Daulat Ram v. Mahabir Parshad and others

Mehar Singh, J.

defendants, if all the plaintiffs or the defendants appeal from the decree and any of them dies and the appeal abates so far as he is concerned under Order 22, rule 3. It is apparent that the basis on which the learned Judges proceeded to their decision in *Abdul Rahman's case* no longer subsists in view of the decision of their Lordships in *Rameshwar Prasad's case.* So even *Abdul Rehman's case* does not advance the argument on the side of the appellant Mahabir Parshad.

Appellant Mahabir Parshad has impleaded the remaining two decree-holders as respondents to the appeal. The execution application of all the decree-holders has been dismissed on a common ground that the decree which is sought to be executed has become null and void. The appeal abates so far as decree-holder Sarojni respondent is concerned because her legal representatives have not been brought on the record within time. The order of the executing Court has become final so far as this deceased respondent is concerned. It follows that that order cannot be modified or varied in favour of appellant Mahabir Parshad, and the second surviving decree-holder respondent for obviously that may result in inconsistent orders with regard to the same decree. The order of the executing Court in so far as Sarojni deceased respondent is concerned has become final and if the same order is modified or interfered with so far as the other two decree-holders, namely, appellant Mahabir Parshad and respondent Gunwanti Devi are concerned, the apparent result will be two inconsistent orders with regard to the same decree which the decree-holder seeks to execute. So the appeal of appellant Mahabir Parshad also abates. There is no order in regard to costs in this appeal either.

K.S.K.

APPELLATE CIVIL

Before Mehar Singh, J.

RAMPARTAP,—Appellant

versus

INDIA ELECTRIC WORKS LTD.,—*Respondent.*

S.A.O. 24-D of 1964.

1965

March, 5th.

Code of Civil Procedure (V of 1908)—Order 23—Rule 1(3)—Whether a rule of substantive law or a rule of procedure—Delhi

Rent Control Act (LIX of 1958)—S. 37(2)—Order 23, rule 1(3)—Whether applies to proceedings before a Rent Controller in an eviction application—Counsel for petitioner in an eviction application requesting Rent Controller to consign the application to record-room—Application so consigned—Statement of the Counsel—Whether amounts to withdrawal of the eviction application.

Held, that sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure precludes institution of a fresh suit when the party has once come before the Court with a suit and while withdrawing it has not the permission of the Court to file a fresh suit. The party so withdrawing its suit has since exercised its right of action to come before a Court, it is prohibited from coming before a Court a second time in the circumstances detailed in sub-rule (3) of rule 1 of Order 23. If a plaintiff or a party has once exercised the right to institute a suit or proceeding, what is an obstruction or a prohibition to the institution or starting of the same all over again is in substance nothing more than a rule of estoppel which estops a party to come before the Court a second time. An estoppel is a rule of evidence and all rules of evidence are rules of procedure. Hence sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure is a rule of procedure and applies to proceedings before a Rent Controller in an eviction application under section 14 of the Delhi Rent Control Act, 1958.

Held, that when the counsel for the petitioner in an eviction application makes a statement to the Rent Controller requesting it to consign the application to the record-room and such request is accepted, the statement amounts to withdrawal of the application. Although the counsel may not use the word "withdraw" in the statement, yet the statement is to be read in a reasonable manner and, if he was not withdrawing the application, it is not clear what he was trying to do.

Second appeal under section 39 of Act 59 of 1958 from the order of Shri Pritam Singh, Rent Control Tribunal, Delhi, dated 2nd November, 1963, affirming that of Shri A. R. Choudhri, Additional Rent Controller, Delhi, dated 30th April, 1963 and dismissing the appeal with costs.

D. K. KAPUR, ADVOCATE, for the Petitioner.

CHANDER MOHAN LAL, ADVOCATE, for the Respondent.

ORDER

Mehar Singh, J.

MEHAR SINGH, J.—This second appeal from the order, dated November 2, 1963, of the Rent Control Tribunal arises out of an application under section 14(1)(b) of the Delhi Rent Control Act, 1958 (Act 59 of 1958), wherein the appellant, who is the landlord, sought eviction of the respondent from the premises in question on the ground that the respondent, as tenant, has sublet, assigned or otherwise parted with possession of the whole of the premises without obtaining the consent in writing of the appellant, which application was dismissed by the Additional Rent Controller under Order 23, rule 1(3), of the Code of Civil Procedure on the ground that a previous similar application by the appellant, made on the same ground on May 26, 1961, was dismissed on a statement by the counsel for the appellant to that effect on January 29, 1962, after the respondent had put in reply to that application, and that amounted to withdrawal of the previous application without obtaining permission of the Additional Rent Controller to file a fresh application. This order of the Additional Rent Controller has been maintained by the Rent Control Tribunal.

