

(2015) 01 BOM CK 0157

In the Bombay High Court

Case No : Appeal From Order No. 415 of 2014 and Civil Application No. 469 of 2014

Chandra Prem Shah and Others

APPELLANT

Vs

K. Raheja Universal Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 30-01-2015

Acts Referred:

Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 — Section 28
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 2 Rule 2, Order 41 Rule 41, Order 43 Rule 43, Order 7 Rule 10
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 22, 22(1)

Citation : (2015) 5 ABR 821 : (2015) 4 ALLMR 716 : (2015) 5 BomCR 823 : (2015) 5 MhLj 714

Hon'ble Judges : Mridula Bhatkar, J.

Bench : Single Bench

Advocate : Abhijeet Singh i/by A.R. Mishra, for the Appellant; Bharat R. Zaveri, Advocates for the Respondent

Judgement

Mridula Bhatkar, J.—By order dated 3rd March, 2014, the learned Judge of the City Civil Court decided preliminary issue of jurisdiction against the plaintiffs i.e. present appellants and ordered that the plaint be returned to the plaintiffs for presentation before appropriate Court. Against the said order, present Appeal from Order is filed.

2. The learned counsel for the respondent objected the maintainability of Appeal against the said order and contended that though by the said order plaint is returned, it not to be construed as order passed under Order VII Rule 10 of the Code of Civil Procedure (for short called as, "Code"), but it is in fact an order of rejection of the plaint under Order VII Rule 11 of the Code or alternatively under Order XIV Rule 2 of the Code and hence the First Appeal lies against this order and not an Appeal from Order.

3. The order of return of plaint under Order VII Rule 10 of the Code, if passed

then not a First Appeal under Order XLI, but an Appeal against Order under Order XLIII is to be filed. Return of plaint is not a decree though reasons in brief are required to be recorded in the said order.

4. In the present matter though the Judge has returned the plaint, he did not mention under which provision of the Civil Procedure Code, he has passed the order. However, the provision empowering the Court to return the plaint is none but under Order VII Rule 10 of the Code only. In the present case a relief was sought against the co-operative society which was added subsequently and therefore, objection was raised before the trial Court that it is an issue between a Co-operative Society and the Member of the said society and therefore, the Civil Court has no jurisdiction to decide the dispute between the society and its members. My attention was drawn to the fact that on 19th June, 2013 the trial Court framed the issues and thereafter on 6th September, 2013, Notice of Motion was decided with direction that the parties to maintain status quo and decide the issue so framed separately which is as follows:-

Whether this Court has jurisdiction to try and decide the suit? The court also observed that the issue of the jurisdiction goes to the root of the matter and therefore, it should be considered as preliminary issue.

5. The learned counsel for the respondent while objecting the maintainability of the Appeal from Order submitted that while invoking the powers under Order VII Rule 10, if the suit is instituted in the wrong Court, not having either territorial or pecuniary jurisdiction, then it is to be returned. It was submitted that if at all there is objection on the ground of subject of the suit and the Court has no jurisdiction, then the plaint cannot be returned, but the plaint needs to be rejected under Order VII Rule 11 Sub clause (d) of the Code. Sub clause (d) of Rule 11 of Order VII reads thus:-

11. Rejection of plaint.-The plaint shall be rejected in the following cases:

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(d) where the suit appears from the statement in the plaint to be barred by any law;

6. The learned counsel submitted that the jurisdiction of the Civil Court is expressly barred under the Maharashtra Co-operative Societies Act, and therefore, the order cannot be said to be passed under Order VII Rule 10, but it is the order under Order VII Rule 11, hence Appeal is not maintainable instead First Appeal should have been filed. In support of his submissions, he relied on the judgment of Division Bench of this Court in Lt. Col. Anil Bhat, Sucheta Bhat and Nadiya Bhat of Delhi, Indian Inhabitant Vs. Citibank, N.A. (a National Banking Association duly constituted, registered and in existence in accordance

with the law of the United States of America now in force), . In the said case there was an order of rejection of plaint when the respondent bank filed suit for recovery of security before D.R.T. and the objection was raised whether after Tribunal came to the conclusion that it had no jurisdiction over the subject matter, could it then pass consequential order of rejection of plaint by exercising powers of Civil Court under the Civil Procedure code. There is no specific power of rejection of plaint under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993, wherein section 22(1) of the Act, provides that the Tribunal shall not be bound by the procedure laid down by Civil Procedure Code. The Division Bench of our High Court, while dealing with the issue has relied on the ratio laid down by the Supreme Court in *Raizada Topandas and Another Vs. Gorakhram Gokalchand*, . The Division Bench of this Court has reproduced the ratio laid down in case of *Raizada Topandas (supra)*, which reads thus:-

