

Bharat and ors. Vs. Ram Pratap and ors.

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Court : Allahabad

Decided On : May-02-1984

Reported in : AIR1985All61

Judge : K.N. Goyal and ;K.N. Misra, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 23, Rule 1, 1(1) and 1(2)

Appeal No. : Second Civil Appeal No. 418 of 1972

Appellant : Bharat and ors.

Respondent : Ram Pratap and ors.

Advocate for Def. : Biseshwar Nath and ;Umesh Chandra, Adv.

Advocate for Pet/Ap. : B.L. Shukla, Adv.

Disposition : Appeal allowed

Judgement :

K.N. Misra, J.

1. This appeal was heard by one of us brother K. N. Goyal J. who after noticing that there was some conflict in the decisions of single Judges on the legal question involved in this appeal referred this second appeal to be decided by the Division Bench This appeal has thus come up before us for decision.

2. Briefly stated the facts of the case are that the plaintiff appellant had filed a suit No. 239 of 1964 for declaration against the defendant-respondents and in that suit an application under Order 23 Rule 1(2) Civil PC (for short C.P.C.) (as it stood prior to its amendment) for permission to withdraw the suit with liberty to file a fresh suit on the same cause of action was moved This application was allowed by order dated 28-9-1967 passed by Munsif, North, Sultanpur. The operative portion of the order reads :--

'The application is therefore allowed while permitting the plaintiff to withdraw the suit The plaintiff will pay up the entire cost of this suit to the defendant.'

3. Thereafter, the plaintiff filed the present suit. The plaintiffs' contention was that as a result a partition between the zamindars of village Rohitpara land of Ahata No. 29 and Ahata No. 25 was Sehan of plaintiff and Bhulan, father of defendant 1, who were members of the same family. As a result of private partition between plaintiff and Bhulan, 10 Biswas of land of Ahata No. 25, situated towards north, fell in the share of Bhulan and 1 Bigha land of the said plot situate towards south, fell in the share of the plaintiff. After separation, plaintiff constructed a Sariya in his portion of land in Ahata No. 25 and Bhulan constructed a Sariya on his portion of land And ever since then, the plaintiff continued to remain the exclusive possession over his portion of land and his Sariya and the defendant continued to be in possession of the land and Sariya which fell in his possession. The plaintiff, thus, pleaded that he has all along been in exclusive possession of his Sariya and the land appurtenant to it. Defendant 1 executed a sale deed dated 27-10-1964 transferring his portion of land of Ahata to defendant 2. Defendant 2, however, threatened to interfere with the possession of the plaintiff over his portion of land of Ahata marked by letters 'Na' 'Ka' 'Sa' and 'Da' in the site-plan annexed to the plaint. The plaintiff, thus, pleaded for the relief of permanent injunction restraining the defendants from interfering with his possession over the disputed Sariya and the appurtenant land.

4. This suit was contested by both the defendants who filed separate written statement. Their defence proceeded on common grounds that the property in suit does not belong to the plaintiff nor he is in possession over the same. They denied

the alleged division of Ahata No. 25 and the construction of Sariya in dispute by the plaintiff. It was also denied that the disputed Sariya is situated on plot No. 25. It was further pleaded that defendant 1 was in possession of the Sariya in suit and he validly transferred it to defendant 2 by means of sale deed dated 27-10-1964. The defendants also pleaded that the plaintiff had earlier filed a suit in respect of this very property, but he had withdrawn that suit and no permission was granted to file fresh suit, and, as such, the suit is barred by principle of res judicata. The following issues were framed in the suit on the pleadings of the parties : --

- (1) Whether the plaintiff is owner of disputed property.'
- (2) Whether plaintiff is in possession. If not its effect?
- (3) Whether suit is barred by principle of res judicata?
- (4) Whether the land in suit and property in suit is not identifiable?
- (5) Relief?

5. On the consideration of the evidence on record let in by the parties, the trial court decreed the suit of the plaintiff holding that the plaintiff is owner of the property in suit, that the suit is not barred by principle of resjudicata and that the property in suit is identifiable on the spot. Aggrieved by the judgment and decree dated 23-9-1968, defendant 2 preferred appeal which was heard and allowed by the lower appellate court vide judgment and order dated 7-9-1972 and the suit of the plaintiff has been dismissed as being barred by Rule 1(3) of Order 23, C.P.C. Since this plea regarding the suit being barred under the said provision was raised at the appellate stage by the defendant appellants, and, as such, the lower appellate court directed the parties to bear their respective costs of both the courts. Aggrieved by it the plaintiffs preferred the present second appeal.