A little more detail of the facts is necessary to appreciate the nature of the controversy between the parties. The respondent is a limited company. Its business was taken over by the Central Government under the provisions of the Industries (Development and Regulation) Act, 1951 (Act 65 of 1951), and a controller to manage its business was appointed under the statutory powers. The Controller then appointed Messrs Turner Hoare and Company Limited of Bombay to be selling agents for the respondent company. Messrs Turner Hoare and Company came in possession of the premises in dispute some time before May 26, 1961. On this last mentioned date, the appellant made an application under section 14(1)(b) for eviction of the respondent on the ground of its having sublet, assigned or otherwise parted with possession of the premises to Messrs Turner Hoare and Company. A reply to that application was made by the respondent on October 14, 1961. In that reply the facts as detailed above were pointed out and it was stated that some time in July, 1961, the agency with Messrs Turner Hoare and Company came to an end. Of course, the ground

Rampartap v. India Electric Works Ltd.

Mehar Singh, J.

of eviction was denied. Upon that, while the case continued pending on January 29, 1962, the counsel for the appellant made a statement before the Additional Rent Controller that that application be consigned to the record. On that, the Additional Rent Controller proceeded to make an order that that application be consigned to the record room according to the statement of the counsel for the appellant and the parties be left to their own costs. There the matter of the first application came to an end.

On May 16, 1962, the appellant filed a second application for eviction of the respondent under section 14(1)(b) of Act 59 of 1958, on the allegation of the latter having sublet, assigned or otherwise parted with possession of the premises to Messrs Turner Hoare and Company. It is this second application which has been dismissed by both the authorities applying sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure.

The first argument by the learned counsel for the appellant is that in terms sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure has no application to the facts of the present case. The reason given for this is that the first eviction application was never withdrawn. All that happened was that the counsel for the appellant asked the Court to consign it to the record room and that request was accepted by the Additional Rent Controller. The learned counsel says that that does not amount to withdrawal. And he further says that the second application may be treated as an application for revival of the first application. In this respect he relies upon *Dhanpat Rai* v. *Alliance Bank of Simla Limited* (1), *Mangal Singh* v. *Sagar* (2) and *Daulat Ram* v. *Pritam Singh* (3), all cases arising out of execution proceedings, in which although the attachment was kept intact, but the execution application was consigned to the record room, and the subsequent execution application was treated as a revival of the first application on the ground that the order on the first application for consignment to the record room was not an order disposing of that application. It is obvious that none of these cases has any bearing on the facts of the

(1) A.I.R. 1930 Lahore 647.
(2) A.I.R. 1936 Lahore 873.
(3) A.I.R. 1940 Lahore 78.

Accession No. ... Date 19.7.67

Rampartap v. India Electric Works Ltd.

Mehar Singh, J.

present case, for an execution application is not the same thing as original proceedings of the nature of a suit as an eviction application under Act 59 of 1958 is. There is one other case to which the learned counsel has referred in this respect and that is *Yakub Ali* v. *Durga Prasad* (4). That also was a case of an execution application. What the executing Court did was to strike off and filed the record of the execution application on the report of the Collector that part of the property to which the application related belonged to persons who were not parties to the decree. A second execution application to execute the same decree was treated as an application to revive the previous execution application. In substance, this case is not different from the three cases already referred to. So that these cases do not advance the argument on the side of the appellant. It is true that the counsel for the appellant in the first application did not use the word 'withdraw' in his statement, but the statement is to be read in a reasonable manner and if he was not withdrawing the application of the apellant, it is not quite clear what he was trying to do. If it had been a statement made by a party not conversant with the manner of litigation, something might have been said, but here was a counsel for the party who was making a statement and it seems rather to stretch what has happened too much to say that as the word 'withdraw' has not been used in the statement of the counsel for the appellant, that statement be treated as not a statement of withdrawal of the first application. I do not consider that such an approach is proper in the circumstances of the case.