The proposition which follows is that the power of the Civil Court to direct return of the plaint is limited to those cases where it has no territorial or pecuniary jurisdiction. In case if it has no jurisdiction in respect of the subject matter then it cannot direct return of the plaint. If this principle is accepted on the facts of the case then the Tribunal would have no jurisdiction to direct return of the plaint as it came to the conclusion that it had no jurisdiction over the subject matter. 7. The learned counsel relied on the judgment in case of Division bench of Calcutta High Court, in *Allahabad Bank Vs. Shank's (Steel Fab Pvt. Ltd. and Others)*, . In para 12 of the said judgment it has been held that:-

12. In our view, the Court was quite justified in not returning the plaint in the facts of the present case, because Order VII Rule 10 speaks of a situation where either the territorial or the pecuniary Jurisdiction of that particular Court is lacking and that such suit is required to be filed in a different court to which the Code of Civil Procedure applies having Jurisdiction to entertain the dispute. This is not a case of lack of either territorial or pecuniary jurisdiction of the Trial Court, but is one where the Statute has created a total bar of jurisdiction of the Civil Court. The fact that a Court can invoke the provision of Order VII Rule 10 only to a case of lack of territorial or pecuniary jurisdiction will plainly appear from the language of the provisions contained in order VII Rules 10A and 10B where there is no scope of passing a direction for appearance of the defendant before a tribunal or other Special Authority on representation of the plaint.

8. Per contra the learned counsel for the Appellant has submitted that under Order VII Rule 10, of the Code, a plaint can be returned at any stage of the suit, therefore, Court has rightly returned the plaint to the plaintiffs. He relied on the order passed by this Court in First Appeal No. 615 of 2013, in *Shamrao Kashinath Patil-vs-Hari Gopal Kini (decd) and ors*, dated 16th August, 2013, wherein the Court allowed to convert the First Appeal No. 615 of 2013 into Appeal from Order. He further relied on the order dated 9th July, 2013 of this Court in First Appeal No. 615 of 2013 wherein similar order was passed by this

Court.

9. At the outset it is clarified that in the above orders passed by Single Judge of this Court, allowing conversion from First Appeal to Appeal from Order, the Single Judge of this court has not discussed this point as the issue was not argued and simply leave to convert was sought and it was granted.

10. It is to be considered whether the order passed by the trial Court which is under challenge in this appeal, is to be treated under Order VII Rule 10, or under Order VII Rule 11 or under Order XIV Rule 2 of the code. Admittedly when the order of rejection of the plaint is passed by the Court, it is neither for want of pecuniary nor territorial jurisdiction, but it was held that the Civil Court cannot entertain the said subject in the plaint, but it is to be entertained by the other forum. Rule 10 of Order VII, states that at any stage of the suit plaint can be returned to be presented to the Court where the suit should have been instituted. The words, "at any stage" undoubtedly by plain reading convey that it can be returned, even at the stage of argument.

11. I could lay hand over the judgment of the Full Bench of the Bombay High Court in Prabhakar Bhat -vs- Vishwambhar Pandit, reported in I.L.R. 1884 Vol. III, p. 313,. The Full Bench in the said case had dealt with the issue of return of the plaint under Section 57 of the old Code (1882) and rejection of the plaint under Section 53 of the old Code of 1882. The Sections are more or less identical to Rule 10 and Rule 11 of Order VII of the Civil Procedure Code (Amended) in 2002. The Full Bench has taken a view that,

It is long established practice of this Court as to the return of the plaints was not opposed to the earlier law and that it has at least indirectly been confirmed by the present law. High Courts from time to time their inception has been to return or direct return of the plaint in ordinary cases when the courts of trial either original suit or at appeal. 12. After the judgment of Full Bench in Prabhakar Bhat (supra), the words "at any stage" were inserted by way of amendment in the section of return of plaint. Earlier in the corresponding provision under Section 57 or 52 (old) the said words were absent. However, Full Bench gave elastic meaning to at what stage the plaint can be returned holding that it can be returned at any stage in absence of prohibition of law to do so. The said ratio by the Full Bench of this Court in Prabhakar Bhat (supra) though in respect of old Code of 1882 still holds the field.

