

(1987) 04 BOM CK 0040

In the Bombay High Court

Case No : First Civil Appeal No. 41 of 1983

Chandrakant Vassudev Lotikar and others

APPELLANT

Vs

Vaman Mahadev Lotikar and others

RESPONDENT

Date of Decision : 10-04-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 96

Citation : AIR 1989 Bom 17

Hon'ble Judges : G.F. Couto, J

Bench : Single Bench

Advocate : M.S. Usgaonkar, for the Appellant; S.D. Lotlikar, for the Respondent

Judgement

1. This appeal by the plaintiffs in the suit is directed against the order dated 5th April, 1983, passed by the learned Civil Judge, Senior Division, Mapusa, whereby he rejected the plaint under O. 7, R.11(b) read with (c), C.P.C.

2. The appellants have filed a suit for the following reliefs:

(a) That it be declared that the plaintiffs are the exclusive owners of the property A. B. and C together with the suit house thereon:

(b) The plaintiffs may be restored back to the southern portion of the suit house and the defendants be evicted therefrom.

(c) Permanent injunction restraining the defendants from causing any obstructions to the plaintiffs or their tenants to exercise of the lawful possession, use and occupation of the property A. B. and C and o f the suit house;

(d) alternatively the plaintiffs be restored back to the rustic part with the trees of the property A,B and C;

(e) properties A. B. and Con one side and D on the other according to the measurements be demarcated so that the extent of property D is clearly defined and the boundary between the property D and B is defined;

(f) demarcation be passed that the plaintiffs and defendants are co-owners of the property and

(g) property D be divided by metes and bounds in proportion of the shares of the plaintiffs and defendants.

3. The suit was resisted by the respondents and inter alia they raised the question that the suit was undervalued for the purposes of court-fee. By his order dated 19th Nov. 1974, the learned Civil Judge, Senior Division, Mapusa, directed the plaintiffs to amend the plaint stating the value of the subject-matter as being Rs. 35,668/- and to pay the difference of court-fee as per the observations made in his order. A revision application was filed by the present. A revision application was filed by the present appellants against the said order in the Court of the Judicial Commissioner of Goa, Daman and Diu. At the hearing of the said revision application, the learned counsel appearing for the respondents herein pointed out that the relief claimed under Cl. (d) is an alternative relief in relation to the relief of permanent injunction prayed for under Cl. (c) and, therefore the court-fee has to be paid on the larger value of the two reliefs. The learned Judicial Commissioner agreed with this submission of the learned counsel appearing for the respondents and, accordingly, set aside the order dated 19th Nov. 1974, passed by the learned Civil Judge, Senior Division, Mapusa, and remanded the matter to the trial Court to be decided in accordance with the directions given by him. After the matter was received in the trial Court, it appears that the learned Advocate appearing for both the parties had agreed on 29th July, 1982, that prayer (d) should be valued at Rs. 3,400/- and that the plaintiffs should pay the court-fee on it. They further admitted that prayer (d) was an alternative prayer and therefore the plaintiffs were directed to pay the difference of court-fee on the said amount of Rs. 3,400/- within two months from 29th July, 1982.

4. The suit came up for evidence on 16th Nov., 1982 and was adjourned to 5th April, 1983. It was found that in spite of the order dated 29th July, 1982, the appellants/plaintiffs had not paid the deficit court-fee within the period of two months nor they sought extension for the said payment in accordance with the provisions of O.7, R.11 or under S. 148, C.P.C. Therefore, the learned Judge by the impugned order dated 5th April, 1983, rejected the plaint under O.7, R.11, Cls. (b) and (c) read together.

5. Mr. M. S., Usgaonkar, the learned counsel appearing for the appellants, submitted that the questions that fall for the determination of this Court are two, viz., (i) whether the suit could be rejected on account of non-payment of court-fee on an alternative prayer although the court-fee had been duly paid on the main prayers in the suit and (ii), whether an appeal being continuation of the proceedings of a suit, the appellants can give up the alternative prayer with the result that the plaint could not be rejected on the main ground on non-payment of court-fee on the alternative prayer.

6. As regards the first contention, the learned counsel invited my attention to O.7, R.11 and submitted that the plaint shall be rejected, inter alia where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so. The learned counsel urged that if the main prayers are duly valued and the proper court-fee is paid, there is no question to reject the plaint, for court-fee had been paid on the main reliefs. He sought to get support to this contention from the decision of the Punjab and Haryana High Court in Balwant Singh Vs. The State Bank of India and Others, .