The second argument by the learned counsel for the appellant is that even if sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure applies, the subject-matter of the second eviction application is not the same as was the subject-matter of the first eviction application. The learned counsel says that when the first eviction application was instituted, at the time because the Controller had in exercise of his statutory powers inducted the agent into the premises, there was probably technically not a case of subletting, assignment or parting with possession, and the first application was thus really not competent. In the circumstances, if the counsel for the appellant did make a statement of the type as has been stated, he could not be said

(4) I.L.R. (1915) 37 All. 518.

to have made any such statement and allowed the first application to come to an end with the same subject-matter as that of the second application. The reason further elaborated is that the ground at that time, that is to say when the first application was instituted, really did not exist and as it has come into existence subsequently, the subject-matter of the subsequent application cannot possibly be described as the same as that of the first application. This argument probably may have stood the ground if the respondent had not in its reply to the first application made on October 14, 1961, pointed out that the agency of the agents had been terminated some three months earlier in July, 1961. It was some three months after that statement by the respondent that the counsel for the appellant brought an end to the first eviction application of the appellant. During the pendency of that application a situation had arisen, which is a situation on the basis of which the second application has been made to the Additional Rent Controller. So that it is not correct that the subject-matter in both the applications is not the same. Now, it may be that before July, 1961, the appellant may have had his first application for eviction dismissed on this consideration that he had come to know that really there was no case of subletting, assignment or parting with possession by the respondent to the agents, for the agents had come into possession of the premises under a statute. But in and after July, 1961, the agents ceased to be the agents and nothing stopped the appellant to continue with the first application. Even if a technical consideration is pressed to the limit that on May 26, 1961, the first application of the appellant was not competent, surely nothing stopped that application continuing when it became competent in July, 1961, for in July, 1961, a fresh application of the same type could immediately have been filed. So, as stated, it is not correct that the subject-matter of the two applications has not been the same.

Another argument by the learned counsel for the appellant has been that the respondent is barred by estoppel from questioning the competency of the second application and the basis for this argument is that in July, 1961, it represented that Messrs Turner Hoare and Company had ceased to be its agents and had nothing to do with the respondent's affairs and the learned counsel says that the respondent cannot now turn round and say that Messrs Turner

Rampartap
v.
India Electric
Works Ltd.

Mehar Singh, J.

Hoare and Company are in possession and this eviction application is not competent against the respondent. But I am not quite clear how there is any estoppel involved in this. The respondent stated facts clearly in the first reply to the first eviction application of the appellant and it did not seem to have misrepresented any facts on the basis of which the appellant's position has been altered in any respect. All that it then said was that by July, 1961, Messrs Turner Hoare and Company had ceased to be the agents of the respondent. But the respondent is not now saying that Messrs Turner Hoare and Company are its agents. It is not now saying that it has sublet or assigned or parted with possession of the premises to Messrs Turner Hoare and Company. But what it is merely saying is that the second application of the appellant is not competent in view of sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure.

There is the last argument by the learned counsel for the appellant that sub-rule (3) of rule 1 of Order 23 of the Code of Civil Procedure cannot apply to the present case because that sub-rule is a rule of substantive law and is not a rule of procedure and that under section 37(2) of Act 59 of 1958, only rules of practice and procedure of a Court of Small Causes apply to Rent Controller. It is not denied that rule 1 of Order 23 applies to a Court of Small Causes. The learned counsel points out that sub-rule (3) of rule 1 of Order 23 bars a fresh suit. It thus vests a right in the opposite party not to be brought before a Court by a second or a fresh suit by a party who has withdrawn its previous suit without obtaining permission to file fresh suit. As the sub-rule deals with a substantive right of the party opposed to the party withdrawing the suit or proceedings, it is a rule of substantive law and not a rule of procedure. Sub-rule (3) of rule 1 of Order 23 precludes institution of a fresh suit when the party has once come before a Court with a suit and while withdrawing it has not obtained permission of the Court to file a fresh suit. The party so withdrawing its suit has once exercised its right of action to come before a Court. It is prohibited from coming before a Court a second time in the circumstances detailed in sub-rule (3) of rule 1 of Order 23. There is a similar prohibitory rule in Order 2, rule 2 of the Code of Civil Procedure, which prohibits a plaintiff from suing second time in respect of portions of relief omitted or relinquished in a previous

Rampartap
v.
India Electric
Works Ltd.

Mehar Singh, J.

suit. There is then section 11 of the Code of Civil Procedure which bars a Court from trying any suit or issue which has substantially been decided on merits between the same parties previously and, of course, subject to all conditions laid in that section. Now, in all the three cases the party concerned or rather the plaintiff has exercised his right of action once and it is on the exercise of that right of action that the limitations are then placed either prohibiting him from coming to the Court again or prohibiting the Court from taking cognizance of it again. No doubt, when these provisions are considered in detail, there are differences of detail but those are not material for the present matter. What I am pointing out is that if plaintiff or a party has exercised the right to institute a suit or proceeding, what is an obstruction or a prohibition to the institution or starting of the same all over again is in substance nothing more but a rule of estoppel which estops a party to come before the Court. This is how I understand sub-rule (3) of rule 1 of Order 23. If so far I am right, I think there is no difficulty with the rest because an estoppel is a rule of evidence and all rules of evidence are rules of procedure. So that sub-rule (3) of rule 1 of Order 23 is, in my opinion, a rule of procedure and applies to proceedings before a Rent Controller in an eviction application under section 14 of Act 59 of 1958.

