Abdul Ghafoor vs Abdul Rahman on 10 January, 1951

Equivalent citations: AIR1951ALL845, AIR 1951 ALLAHABAD 845

Author: Ghulam Hasan

Bench: Ghulam Hasan

JUDGMENT

Misra, J.

1. This is a defendant's application in revision under Section 115, Civil P. C. The following two questions of law were referred to the Full Bench :

> (1) Whether the words 'other sufficient grounds' in Rule 1 (2) (b) of Order 23, Civil P. C., cover grounds other than those mentioned in Rule 1 (2) (a) ? (2) If the answer to the first question is in the affirmative, in what circumstances and on what principles interference under Section 115, Civil P. C., can be justified ?

2. The suit wherein these questions arose was one for a declaration to the effect that an oral gift made by the plaintiff, Abdul Rahman, in favour of the defendant, Abdul Ghafoor, his nephew, in 1942 was invalid and ineffectual and the entry of the defendant's name in the khewat wrong and fictitious. The transfer, it was alleged, was never accepted by the donee and the property which it covered remained throughout with the plaintiff. One of the issues which arose for determination in the case thus was whether the plaintiff was in possession of the gifted properties.

3. The trial Court considered the question on merits and answered it against the plaintiff. It held that the gift was not invalid and it, therefore, dismissed Abdul Rahman's suit. The plaintiff went up to the Court of the Civil Judge, Rae Bareli, in appeal but before the case was taken up for hearing, he applied for withdrawal of the action with liberty to institute a fresh suit. The reasons which necessitated the withdrawal were stated to be : (1) That there was a formal defect in the plaint inasmuch as the plaintiff inadvertently failed to plead that Section 24, Regulation of Agricultural Credits Act (XIV [14] of 1940) operated to render the gift invalid, and (2) That he omitted to pray alternatively for possession.

4. The learned Civil Judge did not consider the first ground on merits presumably because he thought that the omission to set up Section 24, Regulation of Agricultural Credits Act could be rectified by amendment of the plaint or that it did not in any event occasion any serious prejudice to Abdul Rahman. He granted leave on the second ground alone, his view being that the plaintiff's omission to seek possessory relief was either a formal defect or a defect akin to it. Abdul Ghafoor

questions the correctness of this order and it is contended on his behalf that Rule 1 (2) (a) of Order 23, Civil P. C., did not apply because the defect, if any, was not of a formal character and further that the case was not covered by Rule 1 (2) (b) in view of the fact that the omission to pray for consequential relief could not in the circumstances of the case be said to be 'other sufficient ground' within the meaning of that clause. It was urged on these grounds that the condition precedent for the exercise of jurisdiction conferred by Clauses (a) and (b) of Sub-rule (2) not being present, the learned Civil Judge could not permit the plaintiff to withdraw the suit and file another on the same cause of action. It was conceded that Clause (a) had no relevancy to the case. The reference was necessitated on account of the conflict of views on the point involved between the Avadh and Allahabad decisions--Md. Ejaz Rasul Khan v. Mubarak Husain, A. I. R. (12) 1925 Oudh 291 and Tikai Chowby v. Firm Sheo Dayal Ramji Das, 3 Luck 403 on one side and Kali Bam v. Dharman, A. I. R. (21) 1934 ALL. 214 on the other. The two Avadh cases have ruled that, the words 'other sufficient grounds' occurring in Clause (b) of Sub-rule (2) of Rule 1 of Order 23, Civil P. C. should be limited in their scope by the expression 'formal defect' which occurs in the earlier clause and should be governed by the ejusdem generis doctrine. The Allahabad case on the other hand holds that under Clause (b), the Court has unrestricted power to allow withdrawal upon any ground which might in its discretion be deemed sufficient irrespective of the consideration whether the defects pointed out were or were not of a formal character. The learned counsel for Abdul Ghaffor, who has come up in revision presses for the adoption of the first mentioned view.

5. Sub-rule 2 of Rule 1 of Order 23, Civil P. C. provides :

> "Where the Court is satisfied :
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> (a) that a suit must fail by reason of some formal defect, or
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> (b) that there are other 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 abandon such part of a claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of a claim."

