

Awadabai and Others Vs. Parvati and Others

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Court : Mumbai

Decided On : Sep-07-1989

Reported in : AIR1990Bom105; 1990(1)BomCR234

Judge : H.H. Kantharia, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 23, Rule 1

Appeal No. : Appeal from Order No. 601 of 1981 with Civil Appln. No. 2870 of 1981

Appellant : Awadabai and Others

Respondent : Parvati and Others

Advocate for Def. : Narendra V. Walawalkar, Adv.

Advocate for Pet/Ap. : R.S. Deshpande for;A.V. Sawant, Adv.

Judgement :

1. The first respondent, Parvati alias Drupadabai w/o Ramchandra Borate, (hereinafter referred to as 'the plaintiff') filed civil suit No. 15 of 1974 in the Court of the learned Civil Judge, Junior Division, Dahiwadi for partition of certain property and possession of her separate share together with mesne profits. The said suit was dismissed by the learned trial Judge by an order dated November 29, 1978 on the ground that it was not tenable without payment of the costs of the previous suit

No. 53 of 1972 which was withdrawn by the plaintiff conditionally. The matter was taken in appeal in the District Court at Satara by the plaintiff who filed Civil Appeal No. 2 of 1979 impugning the order dated November 29, 1978 passed by the learned trial Judge. The learned Assistant Judge, Satara, who heard the said appeal allowed it as he was of the opinion that the order passed by the Judge while allowing the withdrawal of the original suit was not properly interpreted by the Civil Judge, Junior Division, Dahiwadi. He accordingly set aside the order passed by the learned trial Judge and remanded the matter to the trial Court for fresh trial in accordance with law. The judgment and order was recorded by the appellate Court on June 9, 1981 which has been impugned in this appeal by the original defendants Nos. 8 to 12.

2. Now, the undisputed facts are that the previous suit No. 53 of 1972 was withdrawn by the plaintiff on August 18, 1973 by filing an application (Exh. No. 40) on which the following order was passed :

'The suit is allowed to be withdrawn with permission to file a fresh suit on the same cause of action on payment of 1/4th costs of the defendants. Court-fee to be refunded as per rule.'

Thereafter, the plaintiff filed civil suit No. 15 of 1974 in the trial Court on February 14, 1974 on the same cause of action but without payment of costs as was ordered earlier when suit No. 53 of 1972 was allowed to be withdrawn. Therefore, a contention was raised on behalf of the defendants that civil suit No. 15 of 1974 was not maintainable inasmuch as it could not have been filed for the same cause of action unless 1/4th of the costs was paid to the defendants as was ordered at the time of withdrawal of suit No. 43 of 1972. Same arguments as were advanced before the trial Court and in the appellate court were advanced before this Court. Thus, Mr. Deshpande on behalf of the appellants urged that the second suit was not maintainable without the payment of costs and on the other hand Mr. Walawalkar on behalf of the plaintiff submitted that such an argument as advanced by Mr. Deshpande was considered to be too technical by the Supreme Court in case of *M/s. Konkan Trading Company v. Suresh Govind Kamat Tarkar*, : [1986]2SCR182 while deciding a similar matter.

3. It is no doubt true that when the second suit was filed, the plaintiff had not paid 1/4th costs to the defendants as was ordered by the Court while allowing the withdrawal of suit No. 53 of 1972 and the arguments advanced on behalf of the parties were based on the provisions of Order XXIII, Rule 1 of the Civil Procedure Code. In the case of M/s. Konkani Trading Company (supra) a similar situation had arisen and while interpreting the provisions of O. XXIII, R. 1, their Lordships of the Supreme Court, after considering all the decisions on the point, came to the following conclusions (at p. 1010):--

'Under Order XXIII, Rule 1(3) while granting permission to the plaintiff to withdraw the suit with liberty to file a fresh suit, it is open to a Court to direct the plaintiff to pay the costs of the defendants. Even if such 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 of not paying costs before instituting the fresh suit, 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 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 on which it was presented. This view not only advances the cause of justice but is also in accord with the spirit behind S. 148.'

Their Lordships of the Supreme Court were further pleased to say that all contrary views expressed by the various High Courts stand overruled. Therefore, the point of law now raised by the learned counsel of both sides is fully covered by this latest pronouncement of the Supreme Court. And it is important to note that in the present case the payment of costs was not made as a condition precedent to the filing of the fresh suit and no date was fixed by the learned Judge for payment of such costs. Therefore, the costs could be paid by defendant (sic) even afterwards and the irregularity committed in filing the suit would be cured later which as the record shows was done by the plaintiff in this case.

4. Such being the facts and circumstances of the case and the position in law as settled by Supreme Court, I find no merit in this appeal which deserves to be

dismissed.

5. In the result, the impugned order dated June 9, 1981 passed by the learned Assistant Judge, Satara, in civil appeal No. 2 of 1979 is confirmed. The appeal stands dismissed but with no order as to costs.

6. In view of the appeal being dismissed, nothing survives in the civil application No. 2870 of 1981. Rule issued therein stands discharged. Interim stay stands vacated. No order as to costs.

7. Order accordingly.

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