

Subasini Devi Vs. Ashutosh Lahiri

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Court : Kolkata

Decided On : Feb-11-1924

Reported in : AIR1924Cal751,84Ind.Cas.372

Appellant : Subasini Devi

Respondent : Ashutosh Lahiri

Judgement :

1. The plaintiff brought a suit in 1921 against the petitioner in the Court of the Munsiff at Howrah for recovery of possession of a piece of land. After hard contest that suit was dismissed by the Munsiff on the 23rd January, 1922. The plaintiff thereupon preferred an appeal and on the 28th July, 1923, filed an application under Order 23, Rule 1 on the following allegation, viz., 'there are some mistakes and defects in the plaint and some necessary words are wanting, there is the chance of this being disadvantageous to the decision of the case. If the case is conducted, there is likelihood of injury being done to me. Therefore it is humbly prayed that order may be passed allowing me to withdraw the original suit with permission to bring a fresh suit,' On this application the learned Judge passes the following order : 'The appellant is allowed on his prayer to withdraw from the suit with leave to sue again if the claim be not time barred. Appellant to pay the costs of the respondent of both the Courts.' This order is challenged on the ground that, it was passed in the illegal exercise of jurisdiction. We are of opinion that this order cannot be sustained.

2. Order 23, Rule (1) invests the Court with power to allow the plaintiff to withdraw a suit on certain conditions, namely, where the suit must fail by reason of some formal defect or that there are other grounds for allowing the prayer to withdraw. In this case the learned Judge has not assigned any reason why he thinks that the plaintiff should be allowed to withdraw from the suit with liberty to bring a fresh suit. This power has been conferred upon the Court to be exercised on certain conditions. The learned Judge has not mentioned there was any necessity for allowing the plaintiff to withdraw the suit and apparently he had no jurisdiction to pass an order under that provision of the law. It is more incumbent upon an appellate Court in giving permission to the plaintiff to withdraw a suit which has been fought strenuously in the Court below to record its reasons. There is evident authority for our power under Section 115 to interfere with an order like this. It will be enough to cite only one case, viz., the case of *Bajendra Lal v. Atal Behave Sur* (1916) 44 Cal. 454 for the view that an order like the present one can be revised under Section 115, Civil Procedure Code. A case arising upon similar circumstances was considered by Chitty and Beachcroft, JJ. in the case of *Shona Sheikh v. Dhani Sarkar* (1917) 41 I.C. 934. There it was held that that was a fit case in which this Court could interfere under Section 115, Civil Procedure Code and the order that was passed by the lower Court in that case was set aside. The lower Appellate Court has assigned no reason for giving permission to the plaintiffs nor does the application filed by the plaintiffs for permission to withdraw the suit disclose any real defect; or any sufficient reason for the grant of the relief prayed.

3. The Rule is therefore made absolute the order of the lower Appellate Court dated the 28th July, 1923 set aside and the case remanded to that Court to be taken, up from the point at which it stood - when the order now complained of was made. The petitioner is entitled to her cost of this Rule. We assess the hearing fee at one gold mohur.