The sub-rule contemplates two circumstances on the happening of either of which permission to withdraw a claim with liberty to institute a fresh one can be granted : (a) that the formal defect is of such a character that the suit would fail on account of it, or alternatively, (b) that 'other sufficient grounds' exist for enabling the plaintiff to launch on the litigation de novo.

6. I need scarcely emphasise, what appears on a plain reading of the second sub-rule that in cases falling under Clause (b) it is not incumbent on the Court to find that the pending suit is bound to fail. The defect, however, which would necessitate the institution of another action would have to be the result of a bona fide mistake which cannot be cured or got otherwise than by withdrawal. The rule constitutes an exception to the general doctrine which precludes the entertainment of successive litigations on the same cause of action between the same parties. By its incorporation in the Code, the Legislature it would seem, did not intend that even if the circumstances which give

finality to the decision of a suit between the parties are present and the suit fails on evidence or the plaintiff does not conduct his case with proper care and diligence, the Court should be able to get round that general doctrine by recourse to the provisions of Sub-section (2).

7. In the first Code of 1859, the corresponding rule was contained in Section 97. Under it the Courts were empowered to permit withdrawal if they were satisfied that sufficient grounds for the adoption of that course existed. The language of the section was wide and apparently unrestricted but the Courts found it impossible on general principles to give an unlimited scope to it in view of the existence side by side of the rule of res judicata. The observations of Sir James Colville in Robert Watson & Co. v. Collector of Zillah Rajshahye. 13 M. I. A. 160 may be recalled in this connection with advantage :

> "We have not been referred to any case nor are we aware of any authority which sanctions the exercise by the country Courts of India of that power which Courts of Equity in this country occasionally exercise, of dismissing a suit with liberty to the plaintiff to bring a fresh suit for the same matter. Nor is what is technically known in England as a non-suit, known in those Courts. There is a proceeding in those Courts called a non-suit which operates as a dismissal of the suit without barring the right of the party to litigate the matter in a fresh suit; but that seems to be limited to cases of misjoinder either of parties or of the matters in contest in the suit to cases in which a material document has been rejected because it has not borne the proper stamp, and to cases in which there has been an erroneous valuation of the subject-matter of the suit. In all those cases the suit fails by reason of some point of form, but their Lordships are aware of no case in which upon an issue joined, and the party having failed to produce the evidence which he was bound to produce in support of that issue, liberty has been given to him to bring a second suit, except in the particular instance that is now before them."

8. The action in Watson's case. (13 M. I. A. 160) was commenced in the year 1869 but it is not without significance that in 1869 when the above observations were made, the Code of 1859 had been on the Statute book for ten years and the Indian Courts had been invested with jurisdiction to permit withdrawal of suits on being satisfied that 'sufficient grounds' for the adoption of such a course existed. Their Lordships must of course be deemed to be aware of the very wide language used by the Legislature in Section 97 but in spite of it they observed that the rule in India was confined to cases where there was some fatal defect of a formal nature. It seems reasonably clear, therefore, that on general principles and in deference to the well established and universally recognised rules underlying the procedural law, a general unrestricted jurisdiction to sanction the institution by the same plaintiff against the same defendant of a fresh suit on the same cause of action cannot be deemed to exist unless of course the Legislature confers such jurisdiction in the clearest and most unequivocal language.

9. The history preceding the enactment of the present sub-rule may also be recalled usefully. The wide language of Section 97 of the Code of 1859 has already been referred to. The provision was on that account understood by some Courts as conferring upon them an unlimited jurisdiction --see in

this connection Joy Kishen Mookerjee v. Raj Kishen Mookerjee 16 W. R. 101 and Mt. Khatoon Koonwar v. Babu Hurdoot Narain Singh, 20 W. K. 163. This was, it may be mentioned by no means the universal practice: see Muddum Ram Doss v. Israil Ali, 21 W. R. 291 but the Legislature nevertheless presumably ex abundanti cautela chose to alter Section 97 by substituting for it in the Code of 1877, Section 378 which provided that:

> "If at any time after the institution of the suit, the Court is satisfied on the application of the plaintiff (a) that the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for permitting him to withdraw from the suit or to abandon part of his claim with liberty to bring a fresh suit for the subject-matter of the suit or for the part so abandoned, the Court may grant such permission on such terms as to costs or otherwise as it thinks fit."

