

(1961) 09 RAJ CK 0004

In the Rajasthan High Court

Case No : Civil Miscellaneous First Appeal No. 74 of 1959

Jaichand Lal

APPELLANT

Vs

Firm Kesrichand Bhanwarlal and Others

RESPONDENT

Date of Decision : 11-09-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 20

Citation : AIR 1962 Raj 88 : (1962) RLW 121

Hon'ble Judges : P.N. Shinghal, J; C.B. Bhargava, J

Bench : Division Bench

Advocate : Sumer Chand Bhandari, for the Appellant; C.L. Agarwal, for the Respondent

Final Decision : Allowed

Judgement

Bhargava J.

1. Following a decision of this Court in Mannalal and Others Vs. Paneychand and Others, the learned Senior Civil Judge, Ganganagar, has returned the plaint in the present case for presentation to the proper court.

2. The suit was filed by the present appellant for recovery of Rs. 29,940/- for price of parts of machinery supplied by him to the defendants at Calcutta on 15th April, 1956. Defendant No. 2 is the father, defendants Nos. 3 and 4 are his sons, and it was alleged in the plaint that they were all members of a joint Hindu family and carried on their business in the name of firm Kesrichand Bhanwarlal at Rajbiraj, a place within the State of Nepal. Firm Kesrichand Bhanwarlal of Rajbiraj was also impleaded as defendant No. 1 in the suit. In the plaint, defendants Nos. 2, 3 and 4 were described as residents of Nohar within the district of Ganganagar and that is why the suit was filed at Ganganagar. Defendants filed their written statement and objected to the jurisdiction of the court on the ground that they were not actually and voluntarily residing at Nohar, but for the last thirty to forty years had been carrying on their business and

permanently residing at Rajbiraj. Along with the plea about jurisdiction the defendants raised other pleas also on the merits of the case as well in the written statement.

3. The learned Senior Civil Judge framed issues on the whole case and one of them related to the question of jurisdiction. The issue regarding jurisdiction was tried as a preliminary issue and the learned Judge, after recording the evidence of the parties on this issue and hearing them, ordered the return of the plaint for presentation to the proper court. On facts, the learned Judge found that the defendants had their ancestral home at Nohar. He also found that they had constructed a house at a huge cost of Rs. 50,000/- to Rs. 60,000/-and performed their marriages at Nohar. He further found that for the treatment of one of their female members they had gone to Bikaner Zenana Hospital and that their names were entered in the electoral rolls of Nohar Municipality. However, as in his opinion the above mentioned decision applied to the facts of this case, he passed the order under appeal.

4. In this appeal, learned counsel for the appellant contends that the learned Senior Civil Judge has misapplied the decision of this Court in ILR (1959) Raj 62 : Mannalal and Others Vs. Paneychand and Others, to the facts of this case, inasmuch as it is proved beyond doubt that defendant No. 2 was present at Nohar at the time of the institution of the suit and the summons was also served on him there. He also contends that in any event as the defendants had filed their written-statement with regard to the merits of the case also along with the objection to jurisdiction of the court, and further claimed to be non-resident foreigners, they should be deemed to have submitted to the jurisdiction of the court of the Civil Judge at Ganganagar, and it was no longer open to them to say that the court had no jurisdiction. Reliance is placed in this connection on Ramanlal and Another Vs. Ramgopal,

Lastly, it is contended that the learned Civil Judge wrongly shut out appellant's evidence by refusing to issue a warrant against one of his witnesses, namely, Rameshwar on whom the service of summons was duly effected. On the other hand, learned counsel for the respondents has supported the order of the learned Senior Civil Judge on the basis of the decision referred to by that court in its judgment. We may mention here that it is not disputed by the plaintiff that the defendants carried on their business within the territories of the State of Nepal. It is also not disputed that the cause of action arose at Calcutta where the goods were supplied. The only ground for filing the suit at Ganganagar was that the defendants, according to the plaintiff, actually and voluntarily resided within the jurisdiction of that court. The controversy, therefore, centres round the point whether the defendants or any one of them was, at the time of the commencement of this suit, actually and voluntarily residing within the jurisdiction of the court of Senior Civil Judge, Ganganagar.

