
(1965) 04 CAL CK 0008
In the Calcutta High Court
Case No : Suit No. 503 of 1958

Setabi Dei

APPELLANT

Vs

Ramdhani Shaw and Others

RESPONDENT

Date of Decision : 09-04-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 1 Rule 3, Order 9 Rule 5, Order 9 Rule 5(2), 11
Hindu Widows Remarriage Act, 1856 — Section 2

Citation : AIR 1966 Cal 60

Hon'ble Judges : P.C. Mallick, J

Bench : Single Bench

Advocate : A.K. Mitra, for the Appellant; S. Hazra, for Choteylal, N.N. Dutt, for one of the parties, P.K. Hazra, S.C. Advocate for Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

P.C. Mallick, J.—A very interesting point of law has been canvassed in this case. The point is whether the Court has the power to add a party against whom the suit was dismissed by a previous order under Order IX Rule 5 of the Code of Civil Procedure. The point is not covered by any authority and is a point of first impression. Able arguments have been advanced from the Bar and I am grateful to the learned counsel who participated in the debate.

2. The facts leading to this application may now be stated. This is a suit for partition of a Mitakshara coparcenary. All the members have been impleaded as parties. The suit was Instituted on February 9, 1955, and though a decade is past, the suit has not made progress. One Chotelal, who was a minor at the date of the institution of the suit, on attainment of majority made an application on September 8, 1959, inter alia, for an order that the suit be dismissed under Order IX Rule 5 of the Code of Civil Procedure. On November 25, 1959 A.N. Ray, J. made an order on the said application dismissing the suit. In his judgment,

Ray, J., recorded a finding that having regard to the fact that the plaintiff had remarried she had forfeited whatever interest she had in the coparcenary property after such remarriage. Against this order an appeal was taken. The appeal court set aside the finding that the plaintiff had forfeited her interest and also the order of dismissal of the entire suit. The view of the Court of Appeal is, that on the application, the suit was liable to be dismissed as against defendant Chotelal alone and it passed an order accordingly. This suit being a partition suit in which Chotelal is a necessary party, the plaintiff is now making this application substantially for two orders: First, the plaint be amended as indicated in the red ink in the copy plaint annexed to the petition. It appears from the copy so annexed that the plaintiff would like to recast the plaint on the footing that only the 5 branches of Ramabatar be represented by the respective kartas so that all others may be unnecessary parties. In that event, the suit when so amended may go on in the absence of Choteylal. Mr. Somnath Chatterjee learned counsel appearing in support of this application did not however press this point. Mr. Chatterjee, however, very forcefully argued that the second prayer which is the alternative prayer should be granted. This second prayer is for an order that Chotelal as against whom the suit has been dismissed as indicated above, should be added as a party defendant to this action. He purports to make the application under Order I Rule 10(2) of the Code of Civil Procedure. It is contended by learned counsel appearing to oppose this application that firstly the Court has no longer the power to add Choteylal as a party and secondly, even if the Court has power to do it, in the facts of this case the Court should not do it. Order 1 Rule 10(2) reads as follows:

"The Court may at any stage of the proceedings either upon or without the application of either party, and on such terms as may appear to the Court to be just order that the name of any party improperly joined whether as plaintiff or defendant, be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

There are two parts of this sub-clause--one deals with the power of the court to strike out a party on the ground that he has been improperly impleaded. The second part relates to the addition of parties. The Court is empowered under this sub-rule to add a party firstly on the ground that he should have been joined when the suit was originally instituted, and secondly on the ground that his presence is necessary in order to enable the court effectually and completely to adjudicate and settle all questions involved in the suit. Mr. Somnath Chatterjee contended that the word "or" connecting the two grounds is disjunctive. This in my Judgment is correct. Under the first clause, the court is empowered to add a party, who, through inadvertence or otherwise, has been left out originally being impleaded as a party defendant to the suit. The second clause contemplates cases where the party who is sought to be added might not have been a necessary or proper party when the suit was instituted but who became so at a

subsequent stage. For example, in a suit by a purchaser for specific performance of a contract for sale, only party to be impleaded is the vendor. If after the institution of the suit the vendor sells the property to another purchaser, the latter acquires interest in the property and the court under the second clause is empowered to add him as a party even though originally when the suit was instituted, he could not have been so impleaded. Similarly after the institution of the suit, there might be a devolution of the interest in the subject matter of the litigation and the court is empowered to add them as parties because in their absence, the questions in dispute cannot be fully and completely adjudicated. I therefore agree with Mr. Chatterjee that the power of the court to add party need not be restricted only to those whose presence was necessary or proper, at the date of the institution of the suit.