The first part of the new section which was added by the Legislature was obviously redundant if the 'sufficient grounds' occurring in the succeeding clause were intended to confer unrestricted jurisdiction to grant liberty whenever they considered that the circumstances of the case rendered such a course expedient. The only way, therefore, in which the amendment can be construed is that the defects pointed out in the first part were intended to guide in some way the exercise of the powers under the subsequent clause. Order 23, Rule 1 Sub-rule (2) of the present Code is substantially the same except the word 'other' has now been prefixed to the words 'sufficient grounds'. For the reasons stated above, however, the addition can scarcely signify that the Legislature purported thereby to open a door for reagitating on the same cause of action claims which have once failed for want of evidence or for some other reason of a similar nature.

10. The decisions of the various High Courts in India are in consonance with the interpretation of Sub-rule (2) which I am inclined to adopt. There have been two principal views about the scope of the expression 'other sufficient grounds' used in Clause (b)--one favouring the application of erusdem generis doctrine, that is to say interpreting the words 'other sufficient grounds' as meaning grands which are of the same genus as 'formal defects' and the other based on the principles enunciated by their Lordships of the Privy Council in the case of Chhajju Ram v. Neki, 49 I. A. 144, holding that the expression 'other sufficient grounds' covers only such grounds as are analogous to 'formal defect'.,. In Md. Ejaz Rasul Khan v. Mubarac Husain, A. I. R. (12) 1925 Oudh 291, Wazir Hasan J. purported to apply the ejusdem generis rule but said at the same time that the words 'other sufficient grounds' in Clause (b) should be given the same meaning as was given by their Lordships of the Judicial Committee in Chhajju Ram's case to the words 'other sufficient reasons' used by the Legislature in connection with applications for review of judgment in Rule 1 Sub-rule (1) Clause (c) of Order 47 of the Code. In other words that there must be sufficiency of a kind analogous to the grounds already specified. In support of his view, the learned Judge cited two earlier decisions of the Avadh Court in Rameshwar Bakhsh Singh v Mirza Rasul Beg, 45 I. C. 603 and Rajindra Puri v. Beni Madko, A. I. R. (12) 1925 Oudh 140. In Tikai Chowbay v. Firm Shea Dayal and Ramji Das, 3 Luck. 403 Sir Louis Stuart C. J. and Raza J. relying on Watson's case (13 M. I. A. 160) also purported to adopt the ejusdem generis rule on the analogy of the decision of their Lordships in Chhajju Ram v. Neki. In Jagmohan Singh v. Ram Khilawan Dube, A. I. R. (16) 1929 ALL. 683, Mukerji and Boys JJ. considered it to be beyond dispute that the expression 'other sufficient grounds' should be read

ejusdem generis with 'formal defect". Likewise in Jumma v. P. Bam Sahai, A. I. R. (21) 1934 ALL, 137, Kendall J. held that the discretion of the Court in dealing with applications under Order 23, Rule 1 (2) (b) was similarly restricted. The Bombay High Court has, as was held in Avadh now laid down that the grounds contemplated by Clause (b) must be analogous to those under Clause (a). Punjushet v. Motiram Budhu, 50 Bom. 192 and Ramrao Bhagwantrao v. Appanna Samage, I. L. R. (1940) Bom. 299 may be referred to in particular. In the first of these cases, Sir Norman Macleod who delivered the principal judgment of the Court and with which Coyajee J. agreed, refused to give an unlimited scope to Clause (b) and to permit a plaintiff who was not likely to succeed in his suit owing to insufficiency of evidence or for some other reason of that character, to withdraw his suit with leave to reopen the dispute at a later date. The Full Bench decision in the second case says that the two clauses of Sub-rule (2) must be read together, that Clause (a) is illustrative of the 'grounds' mentioned in Clause (b) and that the words 'other sufficient grounds' must be analogous to a formal defect though they may not be fatal to the suit. In order to determine what grounds are analogous, Lokur J. who delivered the judgment of the Full Bench referred to the instances of defect of form cited in Watson's case, namely, misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit, and said that they were illustrative of the cases which would fall under the clause. The expression 'formal defect' he observed ought to be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not.

