
(1943) 08 BOM CK 0021
In the Bombay High Court

Champaklal Purshottamdas and Another	APPELLANT
Vs	
Bai Narbadabai and Others	RESPONDENT

Date of Decision : 06-08-1943

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 92

Citation : AIR 1945 Bom 74

Hon'ble Judges : Chagla, J

Bench : Division Bench

Judgement

Chagla, J.—This suit was filed on 3rd April 1940, by plaintiff 1 and the original plaintiff 2 against defendants 1, 2 and 3 as the executors of one Gordhandas Ranchhoddas Bhagat. The suit is to enforce a public charitable trust and was filed with leave obtained from the Advocate-General u/s 92, Civil P.C., 1908. The defendants filed their written statement on 1st July 1940, and one of the points taken was that the suit was bad for non-joinder inasmuch as Shapurji Rustomji Bhowmagri was a necessary party to the suit because he was appointed a trustee along with defendants 1, 2 and 3 to carry out the trusts created by the will of Gordhandas Ranchhoddas Bhagat. On 14th November 1940, a consent order was taken in chambers whereby Shapurji Rustomji Bhowmagri was brought on record as defendant 4 to the suit. Before bringing him on record and amending the plaint and proceedings pursuant to the chamber order I have just referred, no leave of the Advocate-General was taken u/s 92, Civil P.C. The newly added defendant filed his written statement on 17th April 1941, and he took the point, as he was obviously bound to do, that no leave of the Advocate-General having been obtained u/s 92, Civil P.C., the suit was not maintainable. The newly added defendant having taken this defence in his written statement, a notice of motion was taken out on 24th July 1941, by the plaintiffs for leave to withdraw the suit against defendant, 4 with liberty to file a fresh suit against him and on 5th August 1941, the Court granted leave to the plaintiffs to withdraw the suit as against defendant 4 with liberty to them to file a fresh suit against him on the same cause of action. By the same order the plaintiffs were also ordered to pay

to defendant 4 the sum of Rs. 325 being his costs of the suit.

2. Plaintiff 2 died on 23rd August 1941, and pursuant to a chamber order obtained on 24th October 1941, the name of plaintiff 2 was struck off. The plaintiffs obtained leave of the Advocate-General, and pursuant to an order dated 28th November 1941, the plaintiffs brought Shapurji Rustomji Bhowmagri again on record as defendant 4. On 16th January 1942, a consent Judge's order was taken whereby the chamber order dated 24th October 1941, by which plaintiff 2's name was struck off and the consent Judge's order dated 28th November 1941, by which defendant 4 was again brought on record were vacated, and it was ordered that after obtaining the previous consent of the Advocate-General the name of the original plaintiff 2 should be struck off and the name of the present plaintiff 2 should be brought on record and also the name of Shapurji Rustomji Bhowmagri be added as defendant 4 to the suit. The newly added defendant 4 has filed another written statement on 19th June 1942, by which he takes up the contention that his addition as a party defendant to this suit and the amendments in the plaint made pursuant to the order of 16th January 1942, are not in terms of and/or are not warranted by the order dated 5th August 1941, and/or are not lawful. Defendant 4 further takes up the contention that as the original plaintiff 2 died after 5th August 1941, the leave given to file a fresh suit against defendant 4 by the order of that date is not available to the present plaintiffs.

3. Now under Order 23, Rule 1, Civil P.C., it is open to a plaintiff, after he has instituted his suit, to withdraw his suit against all or any of the defendants or abandon part of his claim. If he does so without obtaining the leave required under Order 23, Rule 1, Sub-rule (2), then he is precluded from instituting any fresh suit in respect of the subject-matter of the first suit or any part of the claim in that suit. In this case there is no doubt that before the plaintiffs withdrew the suit against defendant 4, they obtained express leave from the Court to file a fresh suit against defendant 4 on the same subject-matter. But what Mr. Taraporewala has contended is that by adding defendant 4 as a party defendant to this suit after he had been struck off no fresh suit has been filed against him and that Order 23, Rule 1, does not permit the same party against whom the suit has been once abandoned to be impleaded over again.