3. When the court in exercise of the power under Order 1 Rule 10(2) strikes out a party under the first part of the sub-rule on the ground that he has been improperly joined, no second application would lie to add him as a party. The reason is that in the first application there has been an adjudication by the court that the party has been improperly joined. To add the same person as a party formerly held to be an unnecessary party would amount to a reversal of the previous decision. It may be hit by the principles analogous to *res judicata*. When, however, a suit is dismissed under Order 9 Rule 5 a different consideration arises. The court does no adjudication whatsoever except this that summons has not been served. Order 9 Rule 5 expressly reserves the right of the plaintiff to institute a separate suit. Therefore, there is no scope for the application of the principles of *res judicata*. In adding him as party, the court is not called upon to decide whether the previous adjudication was wrong. The court accepts the previous adjudication as good and proper and then is called upon to exercise its power under Order 1 Rule 10(2) and add him as party if it is satisfied that the suit should proceed and without adding him as a party the questions raised in the suit cannot be finally and fully determined.

4. To uphold the contention of the learned counsel appearing to oppose the application, I have to hold that the power of the Court under Order 1 Rule 10 (2) is restricted. The language used in the sub-rule however indicates that the widest possible power was intended to be given to the Court. The Court is empowered to add a party at any stage of the proceeding. The power can be exercised even without an application by any of the parties. The Court is empowered to add a party *suo motu*. The only condition laid down in the rule to enable the Court to exercise its power is that the Court must be satisfied that the presence of the party is necessary to enable the Court effectually and completely to adjudicate the questions involved in the suit. Once the Court is satisfied that in the absence of the party the question raised in the suit cannot be effectually and completely adjudicated the Court is given the widest possible power to add him as a party. The power of the Court is unrestricted subject of course to the other provisions of the Code. It is contended by the learned counsel that such power even though wide, is restricted by Order IX Rule 5 of the Code. The provision of Order IX Rule

5 is mandatory and the Court is required to dismiss the suit as against the party on whom summons has not been served. The same rule however expressly provides that such dismissal would not disentitle the plaintiff to bring a fresh suit on the same cause of action and obtain a decree in that suit. It seems to me that the only object of the rule is to penalise the plaintiff for his negligence. The punishment indicated namely the order of dismissal is the only punishment. Further the punishment was intended for the plaintiff only and not for the defendants or any one of them. This provision, in my judgment, does not necessarily indicate that the court is debarred from adding him as a party under Order 1 Rule 10 (2) after the order of dismissal against him. This is a new suit its against the added defendant and Order IX Rule 5(2) empowers the plaintiff to institute a new suit after the order of dismissal under Order IX Rule 5 (1). In a case where there is a sole defendant the order of dismissal under Order IX Rule 5 (1) necessarily means the dismissal of the whole suit. In such a case the plaintiff has no other option than to institute a new suit by presentation of a fresh plaint. When however there are more defendants than one, the order of dismissal as against one defendant does not end the suit. The suit is still there. The only way in which a new suit may be instituted against him is by adding him as a party. No new suit can be instituted by presentation of a plaint before the existing suit is dismissed. The order of dismissal under Order IV Rule 5 against one defendant only has got to be drawn up as an order and not as a decree. A decree has been defined by the CPC "as a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in suit * * * *". The order of dismissal under Order IX Rule 5 does not adjudicate any question in controversy between the parties in the suit. The order of dismissal of the suit is therefore not a decree. It is only an order and has to be drawn up as such. There is therefore no substance in the contention that by allowing him to be added as a party after the order of dismissal will lead to inconsistent decree. This is the answer to the argument of Mr. Hazra that if I allow the amendment, it would lead to inconsistent decrees. The Court not being empowered to dismiss the whole suit under Order IX Rule 5 when there are more defendants than one, what happens when the suit comes up for hearing? Non-Joinder is not a fatal defect under the present Code though it was so under the old Code. The Court at that stage, is bound to entertain, the plaintiff's application for adding the party in whose absence the suit cannot proceed. Again, any of the defendants, may like the suit to go on and a defendant is empowered to ask the Court to add him as a party. A defendant in a partition suit is as much interested in having a partition decree in the suit as the plaintiff. Why should the Court refuse the defendant this prayer for a fault on the plaintiffs part in not serving on a defendant the summons within the time provided in the Code? I can see none. I am therefore unable to hold that the Court has no power under Order I Rule 10(2) to add one a party against whom there is an order of dismissal under Order IX Rule 5 of the Code. Neither the language used in Order 1 Rule 10(2) nor reason persuades me to hold that the power of the Court to add parties has been restricted by reason

