

(1997) 04 GAU CK 0011

Gauhati High Court (Agartala Bench)

Case No: First Appeal No. 152 of 1996

Dipak Das

APPELLANT

Vs

Dharjyadhan Deb and Others

RESPONDENT

Date of Decision: April 8, 1997**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 2

Citation: (1997) 2 GLR 123**Hon'ble Judges:** H.K.K. Singh, J**Bench:** Single Bench**Advocate:** S.N. Banerjee, for the Appellant; B. Das, for the Respondent**Final Decision:** Dismissed

Judgement

H.K.K. Singh, J.

This is an appeal against the appellate judgment and order dated 22.3.96 passed by the learned District Judge, West Tripura in Title Appeal No. 30/94 arising out of judgment and decree dated 21.2.94 passed by the learned Munsiff, Khowai, West Tripura in Title Suit No. 30/90.

2. The only point for determination in the present appeal is in respect of the power of the trial Court in imposing conditions while allowing the Plaintiff to withdraw from the suit with liberty to bring a fresh suit under Sub-rule 3 of Rule 1 of ORDER XXIII Code of Civil Procedure. The point involved in this appeal being only a question of law, the learned Counsel on both sides have submitted to the Court for disposal of the present appeal at the stage of admission without even calling for the records from the Courts below and as such I am inclined to dispose of the present appeal at this stage.

3. Facts which are necessary for disposal of the present appeal are that the Plaintiff (Respondent No. 1 in this appeal) brought a suit being Title Suit No. 7/88 of the

Court of Munsiff, Khowai, West Tripura, against the present Appellant No. 1 and the proforma Respondent Nos. 2 and 3 as Defendants for title over the suit land and for eviction of the Defendants therefrom. The aforesaid suit was withdrawn under, Sub-rule 3 of Rule 1 of ORDER XXIII CPC with a liberty to institute a fresh suit in respect of the same subject matter. At the time of granting the permission, the trial Court imposed a condition for filing a fresh suit within a period of 2 (two) months from the date of order and also to pay a cost of Rs. 50/- (fifty) to the Defendants. The said order was passed on 18.6.1990. Thereafter, the Plaintiff filed a fresh suit being title Suit No. 7/88 on 14.9.90. After hearing on full contest, the trial Court dismissed the suit on the ground that the fresh suit was brought beyond the period of 2(two) months which was in violation of the condition imposed under the order dated 18.6.90 and hence dismissed the suit vide judgment and decree dated 21.2.94. Against the said judgment and decree of the trial Court the Plaintiff brought the Title Appeal being No. 30/94 of the Court of the District Judge, West Tripura, Agartala and the appellate Court set aside the decree of the trial Court and remanded the case to the trial Court for retrial holding that the trial Court was not justified in dismissing the suit on a mere technical ground of violation of the condition imposed by the Court at the time of allowing the withdrawal of the suit.

4. Mr. S.N. Banerjee, the learned Counsel for the Appellant has assailed the judgment and order of the learned appellate Court submitting that the earlier suit was allowed to be withdrawn on condition that the subsequent suit was to be filed within a period of 2(two) months from the date of order but the Plaintiff brought the subsequent suit after the expiry of the said period of two months, thus, according to the learned Counsel, the condition imposed at die time of according permission for withdrawal of the suit was violated and as such the trial Court was justified in dismissing the suit. The learned Counsel further submits that the said condition was concluded one and it was a condition precedent to be fulfilled by the Plaintiff for filing the subsequent suit and it is not open to the Courts trying the subsequent suit or hearing the appeal to question the validity or otherwise of the condition which has been a concluded matter, thus Mr. Banerjee strongly criticised the judgment and order of appellate Court in setting aside the order of the trial Court.

5. As against the above submission of Mr. Banerjee, Mr. B. Das, the learned senior counsel for the Respondents has submitted that the condition of imposing a time limit for filing the fresh suit i.e. within a period of 2 (two) months from the date of withdrawal was in violation of the provision of law and as such the said condition was void and as such, the Court should not give effect to the said condition and thus, Mr. Das supported the judgment and order of the learned appellate Court.

6. For the better appreciation of the case the relevant portion of the order of the trial Court permitting the withdrawal of the suit is extracted below:

Prayer of the plttff. is allowed to withdraw the suit on condition of file a fresh suit within 2 (two) months from this date and a cost of Rs. 50/- (fifty) is to be paid to the

Defendants.

(underline mine)

The condition imposed by the Court was that the fresh suit was to be filed within a period of 2(two) months from 18.6.90 and that a sum of Rs. 50/- (fifty) was to be paid to the Defendants.

7. The relevant provision of Sub-rule 3 of Rule 1 of ORDER XXIII is also extracted below:

(3) "Where the Court is satisfied,

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the Plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim, it may, on such terms as it thinks fit, grant the Plaintiff permission to withdraw from 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.