11. The Calcutta view is contained in Kharda Co. Ltd. v Durga Charan Chandra, 5 I. C. 187 (Cal.) Mabulla Sardar v Hemangini Debi, 6 I. C. 629 (Cal.), Rajendra Lal v. Atal Bihari Sur, 44 Cal. 454, Hriday Nath v. Akshay Lal Chaudhuri, A. I. R. (4) 1917 Cal. 409 and Udoy Chand v. Reasat Hossain, (A. I. R (9) 1922 Cal. 58). These cases are in consonance with the decision in the Avadh, Allahabad and Bombay Courts. The Madras view is to the same effect and is represented by Kannuswami Pillai v. Jagathambal, 41 Mad. 701 and Jagadambal v. Sundarammal, A. I. R. (28) 1941 Mad. 46. The Patna and the Nagpur High Courts have taken much the same line.--vide Dr. Sukumar Gupta v. Chairman District Board, Gaya, A. I. R. (22) 1935 Pat. 251 and Sitaram v. Chhotkai, 3 I. C. 61 (Nag.).

12. As a general rule, general words which follow particular words of the same nature take their meaning from them and are to be read as comprehending only things of the same kind as those designated by the earlier ones (see Maxwell on Interpretation of Statutes, 9th Edn. p 337), Again, a comprehensive view of an enactment or the overriding principles on which it is based may necessitate putting restrictions upon the generality of the words used in the provisions which constitute exceptions thereto. In such cases it is plain that inspite of the width of the language employed, the provision must be read as subordinated to the overriding principles and in the light of the scheme of the enactment. Having regard to the context in which Clause (b) has been placed and to the preponderance of authority which favours the placing of restrictions on the language of Clause (b), I have no hesitation in accepting if I may say so with respect the view of the Full Bench of the Bombay High Court and in holding that the words 'other sufficient grounds' in Clause (b) are confined only to the grounds analogous to those mentioned in Clause (a).

13. The cases which go to the length of holding that the discretion given in Clause (b) is unlimited are based on two grounds : (1) That 'sufficient grounds' referred to in the clause must needs be grounds other than those mentioned in Clause (a) because the Legislature has chosen to preface those words by the word 'other' and (2) That the separation of the second clause from the first indicates that the Code contemplates two wholly distinct and unconnected circumstances.

14. The most important amongst them may be examined. In Kannuswami Pillai v. Jagathambal, 41 Mad. 701, the order granting liberty to the plaintiff to sue again for a part of the claim came up on Letters Patent appeal from the decision of Abdur Rahim J. who had held that the defect in the suit was not of a character akin to a defect of a formal nature and the order of the Munsif permitting withdrawal was unauthorized. One of the members of the Division Bench, namely, Sadasiva Ayyar J. refused to apply the erusdem generis doctrine saying that it had been pushed too far in English cases and that he would be prepared to place restrictions on the words which were otherwise unrestricted only in three cases. (a) Where the generic words follow specific words in the very same clause of a sentence; (b) Where the specific words are all of the same genus and not of different genera, and (c) Where the general object of the Act is clearly expressed and the intention of the Statute is patently opposed to giving the wider meaning to the succeeding words.

15. Sadasiva Ayyar J. held that none of these considerations applied to Clause (b). The other learned Judge (Oldfield J.) who sat in the Division Bench with him did not feel disposed to reconsider the rule adopted by the Madras Court in the earlier cases in favour of the application of the ejusdem generis doctrine but he agreed with the order proposed by Sadasiva Ayyar J. since the discretion which the learned District Munsif purported to exercise could not be supported on merits and was not arrived at judicially. The view in favour of the unrestricted construction of Clause (b) was not accepted in Jagdambal v. Sundarammal (A. I. R. (28) 1941 Mad. 46 to which reference has alroady been made above.