of the provisions of Order IX Rule 5 of the Code of Civil procedure. There is no reason why power under Order 1 Rule 10(2) should not be exercised in appropriate case by adding a person as party against whom an order under Order IX Rule 5 has been passed previously.

5. Mr. Dipankar Ghose submitted that Order 9 Rule 5(2) only enables the plaintiff to bring a fresh suit and a fresh suit can only be instituted by presentation of a plaint. This is too narrow and technical a view. When a party is added in a suit previously instituted, the suit is a new suit as against the added party and the suit is deemed to be instituted on the date when he is so added. The court is not required to give too narrow a meaning to the words "bring a fresh suit" by limiting it to the institution of a suit by presentation of a plaint. A fresh suit can well be instituted even without presentation of a plaint.

6. The next question to be considered is whether in the facts of this case the Court should exercise this power. The relevant facts to be noted are, firstly, that the suit was instituted in 1955 and little progress has been made in the course of a decade. Many of the defendants have not been served even until now. The explanation of this delay given by Mr. Chatterjee is that there are so many parties and so many minors that there must inevitably be some delay. Further, it being a Mitakshara coparcenary with the birth of a new child proceedings must necessarily be held up for adding the new child as a party. And lastly, the plaintiff is a female. Some of the defects perhaps might have been obviated by not impleading all the grandchildren as parties. Five branches of Ramavatar could well have been impleaded by their respective kartas thereby obviating the necessity of impleading their children as parties. But unfortunately that was not done. But apart from that I do not find sufficient reason for the delay in the further proceedings in the suit. The plaintiff might be a female and so long as she was a widow she might claim her widow-hood as a ground for not being sufficiently diligent. But it is an admitted case that she is married a second time and she has a wealthy and powerful husband who is taking so great an interest in these proceedings. I am compelled to record a finding that the plaintiff has not acted with diligence and the apologia of Mr. Chatterjee that she is a female cannot be accepted in full condonation of the plaintiff's conduct in the matter. If the plaintiff desires that a partition be effected of coparcenary properties, it would be far better for her to institute a new suit with only the Kartas of the five branches as parties, rather than adding Choteylal as party in the instant suit. The next fact to note is that all other members of the coparcenary do not want this suit to go on and are opposing the application. The reason is that already a partition decree has been passed by the Alipore Court, in another suit instituted by one member of the coparcenary at Alipore. All others seem to accept the decree but not the plaintiff. She has taken step to set aside the decree and the proceeding is pending in this court in its Appellate Jurisdiction. If the decree stands, the instant suit becomes useless. When all others are satisfied with the Alipore decree and do not want the instant suit to go on, I am not prepared to pass an order giving a fresh lease of life to the instant suit, which for all practical

purpose is now dead. After re-marriage, the plaintiff has become a stranger to the coparcenary and I will not be justified in allowing her to fritter away coparcenary property in costly litigation. This point which did weigh with Ray, J. can also not be ignored.

7. In the result, the application fails and is dismissed. The parties will bear their own costs. Costs of the guardian-ad-litem will be costs in the cause.

Certified for Counsel.

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