13. Division bench of our High Court and Calcutta High Court, have taken consistent views that plaint can be returned if Court has no pecuniary or territorial jurisdiction and if there is bar under the law due to subject matter involved in the plaint, then it is to be rejected. The power given under Order VII rule 10 and Order VII rule 11 are mutually exclusive. First Appeal is prescribed under Order XLI against the original decree and not against the order. Sub section (2) Section 2 of the Code defines decree as under:-

(2) "decree" means the formal expression of an adjudication which, so far as

regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within [3]* * * section 144, but shall not include-

- (a) any adjudication from which an appeal lies as an appeal from an order, or
- (b) any order of dismissal for default.

14. Thus, when a suit is decreed, it is finally adjudicated. However, by virtue of deeming provision in the definition of Section 2(2), rejection of plaint is a decree and therefore, first Appeal lies against the order if the order of rejection of plaint is passed.

15. Clause (d) of Rule 11 of Order VII, lays down a specific reason of rejection of plaint i.e. "if it is barred by any law". The words, "at any stage" unlike Rule 10 of Order VII, are not mentioned. The suit can be rejected at the initial stage on its presentation, so also if at all the preliminary issue is raised by defendants or even suo-motu by the Court. Civil Procedure Code unfolds the procedure step by step and thus, there is sequence which is expected to be followed by the parties and the Court. The Courts are bound by the discipline of the Code which is to be observed while instituting suit and conducting trial. The main leg of arguments of the learned counsel for the respondents is that once the Court has passed an interim stage and has settled the issues and an issue under Order XIV Rule 2 on the point of jurisdiction is settled and is taken up as a first issue to be decided then, the finding given under Order XIV Rule 2 is necessarily is a final adjudication and then the suit is to be dismissed for want of jurisdiction. The Court has to dismiss it and the Court cannot return the suit. These submissions are not acceptable. Even at the appellate stage, under Rule 10B, the Court has power to transfer the suit to the proper Court as appeal is a continuation of the suit. Framing of issues does not curtail power of the Court either to return or to reject the plaint. If on the point of jurisdiction of the Court, the said point is not decided earlier at interim stage, then at the time of settling the issues, the law provides opportunity to the parties to raise the issue of jurisdiction and also empowers the Court to decide that issue. Therefore, plaint can be returned not only at the initial stage, but the words "at any stage" are flexible and to be given its full and effective meaning. It is to be remembered no artificial compartments in the powers of the Court in return of suit can be made as the procedure is a handmade of law.

16. In the case of Lt.Col. Anil Bhat (Supra), the proceedings filed before the Debts Recovery Tribunal were without jurisdiction and, therefore, it directed to return the plaint for presentation to the proper Court. Hence, the said order of Debts Recovery Tribunal was challenged before the Division Bench. Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 lays down the procedural powers of the Tribunal and it says that it is not bound by

the procedure laid down by the Code of Civil Procedure. It was questioned that when the Court has no jurisdiction over the subject matter, then it has no jurisdiction to pass further orders.

17. In the said case observation of the Supreme Court in *Raizada Topandas (Supra)* were referred, wherein the Supreme Court dealt with the interpretation of Section 28 of the Bombay Rents Hotel and Lodging House Rates Control Act, 1947. The suit was filed before the City Civil Court. The objection was raised and the City Civil Court held in favour of the defendant. The High Court set aside the order and held that it is the plaintiff who can choose the forum and on the basis of his statements of facts, the jurisdiction is to be determined initially and it maintained that the City Civil Court has jurisdiction to entertain the said suit as the landlord and the tenant relationship was not claimed. The order of the High Court was maintained by the Supreme Court. The Supreme Court held that the power of the City Civil Court to direct the return of the plaint is limited to those cases where it has no territorial or pecuniary jurisdiction. In case, if it has no jurisdiction in respect of the subject matter, then it cannot direct the return of the plaint.