6. We have heard learned counsel for the parties at some length and have perused the record very carefully.

7. Learned counsel for the appellants Sri R. K. Sharma, contended that the lower appellate court mis-construed the order dated 28-9-67 passed by Munsif, North,

Sultanpur, in earlier regular suit No. 239 of 1964 by which application for withdrawal of the suit with liberty to file fresh suit was allowed Learned counsel contended that although the order in express words was not passed for granting permission to the plaintiff to file fresh suit, but since the plaintiffs' application, containing the prayer for withdrawal of the suit with liberty to file fresh suit, was allowed, and, as such, the order dated 28-9-1967 cannot be construed in the manner done by the lower appellate court and it cannot be taken to be an order refusing permission to file fresh suit which prayer was not rejected. Since the learned Munsif had allowed the application, and, as such, the subsequent suit filed by the plaintiff in respect of the same property in suit on the same cause of action could not be dismissed as barred under Rule 1(3) of Order 23, C.P.C (old). Learned counsel further contended that where the plaintiff moves an application for withdrawal of the suit with liberty to file fresh suit under Order 23 Rule 1(2) of the Code (old), the court while refusing to grant permission to file fresh suit could not, in law, consign the suit having been withdrawn. The court had to proceed with the suit in the event it refuses permission to file fresh suit. His contention thus, was that order dated 28-9-1967, passed by the Munsif, North Sultanpur in earlier suit allowing the application for withdrawal cannot be construed to be one rejecting the prayer for filing fresh suit but it has to be construed to be one granting the composite prayer contained in the application for withdrawal of the suit moved by the plaintiff under Order 23 Rule 1(2) of the Code (old). Referring to the decisions of this court in Prem Ballabh Pant v. Mt Sri Krishna Sundari : AIR1934 All292 , Balbir Singh v. Smt Sulochana : AIR1970 All382 and Lala Dodraj v. Gayan Prakash (1932) 135 Ind Cas 160, learned counsel contended that the view taken in these cases was that the court had no jurisdiction to accept the prayer for withdrawal of the suit while rejecting the prayer for liberty to file a fresh suit, and, as such, if the permission to file fresh suit was not to be granted to the plaintiff, then the court had no option but to reject the application and the suit should have been allowed to be prosecuted on merit Since that has not been done, the order dated 28-9-1967 has to be construed that the permission to file fresh suit was granted and the lower appellate court had erred in dismissing the present suit of the plaintiff-appellants being barred under Order 23 Rule 1(3) of the Code (old).

8. In reply learned counsel for the respondents contended that a perusal of the order dated 28-9-1967 would indicate that the learned Munsif found that there was no formal defect in the suit, and, as such, he had merely allowed the withdrawal of the suit and no permission was specifically granted to the plaintiff for bringing fresh suit. Learned counsel urged that when specifically permission to institute fresh suit was not granted, and, as such, the order dated 28-9-1967 allowing the application for withdrawal of the suit cannot be so construed as to give permission to the plaintiff to file fresh suit. He, thus, urged that the second suit has been rightly dismissed by the lower appellate court being barred under Order 23 Rule 1(3) of the Code (old) and no inference of constructive permission having been granted can be drawn by the said order. In support of his contention learned counsel placed reliance upon single Judge decision in *Lallu v. Board of Revenue* : AIR1973 All195 wherein it was held that: --

' The Court is empowered to grant the liberty to institute a fresh suit only after finding that the suit must fail by reason of some formal defect or that there are other sufficient grounds for granting liberty. After recording these findings the court must pass a specific order granting liberty to institute fresh suit. If no such specific order is passed, it is not permissible to infer such an order by 'constructive interpretation'. Where two reliefs are prayed for and the court specifically grants one relief, the only inference that can be drawn is that the other relief has been refused. Where, therefore, the order in the earlier suit permitting withdrawal of the suit was silent about granting of permission to institute a fresh suit it must be taken that the court in the earlier suit refused to grant permission to file a fresh suit. In the absence of such a permission, the second suit is clearly barred by Sub-rule (3) of Rule 1 of Order 23, and the Court not only commits a manifest error of law in holding that the suit is not barred but also commits an error of jurisdiction in entertaining the suit and in decreeing the same.'

