

## Baldeo Dass vs Joshi Gauri Dutt And Ors. on 18 September, 1952

**Equivalent citations: AIR1953ALL329, AIR 1953 ALLAHABAD 329**

ORDER

Kaul, J.

1. This is an application for revision of an appellate order passed by the learned Civil Judge of Banaras granting permission to certain plaintiffs to withdraw their suit with liberty to bring a fresh suit under Order 23, Rule 1, Civil P. C.

2. The material facts lie within a short compass:

One Joshi Ratan Shanker was granted a lease of some lands by the zamindar, Mt. Basant Kunwar. The rent due in respect of the lease fell in arrears and a decree for recovery of the same was obtained by the zamindar. In execution of that decree some of the leased plots were sold at a court auction and purchased by one Baldeo Dass. Thereupon a suit was instituted by the three sons of Joshi Ratan Shanker, one of whom was a minor. It was averred that the decree for rent was fraudulently obtained, that the sale of the leased lands was set aside by the Tahsildar on deposit of the decretal amount and that this order, was subsequently set aside by the Tahsildar which he could not do for want of legal authority and that the entire proceeding before the Tahsildar was ultra vires. On the above grounds they prayed for the following reliefs:

"(a) By the decree of the Court it be declared that the entire proceedings in Suit No. 718 of 1942 in the Court of Tahsildar, Banaras, Basant Kunwar v. Joshi Ratan Shanker, relating to plots Nos. 149, 150, 162, 169 and 170 of village Mawaiya, Pargana Sheopur, Banaras and execution proceedings of the said decree are void, ultra vires and ineffectual against the rights of the plaintiffs and defendant 3 and do not confer any right on defendants 1 and 2, valued at Rs. 176.

(b) By a perpetual injunction defendant 1 be restrained from interfering with the peaceful enjoyment of the premises consisting of plots Nos. 169/52, 170/62 and 149/3-48, which are a part of the premises described below in any way or mode whatsoever.

Valued at Rs. 2,500 of which 1/10th (one tenth) is Rs. 250.

(e) Costs of the suit be decreed against defendants 1 and 2.

(d) If the plaintiffs be found to be entitled to any relief or reliefs in addition to or instead of the aforesaid reliefs the same may also be granted."

3. The learned Munsif, Banaras, before whom the matter came up for hearing, held that the civil Court had no jurisdiction to entertain the suit, that the lease obtained by Joshi Ratan Shanker was not taken on behalf of the joint family, that his sons had no interest in the lease and that the suit was barred by limitation. He accordingly dismissed the suit. The plaintiffs went in appeal and the matter came up for consideration before the Additional Civil Judge of Banaras. [4] It appears that after the arguments in appeal were concluded, an application was made on behalf of the plaintiffs-appellants seeking permission to amend their plaint. The learned Judge rejected that application as he was of opinion that it attempted to introduce entirely new matter in the controversy. Thereupon the petitioner made an application for permission to withdraw the suit with liberty to bring a fresh suit under Order 23, Rule 1, Civil P. C. The relevant portion of the application ran thus :

"1. In this case since a few material allegations on legal grounds for avoiding and setting aside the Revenue Court decree has not been specified in the plaint.

2. Those allegations are entirely legal and their omission makes the suit legally untenable and liable to be dismissed on formal technical grounds.

3. That this is plaintiff-appellant's first attempt to get the plaint amended.

4. That since the amendment application has been opposed and disallowed plaintiffs have got only alternative of having the suit withdrawn.

"Under the circumstances the plaintiff-appellant prays that the plaintiff-appellant may be allowed to withdraw the suit with permission to file a fresh suit."

This application was allowed by the learned Judge who passed the following order :

"Bait allowed to be withdrawn with liberty to bring a fresh suit on the same cause of action only if the costs of the contesting defendants in the trial Court and in the appellate Court are paid beforehand."

5. The present revision application was filed by the purchaser Baldeo Dass challenging the legality of the order passed by the Court below. It is now well settled that a Court has jurisdiction to grant permission to withdraw from a suit with liberty to bring a fresh suit under Order 23, Rule 1, Civil P. C., only if there is a formal defect or a defect of an analogous character as a result of which the suit is bound to fail. In the absence of any such defect the Court has no authority to grant permission to withdraw a suit with liberty to bring a fresh suit: see *Abdul Ghafoor v. Abdul Rahman*, 1951-49 ALL. L. J. 607.

6. It was contended by the learned counsel for the petitioner that there was no defect either formal or of an analogous character in the plaint presented to the trial Court and accordingly the learned Judge in appeal had no jurisdiction to exercise the powers conferred by Order 23, Rule 1. It will be noted that the application for permission to withdraw from the suit with liberty to bring a fresh suit made by the applicant's counsel was extremely vague and indefinite. It says that "a few material allegations of legal grounds for avoiding and setting aside the revenue Court decree have not been specified in the plaint." The "allegations of the legal grounds" referred to are not specifically mentioned. It is true that a reference was made in this application to the previous application for amendment of the plaint which was rejected by the learned Civil Judge because it sought to introduce "new matter" in the controversy. It was frankly conceded by the learned counsel for the opposite parties that the learned Judge's view of the matter sought to be introduced by amendment of the plaint was not wrong. Apart from the grounds which were mentioned in the plaint, it was sought to challenge the proceedings which culminated in the sale of the leased lands on the ground of negligence of the plaintiff's own father, Joshi Ratan Shanker. Therefore, the learned Judge was right in rejecting the application for amendment. The application for permission to withdraw from the suit with liberty to bring a fresh suit was only a device to introduce new matter into controversy indirectly. When the attempt to introduce that matter directly in the controversy failed, the plaintiff's applied for permission to withdraw the suit and introduce this matter in the fresh suit which they intended to file. I am clear that on the finding arrived at by the learned Judge there was no defect in the plaint which was of a formal or of an analogous character.

7. A reference is made by the learned Judge to the fact that one of the parties was a minor and that he could at any time bring a fresh suit. Even if the view taken by the learned Judge of the rights of the minor was right, there can be no doubt that this consideration was irrelevant to the matter which he had to determine under Order 23, Rule 1, Civil P. C.

8. For the reasons given above, the application is allowed, the order dated 21-7-1948, passed by the learned Additional Civil Judge of Banaras granting the plaintiffs permission to withdraw from the suit with liberty to bring a fresh suit is set aside. The record shall be returned to the Court below with the direction that the appeal in which the said order was passed be disposed of in accordance with law. The opposite parties 1 to 3 will get their costs.