I will, however, assume for a moment that sub-rule (3) of rule 1 of Order 23 is not a rule of procedure but is a rule of substantive law and that the authorities below erred in dismissing the application of the appellant or rather deciding the incompetency of it because of that provision, but on another ground the order has to be sustained. The ground is this, the appellant's counsel made a statement in the first eviction application asking the Additional Rent Controller to consign it to the record room. The statement was made at the stage when some months earlier the agency of the agents had been terminated. The agents were there in the same position without the agency as they seem to have continued to do so. The learned counsel for the appellant at this stage points out that there is nothing to show that in July, 1961, the agents were in the premises after the termination of the agency but while from October 14, 1961, the respondent has said that it has nothing to do with the agents, it has nowhere been stated that the agents ever

Rampartap
v.
India Electric
Works Ltd.

Mehar Singh, J.

vacated the premises at any time. So the counsel for the appellant had the first application dismissed for no obvious reason. What would have been the effect if he had just added one more sentence to his statement and said that there is nothing in the application of the appellant and it be consigned to the record room. The result would have been that the application would have been dismissed on merits as without foundation. I do not see that the present statement of the counsel for the appellant has a different effect. He had the application dismissed without any reason and it must be read as having been dismissed because there was no substance in it. In this light that application was dismissed on merits. It is not only when statements of witnesses are taken and documents are proved and then a decision given that a suit or an application is dismissed on merit. If a party having instituted a suit or an application without any reason wants it to be dismissed, the obvious conclusion is that it has nothing to support it and then the dismissal is on merits. That being so, no second application for the same cause of action, that is to say subletting, assignment and parting with the possession of the premises is competent under the general rule of estoppel. It has been said, with reference to *Thota China Subba Rao* v. *Mattapalli Raju* (5), that the second application is competent because it is a continuous cause of action. That was a case of a redemption suit and till a redemption suit is barred by the rule of limitation, every single minute gives the mortgagor a cause of action to redeem and no failure of his to redeem earlier ever bars a suit to the last date of limitation. The situation here is not parallel. At least by July, 1961, there was a ground which the appellant did and could urge in the first eviction application. By the time the second eviction application came to be instituted, it is not shown that the situation has on any material aspects altered. The agents without the agency are still said to be the sub-lessees or the assignees or the persons to whom the possession of the premises has been given. So that there is no recurring cause of action in the present case. If an argument like this were to succeed, there would be day to day applications under section 14(1)(b) of Act 59 of 1958 in that as soon as one was dismissed the next day second could be filed. I do not think such a state of affairs is admissible

(1) A.I.R. 1950 F.C. 1.

under the provisions of that Act and the last case cited by the learned counsel does not apply to the facts of the present case.

Rampartap
v.
India Electric
Works Ltd.

Mehar Singh, J.

The result is that this appeal fails and is dismissed with costs.

K.S.K.

INCOME-TAX REFERENCE

Before D. K. Mahajan and S. K. Kapur, JJ.

MESSRS BHARAT FIRE & GENERAL INSURANCE LTD.,—*Applicant.*

versus

THE COMMISSIONER OF INCOME-TAX, DELHI AND RAJASTHAN,—*Respondent.*

Income-Tax Reference No. 17-D of 1962.

1965

M arch 19h

Income-tax Act (XI of 1922)—Ss. 23-A and 34—Finance Act (XV of 1955)—Ss. 15 and 20—Finance (No. 2) Act of 1957—S. 11—Assessment year 1954-55—Assessee a shareholder in a private company, in respect of which order under S. 23-A passed—Deemed dividend falling to the share of the assessee not distributed—Whether assessable in the hands of the assessee—Previous year for the purpose of deemed dividend—Whether the same as for dividend income—S. 2(6-C)—*Deemed dividend—Whether income.*

Held, that sub-section (4) of section 20 of the Finance Act, 1955, had amended section 23-A of the Indian Income-tax Act, 1922, and provided that the provisions of section 23-A as in force immediately before the 1st of April, 1955, would continue to apply to the shareholders of a company referred to in sub-section (1) of section 23-A in respect of their appropriate previous years. Sub-section (4) of section 11 of the Finance (No. 2) Act of 1957 did not at all deal with the existing rights and obligations of the shareholders and in terms provided that the provisions of section 23-A as in force on a particular day "shall continue to apply ......". The term "continue" signifies that something which was applicable is continued. It cannot, therefore, be held that the liability of the shareholders was completely wiped out retrospectively by section 11 of the Finance (No. 2) Act of 1957. The assessee company was liable to be assessed in respect of the deemed