

(2019) 03 OHC CK 0028

In the Orissa High Court

Case No : Writ Petition (Civil) No.1813 Of 2004

Trinath Basant Ray & Another

APPELLANT

Vs

Sk. Mohamood & Another

RESPONDENT

Date of Decision : 08-03-2019

Acts Referred:

Code Of Civil Procedure, 1908 — Order 23 Rule 1(2), Order 23 Rule 1(3), Order 23 Rule 1(3)(b)

Citation : (2019) 03 OHC CK 0028

Hon'ble Judges : K. S. Jhaveri, CJ;Dr. A. K. Rath, J

Bench : Division Bench

Advocate : Prafulla Ku. Rath, Soumya Mishra

Judgement

Dr. A.K.Rath, J Cleavage of decisions between the two coordinate Benches on the interpretation of sub-rule (3) of Rule 1 Order 23 CPC in the case of Babrak Khan v. A. Shakoor Muhammad, (1954) 20 CLT 642 and Atul Krushna Roy v.

Raukishore Mohanty and others, AIR 1956 Orissa 77, necessitated one of us (Dr. A.K. Rath, J) to refer the matter to the larger Bench.

2. The following question of law has been referred for our decision:

Whether the expression 'sufficient grounds' occurring in clause (b) of sub-rule (3) of Rule 1 of Order 23 CPC should be construed ejusdem generis with the words 'formal defect' mentioned in clause (a) of the said sub-rule and withdrawal of suit can be

permitted only if the defect is analogous to a formal defect?

3. Sub-rule (3) of Rule 1 Order 23 CPC, which is hub of the issue, is quoted hereunder;

1. Withdrawal of suit or abandonment of part of claim.- (1) & (2)
 xxx
 xxx
 xxx

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.â??

4. The word â??orâ?? appearing in after clause (a) and before clause (b) clinches the issue.

5. In Babrak Khan, learned Single Judge, relying on the decision of the Privy Council in the case of Chhaju v. Neki AIR 1922 P.C 112, held that â??sufficient groundsâ? occurring in clause (b) of sub-rule (2) of Rule 1 of Order 23 should be

construed ejusdem generis with the words â??formal defectâ?? mentioned in clause (a) of the said sub-rule and withdrawal could be permitted only if the defect was analogous to a â??formal defectâ?.

6. An identical question came up for consideration in Atul Krushna Roy. The learned Chief Justice held that the expression â??other sufficient groundsâ? need not be restricted to only formal defects or those analogous thereto. The words are

wide enough to embrace other defects as well. It was held that the provisions of Order 23 Rule 1 CPC have been specifically enacted in order to remove any possible doubt as to the meaning of words â??formal defectâ?. The Legislature, in

putting the two expressions separately in the two sub-rules, intended that the â??other sufficient groundsâ? occurring in clause (b) need not be of a formal character. Though the decision in the case of Babrak Khan was drawn to the attention

of the Bench, the learned Chief Justice came to hold that there is no justification for restricting the meaning of the expression â??other sufficient groundsâ? only to formal defects or those analogous thereto. It was further held that the doctrine

of ejusdem generis has been pushed too far in some cases. The expression â??other sufficient groundsâ? need not necessarily be restricted to defects of a formal character and that the words are wide enough to embrace other defects as well.

7. The Reference Bench came to hold that the ratio in Atul Krushna Roy runs contrary to Babrak Khan, whereafter the Honâ??ble Chief Justice has placed the matter before this Bench.

8. We have heard Mr. Prafulla Kumar Rath, learned counsel for the petitioners and Mr. Soumya Mishra, learned counsel for the opposite parties.

9. In *K.S. Bhoopathy and others v. Kokila and others*, (2000) 5 SCC 458, the Apex Court held that grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court, but such discretion is to be exercised by the Court with

caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the Court is satisfied that a suit must fail by reason of some

formal defect, and the other where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim. Clause (b) of sub-rule (3) contains the mandate to the

Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. (emphasis laid)

9.1 The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause

of action.

10. In no uncertain terms the Apex Court in *K.S. Bhoopathy* held that two alternatives are provided under sub-rule (3) of Rule 1 Order 23 CPC.

11. The Apex Court had an occasion to interpret the scope and ambit of sub-rule (3) of Rule 1 Order 23 CPC in *V. Rajendran and another v. Annasamy Pandian (dead)* through legal representatives *Karthayyani Natchiar*, (2017) 5 SCC 63.

Taking a cue from *K.S. Bhoopathy*, the Apex Court held in terms of Order 23 Rule 1(3)(b) where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to

withdraw the suit.

11.1 In interpreting the words "sufficient grounds", there are two views: One view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is,

formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should be read independent of the words "formal defect" and clause (a). Court has been given a wider discretion

to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a).

[illegible]

12. Justice G.P. Singh in his "Principles of Statutory Interpretation", 14th Edition, succinctly stated the principle of ejusdem generis. The learned author held that when particular words pertaining to a class, category or

specific and general words in view of the other rules of interpretation that all words in a statute are given effect if possible, that a statute is to be construed as a whole and that no words in a statute are presumed to be superfluous??.

words should be construed as limited to things which are of the same nature as those specified. But the rule is one which has to be ""applied with caution and not pushed too far"". It is a rule which must be confined to narrow bounds so as not to

14. The expression "formal defect" has not been defined in CPC. The subject of enumeration belongs to a broad based genus as well as narrow based genus. Thus the question of application of principle of "ejusdem generis" does not

formal character. The words are wide enough to take within its sweep other defects as well.

made a pregnant remark :

“The Judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to

spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to “the primordial necessity of order in the social life”. Wide enough in all

conscience is the field of discretion that remains”.

16. In view of the foregoing discussions, we hold that the view taken in Atul Krushna Roy is correct enunciation of law and the contrary view taken in Babrak Khan is not correct enunciation of law, which is accordingly overruled.

17. The reference is answered accordingly. The Registry is directed to place the matter before the assigned Bench.

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