9. We have carefully considered the arguments advanced by the learned counsel for the parties and have gone through the case law cited by the learned counsel in support of their contentions. The foremost crucial question for consideration in the present case is whether an application moved by the plaintiff under Order 23 Rule 1(2) of the Code (old) for permission to institute a fresh suit on the same subject

matter must be treated as an indivisible whole for the prayer contained therein can be split up while refusing to grant permission to institute a fresh suit and whether the court can consign the suit having been withdrawn? There would be no difficulty in a case where the plaintiff moves an application under Order 23 Rule 1(1) of the Code for withdrawal of the suit without further seeking liberty to institute a fresh suit. In such a case, since the application is moved by the plaintiff, the suit would stand withdrawn and the application moved by the plaintiff for withdrawal of the suit cannot be withdrawn even before any order is passed thereon. In *Raisa Sultan Begam v. Abdul Qadir* : AIR1966 All318 , the Division Bench of this court held that : --

'The plaintiff who has already moved an application under Order 23 Rule 1(1), cannot withdraw the application for withdrawal of the suit even before the orders are passed on the withdrawal application, i.e. that the suit is, as far as the plaintiff is concerned, struck off from the file.'

It was further held that : --

'Since withdrawing a suit is a unilateral act to be done by the plaintiff, it requires no permission or order of the court and is not subject to any condition; it becomes effective as soon as it is done just as a compromise does. Any information of it given to the court is not part of it so also any order passed by the Court on receiving the information.'

10. In para 9 of the report it has further been observed that : --

'..... On withdrawal certain orders may be passed by the Court but they are not for giving effect to the withdrawal but to give effect to consequences arising out of the withdrawal..... The right to withdraw has been expressly conferred by Rule 1(1) there is no provision conferring the right to revoke the withdrawal and there is no justification for saying that the right to withdraw includes in itself a right to revoke the withdrawal....'

11. It is, thus, clear that where the plaintiff moves an application for withdrawal simpliciter under Order 23 Rule 1(1) of the Code, the suit would stand withdrawn

because the plaintiff cannot after moving the application for withdrawal under Order 23 Rule 1(1) withdraw such an application. But where the plaintiff moves an application under Order 23 Rule 1(2) of the Code (old) for withdrawal of the suit seeking permission to institute fresh suit in respect of the same subject matter and on the same cause of action, the question which would require consideration is whether the Court can split up the prayer and while refusing to grant permission to file fresh suit pass an order striking off the suit having withdrawn. In *Marudachala Nadar v. Chinna Mathu Nadar* : AIR1932 Mad155 it was held that :-

'An application under Order 23 Rule 1(2) for permission to withdraw from suit with liberty to institute a fresh suit on the same subject-matter must be treated as an indivisible whole, and if a party is not allowed liberty to institute a fresh suit, his pending suit should not be dismissed, but the application should be refused altogether and the suit should be retained on the file.'

12. Similar view was taken in *Thadi Konda Veeraswami v. Thulium Peda Lakshmudu* : AIR1951 Mad715 . The learned single Judge of Calcutta High Court in *Kamini Kumar Roy v. Rajendra Nath Roy* AIR 1926 Cal 233 also took similar view.

13. In the case of *Balbir Singh v. SmtSulochana Devi* : AIR1970 All382 , H.C.P. Tripathi, J. held that the prayer in the application could not be split up. The Court could either accept the application or reject it in toto. In *Lala Dodraj v. Gayan Prakash* (1932) 135 IC 160, the learned single Judge of this High Court held that 'where a party applies under Order 23 Rule 1(2), Civil PC for leave to withdraw a suit with liberty to bring a fresh suit it is for the Court either to allow the application as a whole or to dismiss it as a whole. If the application is refused the plaintiff is entitled to proceed with the suit'