Apparently, this finding may look supportive to the submissions of the learned counsel for the respondent. but, if at all this ratio is understood on the background of plain reading of Rule 10, then it clarifies the legal position. In *Raizada Topandas (Supra)*, the issue was totally different related to scope and interpretation of Section 28 of the Bombay Rent Act and the observations were made in that context. The ratio was laid down mainly in respect of Section 28 of the Bombay Rent Act.

18. Order VII Rule 10 of the Code of Civil Procedure reads as follows:

Order VII Rule 10 : Return of plaint.--(1) 99[Subject to the provision of rule 10-A, the plaint shall] at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.

1 [Explanation.--For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint, under this sub-rule.]

(2) Procedure on returning plaint.--On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

2 [10-A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.--

(1) Where, in any suit, after the defendant has appeared, the Court is of opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.

(2) xxx xxx xxx

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) xxx xxx xxx

(3) xxx xxx xxx

(a) xxx xxx xxx

(b) xxx xxx xxx

(4) xxx xxx xxx

(a) xxx xxx xxx

(b) xxx xxx xxx

(5) xxx xxx xxx

10-B. Power of appellate Court to transfer suit to the proper Court.---

(1) Where,.....

(2) The.....

19. Rule 10 is in three parts, which is 10, 10A and 10B. Rule 10 consists of sub-rule 1 and 2. This rule empowers the Court to return the suit to the plaintiff for presentation in the Court, where the suit should have been instituted. At the time of returning a plaint, it is necessary for the Judge to endorse the date for its presentation and the date of return and also brief statement of reasons for the return. Rule 10A empowers the Court to return the suit after the defendant appears. Then the Court is required to intimate the decision to the plaintiff. A procedure is laid down under rule 10A how the order of returning the plaint is to be passed by the Court by mentioning the Court where it is to be presented then also fix a date for the appearance of the parties in the said Court. Rule 10A is amended in 1976 with necessity of obviate the summonses to the defendants. Rule 10B states that in appeal, the Court has power to transfer the suit to the proper Court.

20. Thus, Rule 10 contemplates that if a suit is wrongly filed in the Court then, the Court should return it to the Court where it should have been instituted.

This rule is applicable and can be invoked only when there is another Court which has jurisdiction to try the suit. If no such forum is available, then this Rule is not applicable. The jurisdiction of the Court is classified in following three categories;

I) Territorial;

II) Pecuniary; and

III) Jurisdiction with reference to the nature of the suit. These three factors have bearing over the inherent jurisdiction of the Court. If suit is filed before a wrong

forum, then it disables the said Court to go ahead with the matter as it lacks inherent jurisdiction. Order VII Rule 10 of the Code of Civil Procedure does not place any bar in respect of not returning the plaint if there is no jurisdiction with reference to the nature of the suit. It simply states that the suit be returned for presentation to the other Court where it should be instituted.

21. Under Section 9 of the Code of Civil Procedure, Court has power to try the civil disputes of the civil nature unless barred either expressly or impliedly. Thus, if at all other forum is created to entertain and try any civil dispute, then the suit is to be tried by that special forum. It can be illustrated by taking example of Motor Vehicle Act where a Tribunal is established to decide the issue of compensation and other matters under the Act. Same is the case of a Family Court. Wherever there is a creation of the Family Court and such Courts are available then the petition is to be filed before the said forum and it is not to be entertained by the civil Court; which otherwise in the absence of establishment of Family Courts is triable by the Civil Court and thus, Order VII contemplates such situation and empowers the Court to return the suit for presentation before the Court where it should have been instituted. This depends on the nature of the suit. Thus, the most important ingredient of this Rule is availability of another forum for presentation of the suit. This is a situation where the plaintiff has erred in presenting the suit in the Court instead he should have chosen the other forum which is a correct one. Thus, within the purport of Order VII Rule 10 of the Code of Civil Procedure, if Court comes across such situation, then the Court is justified in returning the suit under Order VII Rule 10 of the Code of Civil Procedure at any time which also includes a stage of "after settlement of the issues". A Court may dismiss it for want of jurisdiction or return it for want of jurisdiction.