4. The position seems to me to be this. On 5th August 1941, when the suit against defendant 4 was withdrawn, the suit against him came to an end, and between 5th August 1941, and 16th January 1942, there was no suit against defendant 4 and the suit continued on the file of this Court as against defendants 1, 2 and 3. There is no doubt that the suit was instituted against defendant 4 only when he was made a party defendant pursuant to the order of 16th January 1942. Therefore, on that date, as far as defendant 4 is concerned, a fresh or a new suit was instituted against him. It is quite true that, as far as the numbering of the suit is concerned, it is the same suit from which defendant 4 was struck off on 5th August 1941. But I do not think what Order 23, Rule 1, contemplates is a

fresh suit in the sense of a freshly filed suit against all the parties to the suit. It is quite sufficient if the suit is instituted as against a particular party after leave has been obtained under Order 23, Rule 1. This construction of Order 23, Rule 1, receives considerable support from two decisions to which Mr. Daphtary has referred. The first is reported in AIR 1940 43 (Oudh) . In that case the suit was filed by a zamindar against a number of defendants for demolition of a structure and the name of one of them was struck off by the plaintiff during arbitration proceedings as he did not sign the agreement to refer to arbitration. The award which was made was set aside by the Court and the plaintiff applied to re-implead the defendant whose name had been struck off. The Oudh Court held that the re-impleading of the defendant meant a new suit against him. His name had been struck off with the result that the suit was brought to an end against him, and as at the time no leave was taken under Order 23, Rule 1(2), to bring a fresh suit against him, the suit was barred. Presumably if leave had been obtained under Order 23, Rule 1(2), before the name of that particular defendant had been struck off, there would have been no objection to his being impleaded again after the arbitration proceedings had proved abortive.

5. The second decision is *Haveli Shah v. Shaikh Painsa* AIR 1926 P.C. 88. Here we have a case where a suit was filed originally against the defendants as sons and legal representatives of the deceased tort-feasor. The Judicial Commissioner struck out the names of the sons and substituted as the only defendants the names of the administrators of the estate of the deceased. The learned Judicial Commissioner again changed his view and struck out the names of the administrators of the estate of the deceased and resubstituted the names of the sons as party defendants. When these defendants were brought on record, they pleaded that the plaintiff's suit was barred by the law of limitation; and the Privy Council held that the suit must be deemed to have been instituted against the defendants when they were brought on record in substitution of the administrators of the estate of the deceased. In that judgment their Lordships of the Privy Council considered that when the sons were brought on record again, the suit as against them was a new suit and that the previous plaint in which only the administrators were parties was superseded by the new plaint in which the sons were made party defendants. Applying that language of their Lordships of the Privy Council to the facts of this case, there is no doubt that the plaint as it stood on 5th August 1941, after defendant 4 was struck off, was superseded by a new plaint which came into existence when defendant 4 was again made a party defendant to the suit. We had one suit as existing between 5th August 1941, and 16th January 1942, to which defendant 4 was not a party at all, and a new suit was instituted as against defendant 4 on 16th January 1942, when he was made a party to this suit.

6. I, therefore, hold that in bringing defendant 4 on record pursuant to the order of 16th January 1942, the plaintiffs had instituted a fresh suit as against him; and they having obtained leave to file this fresh suit in respect of the same subject-matter by the order of 5th August 1941, they are entitled to maintain the

suit as against defendant 4. A further point has been taken that as leave was granted to the original plaintiffs by the order of 5th August 1941, that leave does not inure for the benefit of the new plaintiff 2 who was brought on record, as I have already stated, on the death of the original plaintiff 2. This contention has not been seriously pressed by Mr. Taraporewala because it is obvious that the original plaintiff 1 and the newly added plaintiff 2 are suing in respect of the same cause of action and leave was given to plaintiff 1 and the original plaintiff 2 to file a suit against defendant 4 in respect of the same cause of action, and that cause of action having inured for the benefit of plaintiff 1 and the newly added plaintiff 2, both the plaintiffs are entitled to avail themselves of the liberty reserved to them under the order of 5th August 1941.