A good number of cases were cited before us with regard to the meaning of the words "actually and voluntarily resides" used in Section 20(b) of the Code of Civil

Procedure. We think it unnecessary to discuss the cases which were cited before us on behalf of the parties because they have all been considered in the judgment of this Court in ILR (1959) Raj 62 : Mannalal and Others Vs. Paneychand and Others, We are conscious of the distinction which has been pointed out in the reported decisions relied upon by the learned counsel for the respondents between actual and constructive or legal residence. The words used in Section 20 are that the defendants or any one of them ""actually and voluntarily resides". What is meant by "actual residence" is that the person should be residing at the place in fact and in reality at the time of the commencement of the suit and not constructively. The question regarding the residence of a person is at question of fact and will largely depend upon the particular circumstances of each case. In Mannalal and Others Vs. Paneychand and Others, the point for consideration was whether a person has his residence at the place where he normally lives and carries on business or the place where his forefathers lived and left immovable property and where the person goes off and on occasions of marriage and other ceremonies. On behalf of the plaintiffs in that case, it was contended that at the relevant date when the suit was instituted the defendants were residing at Momasar within the jurisdiction of District Judge, Bikaner. The trial court as well as this Court on evidence overruled the plaintiffs' contention and found that none of them was at Momasar on the date of the institution of the suit. On these facts, it was held that where the defendants had their ancestral house at Momasar and paid occasional visits to that place out actually lived and carried on business at Calcutta, Momasar was not the place of their actual and voluntary residence,

5. In the present case, One important aspect, which has not been taken into account by the learned Senior Civil Judge and which distinguishes this case from the facts of the case cited above, is that one of the defendants Kesri Chand admitted in his statement that he was at Nohar when the summons were served upon him. His case was that he had only come there a day earlier. But there is the evidence of the plaintiff's witness Sheo Ratan, who is his nephew and also his Am-mukhtar, that Kesri Chand was at Nohar for the last two months and he had met him there in the month of November or December, a month before the institution of this suit. Sheo Ratan has further stated that the members of the defendants' family live at Nohar even when the defendants live at Rajbiraj. The attention of the learned Senior Civil Judge was not directed "to this part of the evidence and to the fact that at least one of the defendants, namely Kesri Chand; at the time of the institution of the suit, was residing at Nohar.

The courts of any country have jurisdiction to entertain actions in personam within local limits of whose jurisdiction the defendant is residing on the date of the institution of the suit wherever the cause of action may have arisen. Section 20(a) of the Code embodies the same rule. There may be cases like Manna Lal's case, where a person only pays visits to his ancestral place to meet his kith and kin or to perform certain important ceremonies without any intention of residing there. In those cases, there may be only animus revertendi.

In the present case, Kesri Chand defendant was not only residing at Nohar at the time of the commencement of the suit but the evidence shows that very recently only a few years before the institution of the suit, the defendants have constructed a new house costing about Rs. 60,000/- to Rs. 70,000/-. The house has not been let out to any person. Kesri Chand has admitted in his statement that he has built this house for his own residence and for the temporary abode of Sadhus. Therefore, the facts which emerge from evidence in this case are that although the defendants carry on their business at Rajbiraj, they had already an ancestral house at Nohar; they have recently constructed a new house at a huge cost of Rs. 60,000/-to Rs. 70,000/-; generally their children live at Nohar; their names are mentioned in the electoral rolls of Nohar Municipality; marriages of defendants Nos. 3 and 4 were performed at Nohar and Kesri Chand, who is the father of defendants Nos. 8 and 4, was residing at Nohar at the time of the institution of the suit and at least two months prior to it.

