rule 1 of the Code of Civil Procedure is not to enable a plaintiff, after he has failed to initiate and prosecute his case with due care and diligence, to begin the trial in Court afresh in order to avoid logical and legal consequences of his lapse and want of due care and diligence in conducting the earlier case, so as to prejudice the opposite party. Broadly speaking, the defect contemplated by Order 23, Rule 1, Code of Civil Procedure, must not affect the merits of the case but it should have the effect of shutting out a fair trial on the merits on account of an error which can only be set right by a fresh trial; and the grant of permission to withdraw a suit with liberty to bring a fresh suit removes the bar of *res judicata* which may otherwise operate on the institution of a fresh suit on the same cause of action. It is, accordingly, incumbent on the Court not to treat the matter casually but to apply its judicial mind with a sense of responsibility to the question of formal defect or of the existence of other sufficient ground, justifying withdrawal with permission to institute a fresh suit. Indeed, it is eminently desirable that the order of the Court discloses the nature of the formal defect by reason of which, in its view, the suit must fail; Courts are expected to pass speaking orders in such matters, for, that is the outstanding characteristic peculiar to a judicial Tribunal dealing with suitors' right under the judicial process in vogue in this Republic. It must never be forgotten that withdrawal of a suit with permission to institute a fresh one under Order XXIII, Rule 1, is a serious matter demanding exercise of judicial discretion in the light of all the attending circumstances and it has not to be dealt with casually it as a purely formal and harmless order.

Petition under Section 44 of the Punjab Courts Act (VI of 1918) for revision of the order of the Additional Sub-Judge, Batala, dated 15th January, 1965, dismissing the plaintiff's suit as withdrawn without making any order as to costs and with the permission to bring the suit afresh at some later date.

S. L. PURI, ADVOCATE, for the Petitioner.

S. S. KANG, ADVOCATE, for *the Respondents.*

JUDGMENT

DUA, J.—This revision is directed against the order of the learned Additional Subordinate Judge, Batala, dated 15th January, 1966, passed on an application for withdrawal of the suit with permission to bring a fresh suit on the same cause of action presented under Order XXIII, Rule 1, Code of Civil Procedure.

The suit was instituted on 6th May, 1965, and after certain dates of hearing for effecting service on the defendants, written statement was filed on 15th September, 1965. The case was adjourned to 23rd September, 1965, for replication, though I must say that there was hardly any need for replication in the present case.

On 5th October, 1965, issues were framed and the case was adjourned for the plaintiff's evidence to 2nd December, 1965. For scrutiny 2nd November, 1965 was fixed. On the date of scrutiny, it was found that no witness had been summoned. On 2nd December, 1965, no witness was present and indeed none had been summoned. The Court expressly observed that in the interest of justice, one opportunity was being granted to the plaintiffs to produce their evidence and they were directed to take Dasti Robkar. Rs. 10 were also awarded by way of costs to the defendant. Case was then adjourned to 14th January, 1966. On 14th January, 1966, the following application was made by the plaintiff under Order XXIII, Rule 1, of the Code:—

> "There is some technical defect in the case. The plaintiff be permited to withdraw the suit with permission to bring a fresh suit on the same cause of action."

Consideration of this application was adjourned to the following day, i.e., 15th January, 1966. On that day, the Court passed the following order:—

> "In view of the application of the plaintiffs to withdraw the suit I dismiss the suit as withdrawn with the permission to bring the suit afresh at some later date. No order as to costs."

It is argued by Shri S. L. Puri, that this order is tainted with a serious legal infirmity and deserves to be set aside on revision. In the application, the plaintiffs had not stated as to what was the technical defect by reason of which the suit must fail. The Court

too had not cared to apply its mind to this aspect. The learned Additional Subordinate Judge, according to Shri Puri, has apparently been under the impression that merely because a party claims permission to withdraw a suit by simply stating that there is some technical defect in the case, the Court is obliged to grant such permission so as to enable such party to institute a fresh suit for the same subject-matter or a part thereof. This, according to the learned counsel, is a wholly untenable position. For this submission, Shri Puri had placed reliance on *Raghbir* v. *Roshan Lal* (1), *and Abdul Ghafoor* v. *Abdul Rahman* (2).

On behalf of the respondents, Shri S. S. Kang has, on the other hand, submitted that the present is a very hard case and the plaintiff is likely to suffer because of the bungling done by his counsel. In support of his submission, he has placed reliance on *Gurprit Singh* v. *Punjab Government* (3) *and Sheo Kumar Dwivedi* v. *Thakurji Maharaj* (4). Order XXIII, Rule 1, Civil Procedure Code, may here be read:—

"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

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(1) 1964 P.L.R. 404.
(2) A.I.R. 1951 All. 845.
(3) A.I.R. 1946 Lah. 429.
(4) A.I.R. 1959 All. 463.

(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 serveral plaintiffs to withdraw without the consent of the others."

