
(1940) 08 BOM CK 0007
In the Bombay High Court
Case No : Civil Reference No. 8 of 1939

Babubhai Vamalchand Kachra	Vs	APPELLANT
Hiralal Vamalchand Kachra		RESPONDENT

Date of Decision : 07-08-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 46 Rule 1, 24

Citation : AIR 1941 Bom 69 : (1940) 42 BOMLR 1093

Hon'ble Judges : Divatia, J;Broomfield, J

Bench : Division Bench

Judgement

Broomfield, J.—This is a reference "by the First Class Subordinate Judge of Surat purporting to be under Order XLVI, Rule 1.

2. The facts are as follows. A suit for a declaration and injunction valued at Rs.. 205 was instituted in the First Class Subordinate Judge's Court. According to the practice by which the work of that Court is distributed the case was allocated to the Joint First Class Subordinate Judge for disposal. Subsequently by order of the District Judge (it is not quite clear whether this was an administrative order or an order u/s 24 of the Civil Procedure Code) the case was sent to the Court of the Extra Joint Second Class Subordinate Judge, who is one of the four Subordinate Judges attached to the First Class Court. While the case was pending in the Court of the Joint First Class Subordinate Judge, an application was made to amend the plaint by including additional properties in the list of suit properties and asking for partition. This application for amendment was granted by the Second Class Subordinate Judge after the case had been taken up by him. The result was that the suit became one beyond his pecuniary jurisdiction and he made the following order:

The suit is now valued at more than Rs. 5,000. So this Court can have no jurisdiction to hear the suit. I therefore pass the order below:-The suit be sent to the First Class Court as this Court has no jurisdiction.

Apparently he reported the action taken by him to the District Judge and in a letter sent by the Clerk of the Court of the District Judge by order of the District Judge the First Class Subordinate Judge was informed that the sanction applied for had been granted. It is not clear, however, that any judicial order of transfer u/s 24 of the CPC had been made. When the case was taken up by the First Class Subordinate Judge, the defendants objected that he had no jurisdiction and that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have returned the plaint for presentation to the First Class Subordinate Judge under Order VII, Rule 10. The learned First Class Subordinate Judge was of opinion that this was the correct view. He doubted whether the District Judge had power to transfer the case u/s 24 of the CPC and also whether any order of transfer under that Section had in fact been made. He thought that there was a difficulty in the way of his entertaining the suit by reason of a decision of the learned Chief Justice in *Shankerji Samalji v. Vrajlal Bapalal* (1934) 59 Bom. ILR 466: 37 Bora. L.R. 255 s.c. and he submitted several questions for the opinion of this Court under Order XLVI, Rule 1.

3. The first point that has to be decided is whether a reference under Order XLVI, Rule 1, lies in the circumstances of the present case. It is clear from the wording of the rule that it cannot apply except in cases where there is a pending suit or appeal in which the decree is not subject to appeal, In the present case it appears to us that the First Class Subordinate Judge in whose Court the suit was instituted and who is the only Judge who can possibly have jurisdiction to try it must either try it or dismiss it. He cannot refuse to try it. Whether he dismisses it without hearing it or decides it after hearing, in either case there will be an appealable decree. That being so we do not consider that Order XLVI, Rule 1, has any application.

4. At the same time we think it is a case in which this Court may properly take action of its own. motion u/s 24 of the CPC and in order to save difficulty and delay transfer the suit to the First Class Subordinate Judge for disposal.

5. The learned First Class Subordinate Judge doubted whether an order u/s 24 could be made, and learned Counsel who appears here for the defendants has also argued that at any rate according to some authorities an order under this Section cannot be made in such a case. The points relied upon seem to be two. It is urged that there must, first of all, be a pending suit, and, secondly, there must be a suit pending in a Court which has jurisdiction to try it.

6. As regards the first point the suit must be regarded as pending before the Second Class Subordinate Judge, if, as is contended, the First Class Subordinate Judge has as yet no jurisdiction to hear it. As regards the second point reliance is placed on a Privy Council ruling, *Ledgard and another v. Bull*, where it was held, following *Peary Loll Mozoomdar v. Komal Kishore Dassia* (1880) ILR 6 Cal. 30, that u/s 25 of the old Civil Procedure Code, which corresponds to the present Section 24, a superior Court cannot make an order of transfer of a case unless the Court from which the transfer is sought to be made has jurisdiction to try it.