7. It was, however, contended by Mr. S. D. Lotlikar, the learned counsel appearing for the respondents that the view taken by Mr. Usgaonkar is not correct. He submitted that the view taken by Koshal. J. (as he then was) clearly shows that the judgment of the Punjab and Haryana High Court has to be read and construed in a manner quite different from the one taken by Mr. Usgaonkar. In fact, in the case before the Punjab and Harayana High Court, the question was in respect of the cause of action and it was held that Cl.(a) of R.11 of O.7 requires a total absence of a cause of action for the rejection of the plaint. However, the Court also noted that the rejection of the plaint has to be total and cannot be partial. This view was also taken by the Andhra Pradesh High Court in K.P. Subrahmanyama v. T. V. Peddiraju AIR 1989 BOM 1971 .

8. there is great force in the submission of Mr. Lotlikar, In fact, R. 11 of O.7 provides that the plaint shall be rejected under alia where the relief claimed is properly valued but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so. In the proviso, It is laid down that the time fixed by the Court for the correction for the valuation or supplying of the requisite stamp papers shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-papers, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff. A plain reading of the above provision of law makes it clear that the view taken by Mr. Usgaonkar that the plaint can be rejected only partially in respect of the alternative prayer cannot be accepted at all. In fact, Cl. (c) speaks of insufficiently stamped plaint and this means that either the plaint is properly stamped and that either the plaint is properly stamped and then can be entertained or is not properly stamped and then is to be rejected. The proviso enables a the Court to extend the time for making the payment of the court-fee due only when a cause of exceptional nature has been shown and if extension is not granted, a grave injustice would be caused to the plaintiff. Except in those cases, there is no discretion left to the Court to grant extension of time to pay the deficient court-fee.

9. This flows clearly from the provision of R. 11 of O.7. the decision of the Punjab and Haryana High Court in Balwant Singh Vs. The State Bank of India and Others, does not in any manner help the case of the appellants. In face, in that case, apparently, the plaint was not disclosing a cause of action in respect of the part of the claim against some of the defendants. The Court held that the plaint could not be rejected as a whole since Cl, (a) of R.11 of O.7 deals with the situation where the plaint does not disclose at all a cause of action and in that case the cause of action has been disclosed at least partly. Then, Koshal, J. (as he then was) observed in para 12 as under;-

"I fully agree and would like to emphasise that the very idea of a plaint being rejected "in part" is repugnant to the provisions of R.11 of O. VII of the Code of Civil Procedure. The plaint in a suit is the document evidencing the suit and not the suit itself and can, therefore, either be rejected or retained which in other words, merely means that it can either be thrown out or proceeded with. It cannot be torn up in two parts, one of which is discarded and the other entertained. This is clearly deducible from the language of the rule. Expressions like "in its entirety" or "in part" are thus wholly inept in relation to the rejection of the plaint".

In other words under R. 11 of O.7, a plaint can either be rejected in toto or proceeded with. It cannot be torn up in two parts, one of which is discarded and the other entertained. To some extent, the same view was taken in K.P. Subrahmanyam's case (supra) for the learned single Judge of the Andhra Pradesh High Court has observed that even when a portion of a plaint alone needs rejection, the whole of it has to be rejected. In another decision, viz, in Bansi Lal Vs. Som Parkash and Others, while dealing with O.7, R.11 and a partial rejection of the plaint, it was held that the law does not change merely because the plaintiff chooses in one suit to combine several causes of action against several defendants which the law allows him. It still remains one plaint and, therefore, rejection of the plaint must be as a whole and not as to a part. Therefore, in the light of the above discussion and on the strength of the above authorities. I am unable to accept the submission of Mr. Usgaonkar that the suit ought not to have been rejected on the basis of the non-payment of court-fee on the alternative prayer. It may be mentioned here that in spite of the two months' time granted to the appellants to pay the deficient court-fee, they failed to do it nor they applied for extension of time for such payment. Thus it justifies and extension of time for the shown to justify any extension of time for the payment of the deficient court-fee. In the circumstances, no discretion was left to the learned trial Judge and he had to Act under the mandatory provision of Rs. 11, O.7.

10. Coming now to the second submission of Mr. Usgaonkar, it is true that an appeal is continuation of a suit. But the fact that remains to be considered is whether, in the facts and circumstances of this case, it can at all be said that there was a suit. Mr. Lotlikar, relying on the observations made by Koshal, j. in

Balwant Singh Vs. The State Bank of India and Others, submitted that once the plaint has been rejected, there was no suit at all, for the plaint in a suit constitutes only a document evidencing the suit and is not suit itself. Therefore , if the plaint itself was rejected, there was no suit and if thing does not exist, the appeal cannot be a continuation of a non-existing thing. In my view, Mr. Lotlikar is entirely correct in this submission. The plaint has been rejected and, therefore, there was nothing before the court. the appeal, therefore, could not be said, is such a case, to be continuation of a non-existing thing. This being so, te observations made by the supreme Court in Nemi Chand v. Edward Mills co. Ltd. AIR 1989 BOM 1953 on which Mr Usgaonkar placed reliance are not all attracted to the facts and circumstances of this case.

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

12. Appeal dismissed.