14. In this view of the matter it appears to us to be well settled that where an application is moved by the plaintiff to withdraw the suit with liberty to bring a fresh suit under Order 23 Rule 1(2) of the Code, the Court may either allow the application as a whole or dismiss it as a whole It has no jurisdiction to consign the suit as withdrawn while refusing to grant permission to the plaintiff to bring fresh suit in respect of the same subject matter and on the same cause of action. If

liberty to bring fresh suit is not to be granted by the court, it has to dismiss the application requiring the plaintiff to prosecute the suit on merits as it stands. The court while refusing to grant permission to institute fresh suit cannot treat the application to be one under Order 23 Rule 1(1) of the Code (old) for withdrawal of the suit simpliciter. Thus, if the application moved by the plaintiff under Order 23 Rule 1(2) of the Code (old) for withdrawal of the suit with liberty to file a fresh suit is allowed by the court even without expressly passing an order granting permission to file fresh suit, the order would be construed to be one granting withdrawal of the suit with liberty to institute fresh suit. The order allowing the application moved under Order 23 Rule 1(2) of the Code (old) cannot be construed to be one passed under Sub-clause (1) of Rule 1 of Order 23 because the prayer in the application could not be split up by the Court. The order passed by the court, unless otherwise expressly expressed, would be construed to be one which it could validly pass in exercise of jurisdiction so vested in it and with reference to the provision under which such an order could be passed. Thus, there is no escape from the conclusion that the order dated 28-9-1967 passed in earlier suit on the application of withdrawal of suit with liberty to file fresh suit cannot be construed to have been passed under Sub-clause (1) of Rule 1 of Order 23 of the Code when the application was in fact not moved under said provision, but it was moved under Sub-clause (2) of Rule 1 of Order 23 of the Code and, therefore, the same could not be treated by the Court under Sub-clause (1) of Rule 1 of Order 23 of the Code by splitting up the prayer or rejecting the prayer seeking liberty to file fresh suit. The court in that event would have no option but to reject the application in toto.

15. An application under Order 23, Rule 1(2) of the Code for permission to withdraw the suit with liberty to institute a fresh suit on the same subject matter has got to be treated as an indivisible whole and the court cannot split up the prayer while refusing permission to institute a fresh suit and that it could not treat the application to be one under Order 23 Rule 1(1) of the Code (old) for withdrawal of the suit simpliciter and, as such, the order allowing the application without expressly granting or refusing permission to institute a fresh suit is to be taken to have been passed granting the composite prayer made in the application under Order 23 Rule 1(2) of the Code, under which an order either allowing the application in toto or rejecting it in toto, could alone be legally passed by the Court.

Therefore, when an application moved under Order 23 Rule 1(2) is allowed there is no escape from the conclusion that the prayer made in the application has been allowed in toto although no specific order is passed granting permission to institute fresh suit in respect of same subject matter and on the same cause of action.

16. In Lallu's case (supra) : AIR1973 All195 , the learned single Judge has not considered the aforesaid aspect of the matter and we are unable to subscribe to the view taken in the said decision. Although we have no hesitation in accepting the view expressed by the learned single Judge in said decision to the effect that : 'The court is empowered to grant liberty to institute a fresh suit only after finding that the suit must fail by reason of some formal defect or that there are other sufficient grounds for granting liberty,' but we find it difficult to hold that the Court must pass specific order granting liberty to institute fresh suit and that if no specific order is passed granting liberty to institute fresh suit, it would not be permissible to infer from such an order by constructive interpretation that permission to institute fresh suit has been granted. In our opinion if the Court passed an order allowing the application containing the composite prayer to the effect that the plaintiff be permitted to withdraw the suit with liberty to file fresh suit, then no other inference can be drawn than the one that the composite prayer as it stands has been granted in toto because the court could not split up the prayers and accept only one of the prayers and reject the other. Since the Court would have no jurisdiction to pass an order by splitting up the prayers contained in an application moved under Order 23 Rule 1(2) of the Code, and, as such, no such inference can be drawn that the second prayer was refused, although not said so expressly in the order. Thus, in this view of the matter, we find it difficult to persuade ourselves to take the view expressed in Lallu's case : AIR1973 All195 (supra) to the effect that where the order permitting withdrawal of the suit was silent about granting permission to institute fresh suit, it must be taken that the court in earlier suit refused to grant permission to file fresh suit. With due respect to the learned Judge we are unable to subscribe to said view taken in Lallu's case (supra).