16. In the next case Sadeq Reza v. Asaf Kader, A. I. R. (18) 1931 Cal. 268 Suhrawardy and Costello JJ. conceded that the construction which favoured the application of the ejusdem generis doctrine was reasonable. They felt, however, overborne by the consideration that Courts of law should be given unfettered discretion in the matter of withdrawal of the suit. They referred to a case where the plaintiff for no fault of his own was not able to produce evidence upon which he relied for proof of his case and asked the Court for permission to withdraw with leave to renew the suit at some future date when circumstances were more favourable. I venture to think that this is exactly the sort of thing that has to be guarded against in the interest of the other party who is entitled to be protected from repeated harassment by claims which must fail for want of requisite proof at the time when they are filed.

17. In Bai Mahakor v. Bhikhabhai Sankalchand, 59 Bom. 114 the language of the rule was said to be such as to leave no scope for the ejusdem generis rule for, if 'sufficient grounds' within the meaning of Clause (b) were to be grounds analogous to those specified in Clause (a), the subsequent clause would fail in its purpose and would militate against the language employed in it. Stress was laid on the difference of angle from which the cases under the two clause a had to be looked at. It was pointed out that in one case it was necessary to find that the suit would fail by reason of a formal

defect while in the other reference to the failure of the suit was significantly omitted. This case is opposed to the earlier decision of the same Court in Punjushet v. Motiram Budhu, 50 Bom. 192 already cited and must be held to be overruled by the more recent Full Bench case Ramrao Bhagwantrao v. Babu. Appanna, (I. L. R (1940) Bom. 299).

18. Daw Dwe v. U. San Hla, A. I. R. (25) 1938 Rang. 389 follows Bai Mahakor v. Shah Bhikhabai Sarikalchand, 59 Bom. 114 and need not be separately examined. The only remaining case to which reference may be made is Gurprit Singh v. Punjab Government, A. I. R. (33) 1946 Lah. 429 where stress was laid on the fact that Clauses (a) and (b) related to two distinct circumstances in which liberty for withdrawal could be given to the plaintiff. Din Mohammad J. with whom Mohammad Sharif J. agreed conceded that in some cases a phrase or clause may materially limit the wider effect of another phrase or clause with which it is associated but he remarked that where the Legislature kept the clauses wholly apart it was impossible to read one in the light of the other. I have stated the reasons for taking the contrary view and if I may say so with respect they appear to me to be more in consonance with the spirit and the intention of the Legislature and supported preponderatingly both on principle and authority.

19. The decision in Kali Bam v. Dharman, A. I. R. (21) 1934 ALL. 214 wherein it was held that Sub-rule (2) (b) can be interpreted so as to give the Court authority to pass an order of withdrawal upon any grounds which appear to it to be 'sufficient' irrespective of the consideration whether the grounds were in the nature of formal defects or not stands almost alone so far as the Allahabad Court is concerned. The learned Judges themselves mention that authorities had not been cited before them for interpreting the rule in any different manner.

20. My answer to the first question is that the words 'sufficient grounds' in Rule 1 (2) (b) of Order 23 of the Code cover grounds analogous to those mentioned in Rule 1 (2) (a).

21. The second question referred to the Full Bench scarcely arises in view of the answer given on the first question. It may however be mentioned that if in exercising powers under Sub-section (2) the Court exceeds the limits within which its discretion is circumscribed or there is otherwise a defect of jurisdiction the decision even though judicially arrived at cannot be allowed to stand. The principle of interference in revisions and the circumstances under which applications under Section 115 against orders permitting withdrawal of suits should be entertained would depend on the facts of each case and it is obviously undesirable even if it be not impossible to define their scope or to attempt to enumerate them.

22. My answer to the second question, therefore, is as follows: If the Court purports to exercise discretion under Clause (b) but the grounds are not analogous to the defects referred to in Clause (a), the decision even though judicial can be interfered with under Section 115 of the Code.

Ghulam Hasan, J.

23. I agree.

Kidwai, J.

24. I agree.