8. The provision of law is clear. Unless the condition imposed by the Court is fulfilled no fresh suit may be filed. Mr. Banerjee has relied upon the decisions of the Calcutta High Court in the case of Hriday Nath Roy v. Ram Chandra Barna Sarma-reported in AIR 1921 (CAL) 34, and in the case of Sonar Bang la Bank Ltd. v. Calcutta Engineering College and Ors. reported in AIR 1960 (CAL) 409. In the case of Hriday Nath Ray (supra) a 5 (five) Judge Full Bench of Calcutta High Court held:

An order for withdrawal of a suit with leave to institute a fresh suit, made under Order 23 Rule 1 , but in circumstances not within the scope of the rule, cannot be treated as an order made without jurisdiction; such order is consequently not null and void. A fresh suit instituted upon leave so granted is not incompetent.

The Court trying the subsequent suit is not competent to enter into the question, whether Court which granted the Plaintiff permission to withdraw the first suit with liberty to bring a fresh suit had properly made such order.

In the latter case i.e. Sonar Bangla Bank Ltd. (supra) the same High Court followed and reiterated the above point of law decided in Hriday Nath Roy's case (supra). Thus, according to Mr. Banerjee the order of withdrawal imposing condition is a concluded matter and as such the validity or otherwise of the condition imposed by a competent Court in exercising its jurisdiction vested by law cannot be reopened or reagitated.

9. To refute the contention of Mr. Banerjee, Mr. B. Das has categorically submitted that the condition imposed by the Court was in violation of the provision of law contained in ORDER. XXIII Rule (2) thus, the condition was void as the Court acted in excess of the jurisdiction in imposing such condition against the provision of statute.

Thus, according to Mr. Das the order of the Court was void-ab-initio. thus, it could be challenged in any subsequent or collateral proceedings.

10. For convenience, ORDER XXIII Rule 2 is extracted below:

2. "LIMITATION LAW NOT AFFECTED BY FIRST SUIT:

In any fresh suit instituted on permission granted under 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.

11. As per the provision of ORDER XXIII Rule 2, it is clear that general law of limitation for institution of a suit shall apply in respect of a fresh suit instituted after withdrawal of the former suit on permission of the Court, in the manner as if the first suit had not been instituted. Thus, according to the said provision with regard to the question of limitation, general law of limitation shall apply and as such no new law of limitation may or can be prescribed by the Court in violation of provision of law.

12. Under Sub-rule 3 of Rule 1 of ORDER XXIII the Court may impose the condition while allowing the Plaintiff to withdraw the suit thus, Court has jurisdiction to impose such condition on such terms as it thinks fit considering the facts and circumstances of the case. Thus, my considered view is that while imposing any condition, the Court cannot impose such a condition which may be against the expressed provision of law prescribed by statute. In other word the condition to be imposed by the Court should not be in contravention of the provision of a statutory law, it cannot be against the expressed provision of law. The Court cannot go beyond law. If the condition imposed by the law is against the provision of law then the said condition is void and non-est as being ultra vires the provision of statute. The Court can neither extend nor shorten the period of limitation prescribed by statute.

13. In the present case, the first suit was withdrawn with a permission to bring the fresh suit thus, ordinary law of limitation for institution of such a subsequent suit shall apply in the manner as if the first suit had not been instituted. Thus, the condition imposed by the Court requiring the Plaintiff to institute the subsequent suit within a period of 2(two) months from the date of withdrawal is void as being ultra vires the provision of ORDER XXIII Rule 2 and law of limitation. Thus, this condition as respects the filing of the suit within a period of 2(two) months from the date of withdrawal is void and non-est. It is needless to say that the offending condition being distinct and severable, the other condition regarding payment of costs to the Defendants survived.

14. My said view finds support from the decision of the Allahabad High Court in the case of Jagdeo Singh and Anr. v. Sitla Pd. reported in AIR 1954 (All) wherein it was held that the law of limitation laid down in the Limitation Act should apply and the

Court has no right to cut down the law of limitation prescribed by the statute. Again, a Division Bench of Madras High Court in the case of [Yalpi Virupakshappa Vs. Chowdireddi Veerabhadra Gowd and Others](#), also held that any condition made by the Court when giving permission to withdraw the suit under ORDER XXIII Rule 1 could not operate to repeal Rule 2 of ORDER XXIII and opposite party cannot, be prejudiced by any order of the Court.

15. In the case of Sri Hriday Nath Roy (Supra), relied upon by Mr. Banerjee, the question of the validity of the condition imposed by the Court at the time of allowing the withdrawal of the suit was not a point referred to and answered by the Full Bench.

16. From the above discussion and finding, I find no ground to interfere with the judgment and order of the first appellate Court. Appeal is dismissed.

17. Considering the circumstances of the case, parties are directed to bear their respective costs in this appeal.