The object of this rule is not to enable a plaintiff, after he has failed to initiate and prosecute his case with due care and diligence, to begin the trial in Court afresh in order to avoid logical and legal consequences of his lapse and want of due care and diligence in conducting the earlier case, so as to prejudice the opposite party. Broadly speaking, the defect contemplated by Order 23, Rule 1, Code of Civil Procedure, must not affect the merits of the case, but it should have the effect of shutting out a fair trial on the merits on account of an error which can only be set right by a fresh trial; and the grant of permission to withdraw a suit with liberty to bring a fresh suit removes the bar of *res judicata*, which may otherwise operate on the institution of a fresh suit on the same cause of action. It is accordingly incumbent on the Court not to treat the matter casually, but to apply its judicial mind with a sense of a responsibility to the question of formal defect or of the existence of other sufficient ground, justifying withdrawal with premission to institute a fresh suit. Indeed, it is eminently desirable that the order of the Court discloses the nature of the formal defect by reason of which, in its view, the suit must fail; Courts are expected to pass speaking orders in such matters, for, that is the outstanding characteristic peculiar to a judicial Tribunal dealing with suitors' rights under the judicial process in vogue in this Republic. In the case in hand not only is the impugned order infirm, but one looks in vain even in the plaintiff's application for the precise nature of the formal or technical defect relied on. All that the application suggests is that there is "some technical defect in the case" even without completing the legal formality of pleading that the suit must fail by reason of this said defect. The order of the learned Additional Subordinate Judge is completly unsustainable and indeed he seems to me to betray an indefensible ignorance of the basic principle underlying the provisions of Order XXIII, Rule 1.

The application must disclose the precise nature of the formal defect and the circumstances giving rise to it, thereby making out a

case for the exercise of judicial discretion in favour of the applicant: similarly the Court must assign explicitly reasons for its conclusion which should be plainly discernible in its order. Such a course in addition enables this Court more satisfactorily to exercise its power and discharge its duty under section 115 of the Code. This section, it is worth-remembering, reposes in this Court a power coupled with responsibility which implies a duty for setting right jurisdictional and similar infirmities in the orders of the Courts below when the dictates of justice so demand. A laconic order, which is not a speaking order, particularly in a case like the present, would merely serve to obstruct this Court in discharging its function properly. The impugned order in the present case is manifestly tainted with serious illegality and a material irregularity in the exercise of the lower Court's jurisdiction and cannot be upheld.

Referring to the decision in the case of *Gurprit Singh*, I find no assistance to the plaintiff-respondents from its ratio because all that is said therein is that the Word "other suufficient grounds" in Order XXIII, rule 1(2)(b) are not *ejusdem generis* with the expression "formal defect" in Rule 1(2)(a). It was not the plaintiff's case in the Court below that there were other sufficient grounds for allowing them to institute a fresh suit. Their extremely laconic application merely pleaded "some technical defect". I should, however, not be understood to be expressing any opinion on the correctness or otherwise of the view recorded in *Gurprit Singh's case*, for on this point there exists considerable conflict in the decided cases. As a matter of fact, the view expressed in the High Court Rules and Orders, Volume 1, Chapter 13, paragraph 7, also does not conform to the Lahore view, nor does the opinion expressed by a learned Single Judge of this Court in *Bhagmal* v. *Khem Chand* (5).

The Bench decision of the Allahabad High Court in *Sheo Kumar Dwivedi's case* is also of no assistance to the respondents. All that it says is that if the error in the order of the Court below is a mere error of law and there is no injustice done, the High Court on revision should not interfere. There is no quarrel with this proposition, but it has clearly no applicability to the case in hand. The infirmity in the present case is far more deep-rooted because except for the bald assertion of the existence of "some technical defect", there is no material on the record which can by any stretch bring the plaintiff's case within the purview of Order XXIII, Rule 1 of the Code.

(5) A.I.R. 1961 Punj. 421.

Even in this Court, no formal defect within the contemplation of law has been pointed out.

The argument that it is a hard case is equally unavailing. Not only do hard cases make bad law, but in the present case, I have not been persuaded to hold that the present is a hard case justifying this Court to decline interference with an order which is obviously and clearly tainted with illegality and material irregularity.

I may also point out to the learned Additional Subordinate Judge that even if this had been a fit case to allow withdrawal with permission to institute a fresh suit, he should have considered the question of imposing terms on the plaintiffs, at least by awarding costs in favour of the defendants. Order XXIII Rule 1(2) in express terms speaks of the Court granting the requisite permission on such terms as it thinks fit. The order of the Court below suggests that the learned Additional Subordinate Judge did not feel himself concerned with the question of terms. It may be mentioned that in the defendant's reply it was expressly pleaded that the application for withdrawal had been filed to avoid the dismissal of the suit for non-production of evidence. This plea should have required the learned Additional Subordinate Judge to pay more attention to the circumstances of the case than has actually been done. It must never be forgotten that withdrawal of a suit with permission to institute a fresh one under Order XXIII, Rule 1, is a serious matter demanding exercise of judicial discretion in the light of all the attending circumstances and it has not to be dealt with casually treating it as a purely formal and harmless order.

For the foregoing reasons, I allow this revision, set aside the impugned order and remit the case back to the Court below for proceeding with the suit in accordance with law in the light of the observations made above. There would be no order as to costs in this Court.

R.S.

CIVIL MISCELLANEOUS

Before R. S. Narula, J.

CHUNI LAL,—*Petitioner.*

versus

STATE OF PUNJAB AND OTHERS,—*Respondents.*

Civil Writ No. 513 of 1966.

September 2, 1966.

Punjab Gram Panchayat Act (IV of 1953)—S. 102(2)(e)—Whether ultra vires *Article 14 of the Constitution—Opportunity to rebut allegations in the show-cause*