22. I am benefited by the judgment of the Hon"ble Single Judge of this Court who has dealt with similar issue in Rhoda Jal Mehta and Others Vs. Homi Framroze Mehta and Others, . In the said matter, the Court was dealing with its power to receive the plaint under Clause 12 of the Letters Patent. In the said matter, necessary leave, as the land is situated out of the territorial jurisdiction of Mumbai, was not obtained and, therefore, the learned Single Judge relied on the judgment of the Full Bench in the case of Prabhakar (Supra) read with the judgment of Division Bench in the case of Devidatt Ramniranjandas Vs. Shriram Narayandas, . The Division Bench while dealing with the provisions of leave under Clause 12 of the Letters Patent has observed as follows: "As the words "empower to receive" seem to me to be important and the meaning is that the Court on the ordinary original civil jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of the jurisdiction unless leave of the Court shall have obtained." The learned Single Judge in Roda Jal Mehta (supra) held that : "If I am not empowered to receive a plaint, I cannot deal with such a plaint. If I am not empowered to receive, I cannot keep it in the records of this Court. I must necessarily return the plaint to the person who has tendered such a plaint. I

cannot understand how on this basis I can dismiss the plaint when I am not empowered to receive the same."

23. The ratio laid down by the Hon"ble Single Judge in *Roda Jal Mehta (Supra)* enlightens us by distinguishing a stage of return of plaint and a stage of rejection of the plaint. A suit cannot be rejected unless it has jurisdiction to entertain the suit. For lack of inherent jurisdiction, it is to be returned. Thus, in other words, the Court should be empowered to receive the plaint and if at all the Court is not empowered to receive the plaint, then the Court shall return the plaint under Order VII Rule 10 of the Code of Civil Procedure. In case of *Allahabad Bank -vs- Shank""s (Supra)* or in the case of *Lt.Col.Anil Bhat and Nadiya Bhat (Supra)*, the example of not having jurisdiction under Order VII Rule 10 of the Code of Civil Procedure are discussed, which are illustrative. Under Order VII Rule 11(d) of the Code of Civil Procedure, when the plaint is rejected, if barred by any law, the Court has to take a further step after receiving the plaint and then to apply mind whether it is barred by any law or not. Such bar should be provided by law for example, "bar due to Res-Judicata", "bar due to Limitation Act" and there may be bar under Section 80 or under Order II Rule 2 of the Code of Civil Procedure etc. Under such circumstances a suit is to be rejected.

24. It can be argued that while returning the plaint the Court has to follow the procedure laid down under Order VII Rule 10 and 10(2) of the Code. Under Rule 10(2), the Court after putting the endorsement and giving brief statement of reasons may return it. However, as per Rule 10A (which was inserted in the Code by way of amendment in the year 1976), has power to fix a date of appearance in the Court where the plaint is to be filed after its return. So it can be argued that how the court having no jurisdiction over the other court can fix a date of appearance in the Court where the plaint is to be filed after its return. Rule 10A is applicable when the defendant appears in the suit and the Court forms opinion that the plaint is to be returned and it intimates the plaintiff accordingly. Thereafter the plaintiff moves an application and informs that the Court may fix a date for appearance of the parties in the Court and thereafter accordingly Court fixes a date for appearance of the parties in the Court in which the plaint is proposed to be presented. The object of this provision as stated earlier is not to interfere in the jurisdiction of the other court, but it is with a view to curtail unnecessary exercise of issuance of summons to the defendant when the defendant is before the Court. Thus, the provision obviates summons facilitating both the parties to appear before the other Court. Thus, this provision does not create any anomaly or clash in the jurisdiction of two Courts.

25. However, in the present case, the Court has rightly come to the conclusion to return the plaint as it lacks jurisdiction due to the nature of the suit and, therefore, though he has settled the issue under Order XIV Rule 2 of the Code of Civil Procedure by virtue of the wide powers given to the Court, the Court has rightly returned the suit for presentation before the cooperative Court. It would not be out of place to mention that in the case of *Prabhakar Bhat (Supra)*, the

Full Bench has held that "The Court had to aid rather than obstruct the plaintiff." Therefore, taking into account this guiding principle if the plaint is rejected then, it will amount to dismissal of the suit amounting to decree and the plaintiff will face hardship as he has to go in the appeal, he will not get any return of the Court fees and on the other hand, if the plaint is returned he would not be a loser as the correct forum is made available.

26. Thus, I hold that the order of return of the plaint passed by the learned trial Judge is correct and legal and, hence, the present appeal against order under Order XLIII of the Code of Civil Procedure is maintainable.