17. It is well settled rule of construction with regard to construction of the judgment that the real intention of the Judge not expressed in the judgment may be irrelevant. It may also be irrelevant if the expressed intention is opposed to the real

intention. (See *Raja Sahib of Poonch v. Kripa Ram* AIR 1954 J & K 23). It is equally well settled that a suit or an application would stand disposed of in terms of the operative part of the order passed thereon. The Court might have intended to dispose the matter in the manner not so expressed in the operative part of the order, but it is the operative part of the order alone that would be decisive in the matter. The intention of the Judge, not expressed in the operative part of the order, would be altogether irrelevant while interpreting the order, even if it be taken to be an error on the part of the court in not passing the operative part of the order in consonance with the observations made in the body of the order because it is well settled principle of law that no party will suffer for the mistake of the court (see *Sriniwas Prasad Singh v. S. D. O. (Compensation Officer) Sadar Tahsil, Mirzapur*, 1960 Rev Dec 251 : (1960 All LJ 557). If the Court has not correctly expressed in the operative part of the order what it intended to pass on the application or in the final judgment in the suit, the party cannot be blamed for the error nor it would be made to suffer for it. It is the operative part of the order that disposes of the suit or application and is decisive in the matter.

If the order is open to appeal or revision, it would lie only against the operative part of the order. Thus, in the present case, if the court was not inclined to grant the permission to the plaintiff to bring fresh suit in respect of the same subject matter and on the same cause of action, it should have expressly passed orders to that effect and should have rejected the application moved by the plaintiff. It could not permit to withdraw the suit by treating the application to be one under Order 23 Rule 1(1) of the Code (old) for the withdrawal of the suit simpliciter. If the prayer for permission to file fresh suit was intended to be refused, the court should have passed express order and rejected the application so that the plaintiff could file revision against that order. Since the application was allowed without any reservation, the plaintiff could very well take it that the prayer as a whole has been allowed and there was no occasion for him to challenge that order merely on the observations made in the body of the judgment, which too did not support such an inference. We have carefully perused the order dated 28-9-1967 and find that even in the body of the order the learned Munsif had not expressly (said) that the plaintiff is not granted permission to file fresh suit. He has simply referred to the legal position as to when permission to file fresh suit can be granted on such an

application. He has observed that : --

'..... Learned counsel for the plaintiff has argued that the plaintiff contains certain such allegations as not to have been made and does not contain certain such facts as ought to have been made therein. The omission of certain relevant facts of the additions of certain irrelevant facts in the plaint cannot by themselves give rise to any formal defect. This is probably the reason why the learned counsel for the plaintiff has not categorically argued in a straightforward way that there is formal defect. This is probably the further reason why learned counsel for the plaintiff has drawn the attention of the court to Section 151, C.P.C., which cannot by any stretch of imagination, be applied for the present purpose specially when there is a clear provision for the withdrawal of the suit. In this view of the matter the application should be allowed for the withdrawal of the suit.'

ORDER

'The application is therefore allowed while permitting the plaintiff to withdraw the suit. The plaintiff will pay up the entire cost of this suit to the defendant.'

18. A perusal of the above quoted order would indicate that nowhere in the order the learned Munsif expressly rejected the prayer for permission for filing fresh suit. In the operative part of the order the application has been allowed without any reservation. We are, therefore, of the opinion that the said order is to be construed as to granting the prayer contained in the application as a whole and the plaintiff-appellant has rightly filed the present suit in respect of the same subject matter and on the same cause of action. The learned lower appellate court, in our opinion, has erred in holding that the present suit filed by the plaintiff was barred by Order 23 Rule 1(3) of the Code (old). The trial court had decreed the suit and the defendant-appellants had challenged the judgment and decree urging two points before the lower appellate court. Firstly it was pointed out that the suit is barred by Rule 1(3) of Order 23 of the Code, and secondly, the property in suit is not identifiable at the spot. No other finding recorded by the trial court was challenged. The lower appellate court agreed with the finding recorded by the trial court on the aforesaid second point and answered it in the affirmative. It had, however, held the suit as barred under Order 23 Rule 1(3) of the Code and

dismissed the suit as already observed above. The said finding recorded by the lower appellate court is not sustainable in law and facts of the case. We also do not find any error in the findings recorded by the trial court and, thus, the judgment and decree passed by the trial court deserve to be maintained.

19. We, therefore, allow this appeal, set aside the judgment and decree dated 7-9-1972 passed by the lower appellate court and restore the judgment and decree passed by the trial court.

20. In the circumstances of the case, we direct the parties to bear their own costs of the present appeal.

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