It was also held in *Jagjivan Javherdas Seth v. Magdum Ali* 1883 ILR 7 Bom. 487 that the District Court could not transfer a suit u/s 24 which had not been properly instituted. We think, however, that these authorities only mean that the Court from which the suit is to be transferred must have had jurisdiction at the time the suit was instituted. The present case was properly instituted in the Court of the First Class Subordinate Judge and the Second Class Subordinate Judge to whom it was transferred for disposal by administrative order had jurisdiction to entertain it and deal with it up to the time when the plaint was amended. We are of opinion that there is no legal objection to our passing an order u/s 24 transferring the case to the Court of the First Class Subordinate Judge. We think the present case is distinguishable from any case which has been cited before us by the facts that the two Courts with which we are concerned are in a sense parts of one Court, and that the suit was properly instituted and registered in the first instance and would have been properly instituted even if the amendment had been part of the original plaint, since all suits whether of special or ordinary jurisdiction are according to the recognised practice instituted in the Court of the First Class Subordinate Judge.

7. As at present advised we are not in agreement with the view taken by the learned First Class Subordinate Judge that the only legal way of dealing with the case was that the Second Class Subordinate Judge should have made an order under Order VII, Rule 10. Speaking for myself, I must say that if the learned First Class Subordinate Judge was of opinion that a re-presentation of the plaint to him was necessary before he could proceed with the case, there was nothing to prevent him returning the plaint to the plaintiff in order that it should be re-presented. But in the view we take, Order VII, Rule 10, has no application in a case like the present when the suit was properly instituted in the first instance. In *Mahomedbhai Husenbhai v. Adamji Halimbhai* (1921) ILR 46Bom. 229: 23 Bom. L.R. 1086 Mac C.j. 236 s. c. said:

Under Order VII, Rule 10, it is no doubt obligatory that the plaint, if instituted in the wrong Court, shall at any stage of the suit be returned to be presented to a Court in which the suit should have been instituted. But it is only in a case where the suit is instituted in a wrong Court that the plaint must be returned.

8. If it transpires during the hearing of a suit that the plaint has been instituted in a wrong Court, everything that has been done by that Court is without jurisdiction and therefore the suit has to be instituted afresh in the proper Court. But in the present case everything that was done by the Second Class Subordinate Judge up to the time when the amendment of the plaint was allowed was within his jurisdiction. We are not aware of any authority for the view that in such a case it is necessary that the suit should be instituted again and reregistered as a fresh suit under Order IV. The amendment of the plaint did not make it a new suit and no re-institution of the suit was necessary.

9. Although we propose to make an order u/s 24, we should not be taken to have decided that an order of transfer is really necessary. *Shankerji Samalji v. Vrajlal*

Bapalal 1934 I.L.R.59 Bom. 466 to which the learned First Class Subordinate Judge has referred, did not deal with similar facts. There a suit had been sent for disposal to a Subordinate Judge subordinate to the First Class Subordinate Judge by administrative order. It was afterwards removed from his file and transferred to another Subordinate Judge also by administrative order. The learned Chief Justice said (p. 468):-

... there is a clear distinction between orders of transfer and administrative orders allocating business to Courts of particular Judges. When once a Judge has taken cognizance of a suit, it seems to me that any order removing the suit from his file is an order of transfer.

Holding that the order made by the First Class Subordinate Judge there was an order of transfer, he ruled that it was invalid because the First Class Subordinate Judge has no power of transfer u/s 24 of the Civil Procedure Code, but only the District Judge or the High Court. It is to be noted that in that case the Subordinate Judge from whose Court the case was transferred was competent to try it. He had not only taken cognizance of it, but, apart from the order removing the suit from his Court, he would have been competent to proceed with it and dispose of it. In our opinion the position is not the same when, as in the present case, the Judge to whom a suit has been sent by an administrative order has become functus officio because by reason of an amendment of the plaint the valuation of the suit exceeds his pecuniary jurisdiction. Where under those circumstances an administrative order for the allocation of business has become inoperative, we can see no reason why the difficulty should not be removed by the First Class Subordinate Judge resuming control administratively of the suit which was properly instituted in his Court. He might in our opinion himself send for the papers in exercise of his powers u/s 23 of the Bombay Civil Courts Act, but whether he sends for the papers or whether they are sent to him makes no material difference.

10. However, for the reasons already given we have decided to make an order u/s 24 ex majore cautela, and we order accordingly that Regular Civil Suit No. 298 of 1938 be withdrawn from the Court of the Extra Joint Second Class Subordinate Judge and transferred for trial to the First Class Subordinate Judge, Surat. Costs to be costs in the case.