6. Under these circumstances, we are not prepared to hold that Kesri Chand was not actually and voluntarily residing at Nohar. Kesri Chand has not stated that it was his only causal visit to Nohar. The rule of law stated in Section 20 gives a choice of forum to the plaintiff that the suit may be instituted at the place where the defendant actually and voluntarily resides, or carries on Business, or personally works for gain. There may be cases where a person may have residence at two places. Again, there may be cases where a person may be carrying on business at one place and may be actually and voluntarily residing at another place. For some time he may be living at the place of his business and for the remaining time at the place where he owns a house and his children reside. It cannot be said in such cases that the only place of his residence would be where he carries on his business and not the other one. In such a case, he will be deemed to reside at both places. In the present case, therefore, even though it is admitted that the defendants were carrying on their business at Rajbiraj, it is clear on evidence that Kesri Chand was actually and voluntarily residing at Nohar at the time of the institution of the suit. This case, therefore on facts is clearly distinguishable from Manna Lal's case. If the learned Judge had considered this aspect of the case, he would not have come to the aforesaid conclusion. We accordingly hold that Kesri Chand defendant No. 2 was actually and voluntarily residing within the jurisdiction of the local limits of the court of Senior Civil Judge, Ganganagar at the time of the commencement of this suit.

7. That, however, would not solve the question of jurisdiction, because there are two other defendants in this case who are the sons of Kesri Chand. No evidence was led by the plaintiff to show that these defendants also, at the time of the institution of the suit, were residing at Nohar and had temporarily gone out when the service of summons was sought to be effected on them. Learned counsel, as stated above, has contended that defendants Nos. 3 and 4 have submitted to the jurisdiction of the court because of their pleas in the written statement on the merits of the case as well. Learned counsel admits that the rule of law laid down in Ramanlal and Another Vs. Ramgopal, applies to those cases only where the

defendant is a non-resident foreigner and its application cannot be extended to cases where the defendant is an Indian national. Learned counsel contends that these defendants on their own showing should be regarded as non-resident foreigners having acquired the nationality of the State of Nepal. In our opinion, there are no materials on record to justify the finding that the defendants in this case are non-resident foreigners. Kesri Chand in his statement has clearly said that he is a citizen of India and he has no property at any other place except Nohar. We, therefore, do not feel justified in holding that the defendants Nos. 3 and 4 have submitted to the jurisdiction of the court of senior Civil Judge Ganganagar, on the principle laid down in Ramanlal's case.

8. In this situation, learned counsel for the appellant has submitted an application seeking leave of the Court u/s 20(b) of the Code of Civil Procedure, Notice of this application was given to the learned counsel for the respondents, and we have heard the learned counsel on this application also. Learned counsel for the respondents urges that leave cannot be granted at this stage, and the proper stage for seeking leave in a case where some of the defendants reside within the jurisdiction of the court while others reside outside its jurisdiction, is when the suit is instituted. Leave can be sought, according to the learned counsel, either prior to the institution of the suit or simultaneously with it, but not after the institution of the suit. Our attention is invited to the words used in the section wherein it is said that

""subject to the limitations aforesaid every suit shall be instituted in a Court within the local limits of whose jurisdiction any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution".

9. It is urged that without the leave of the court, this suit was bad in its inception and that defect cannot be cured now in appeal. We are, however, of opinion that Section 20, Sub-clause (b) does not contain any inhibition to the institution of a suit without obtaining prior leave of the court. The proviso under the sub-clause regarding the leave of the court cannot be read to mean as imposing a condition precedent to the institution of the suit. On the other hand, under this sub-clause a plaintiff is permitted to institute a suit at a place where any of the defendants, where there are more than one, resides or carries on business or personally works for gain. After such suit is instituted, two situations may arise; either that the defendants, who do not reside within the jurisdiction of the court, may not raise any objection to the jurisdiction of the court and the suit proceeds further because of their acquiescence in such institution, or the nonresident defendants object to the jurisdiction of the court. It is in the latter situation that leave cannot be sought and given by the Court after the institution of the suit. The proviso does not exclude the possibility of the leave of the court being given after

the institution of the suit. If the suit can be continued by subsequent acquiescence of the nonresident defendants it can also be continued by subsequent leave of the court. There may be cases where facts honestly disclosed in the plaint may not necessitate leave of the court at the time of the institution of the suit but on enquiry being made on the objection of the defendant, facts come to light that some of the defendants are not residing within the jurisdiction of the court, and then at that stage leave of the court for the continuance of the suit may become necessary. We do not see any reason to read Section 20(b) in a way that may limit the power of the court to grant leave only prior to the institution of the suit and not after it. Illustration (b) under this section makes the position quite clear, and it is a valuable guide in ascertaining the meaning of this sub-clause. Illustration (b) runs as under:

"(b) A resides at Simla, B at Calcutta, and C at Delhi. A, B and C being together at Banaras, B and C make a joint promissory note payable on demand, and deliver it to A. A may sue B and C at Banaras where the cause of action arose. He may also sue them at Calcutta, where B resides, or at Delhi where C resides; but in each of these causes, if the non-resident defendant objects the suit cannot proceed without the leave of the Court".

It, therefore, appears from this illustration that the leave can be granted by the court when the non-resident defendant objects to the jurisdiction of the court. If any authority is needed in support of the view which we have taken, we may refer to *Narayan Shanker v. Secretary of State*, ILR 30 Bor 570 where it was held that u/s 17 Clause (c) of the CPC (Act XIV of 1882) it was not necessary that the leave of the court must have been first given. The leave, though subsequent, was good. The learned Chief Justice observed in that case with reference to Clause (c) of Section 17:

"No doubt, the words of the section are susceptible of that meaning, but the concluding provision as to acquiescence makes it clear that a defect at the institution can be subsequently cured, for, obviously, there could be no acquiescence at the time of the institution. And so we think, there is no necessity for reading the words of the provision in such a way as to say that the leave of the Court must have been first given. Such a conclusion would lead to great inconvenience, and possibly hardship, as in cases where the plaintiff honestly and reasonably believed that all the defendants were residing within the jurisdiction. Therefore, we hold that the leave, though subsequent, was good and the rule must be discharged with costs."

10. In *Seth Wadhmal v. Malik Noor Ahmed*, AIR 1933 Sind 179 leave was sought after the preliminary issue for the question of jurisdiction was decided. The trial Judge rejected the application and ordered that the plaint be returned for presentation to the proper court. On appeal the leave was granted to the plaintiff and the case was sent back to the trial court for decision on merits. The same view was taken in two decisions of this Court, namely, *Sheva Ram v. Pitambar Das*, 1953 Raj LW 282 and *Dwarka Das and Others Vs. Hanumandas*

and Others,

11. Whether we should grant leave to the plaintiff in the circumstances of the case, is the next question. Defendant No. 2 is the father of defendants Nos. 3 and 4, and it is admitted that they all constitute a joint Hindu family of which the defendant No. 2 is the Karta. It is also admitted that the business carried on by them is a joint family business. Learned counsel for the respondents urges that as the defendants Nos. 3 and 4 are residing at a place within the State of Nepal, they will have to travel a long distance in coming to Ganganagar, and it will be convenient for both parties if the plaintiff files a suit at Calcutta, where admittedly the cause of action arose in this case, None of the defendants is a resident of Calcutta although that place might be nearer to Rajbiraj. But in view of our finding that defendant No. 2 has his dwelling house at Nohar and actually and voluntarily resides there, and is the head of the joint Hindu family, we think that no inconvenience would be caused to the defendants Nos. 3 and 4 if We grant leave to the plaintiff to continue this suit at Ganganagar. If the leave is not granted and the plaintiff has to file the suit at Calcutta and eventually a decree is passed in his favour, he will have to get the decree transferred to the court in Rajasthan because the immovable properties of the defendants are situated within the State of Rajasthan. Having regard to the circumstances of the case, we think that leave should be granted to the plaintiffs in this case for continuing this suit at Ganganagar.

12. Our conclusions, therefore, are: (1) that defendant No. 2 at the time of the institution of the suit, was actually and voluntarily residing at Nohar within the jurisdiction of the court of Senior Civil Judge, Ganganagar; and (2) that the suit can continue in the court of Senior Civil Judge, Ganganagar, against defendants Nos. 3 and 4 also because of the leave given by us.

13. We accordingly accept this appeal, set aside the order of the learned Senior Civil Judge, Ganganagar, and send the case back to that court for decision of the case on merits in accordance with law. In the circumstances of the case, we make no order as to costs.