

(1967) 02 GUJ CK 0006

In the Gujarat High Court

Case No : Civil Revision Application No. 1089 of 1966

Keshavlal Parbhudas Chokshi Firm and Others

APPELLANT

Vs

Manubhai I. Vyas

RESPONDENT

Date of Decision : 02-02-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 37 Rule 1, Order 37 Rule 2, 122, 128(2), 27
Constitution of India, 1950 — Article 227 , 227(2)

Citation : AIR 1968 Guj 223 : (1968) GLR 177

Hon'ble Judges : P.N. Bhagwati, J;N.K. Vakil, J

Bench : Division Bench

Advocate : M.F. Thakkar, M.M. Shah, P.M. Rawal, Niranjana J. Mehta, N.C. Thakkar, P.V. Nanavati and B.N. Parmar, for the Appellant; Arun H. Mehta and K.A. Daboo, for the Respondent

Judgement

Bhagwati, J.

(1) The question which arises in this Revision Application is whether R. 142 to 148-A of the Ahmedabad City Civil Court Rules are ultra vires the rule-making power of the High Court. The plaintiff filed a suit being Summary Suit No. 1548 of 1966 against the defendants in the City Civil Court, Ahmedabad, to recover a sum of Rs. 7,734.07 ps., alleged to be due by the defendants to the plaintiff as remuneration for services rendered by the plaintiffs to the defendants in connection with their Income Tax work. The suit was filed as a Summary Suit and on an appearance being filed by the defendants, a summons for judgment was taken out by the plaintiff. On the summons for judgment the learned Judge of the City Civil Court made a conditional order granting leave to the defendants to defend the suit on condition that the defendants deposited a sum of Rs. 1,900 within two weeks. The defendants were aggrieved by this order and they, therefore, preferred the present Revision Application. The Revision Application was admitted and a rule was issued by Divan J., and the rule was made returnable on 21st November 1966. The rule ultimately came up for hearing before Sarela J., on 21st January 1967 but before that date a decision was given

by Raju J., in Civil Revn. Appln. No. 196 of 1963 declaring in effect and substance Rules 142 to 148-A of the Ahmedabad City Civil Court Rules ultra vires the rule-making power of the High Court and holding that the City Civil Court had no power to refuse leave to defend or to impose any condition for leave to defend. If this decision were correct, the defendants would be entitled to unconditional leave to defend the suit and the rule would be liable to be made absolute; but Sarela J., finding difficulty in agreeing with the view taken in that decision, referred the question of vires of Rules 142 to 148-A to a Division Bench. That is how the present Revision Application has come up for hearing before us. Besides this Revision Applications in which the same question is involved and those Revision Applications are also, therefore, placed on Board along with the present Revision Application and we have heard the learned Advocates appearing on behalf of the parties in those Revision Applications.

(2) In order to appreciate the contentions urged in regard to the question before us, it is necessary to refer to a few provisions of the CPC and the Ahmedabad City Civil Court Rules. The CPC was enacted with a view to consolidating and amending the laws relating to the procedure of the Courts of Civil Judicature. The Code is divided into two parts on the lines of the Judicature Acts in England and the Rules made under those Acts. The first part Consists of Sections which constitute the main body of the Code and the second part consists of rules set out in the First Schedule which refer merely to matters of machinery for working out the main provisions enacted in the Sections. Taking up the Sections, we may straight go to Part X of the Code which is headed "Rules" and which consists of Sections 121 to 131. Section 121 which is the first in this group of Sections enacts:--

"121. The rules in the First Schedule shall have effect as if enacted in the body of this Code until annulled or altered in accordance with the provisions of this part".

Section 122 then confers power on the High Court to make rules and by such rules to annul, alter or add to all or any of the rules in the First Schedule and that Section reads as follows:

122. High Courts not being the Court of a Judicial Commissioner may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in the First Schedule". Sections 123 and 124 lay down the procedure for making Rules u/s 122. Section 125 confers rule-making power in the same terms as Section 122 on High Courts, other than the Courts specified in Section 122 but the exercise of this power is made subject to such conditions as the State Government may determine. Section 126 provides that the rules made under Sections 122 and 125 shall be subject to the previous approval of the State Government or the Central Government, as the case may be, and Section 127 declares that the rules so made and approved shall be published in the Official Gazette, and shall from the date of publication or from such other date as may be specified, have the

same force and effect as if they had been contained in the First Schedule. Section 128 is an important provision and, omitting portions immaterial, it says:--

"128. (1) Such rules shall be not inconsistent with the provisions in the body of this Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts.

(2) In particular, and without Prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for all or any of the following matters, namely:--

* * * * *

(f) summary procedure

(i) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising--

on a contract express or implied; or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty; or

on a guarantee, where the claim against the principal is in respect of a debt or a liquidated demand only; or on a trust; or

(ii) in suits for the recovery of immovable property, with or without a claim for rent or mesne profits, by a landlord against a tenant whose term has expired or has been duly determined by the notice to quit, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant".

Sections 129 to 131 are not material and we need not, therefore, dwell on them. Apart from these sections contained in Part X, there is one other section to which we must refer and that is Section 27. This section formed the main plank of the argument of the petitioner founded upon it. It provides:--

"27. Where a suit has been duly instituted, a summons may be issued to the defendant to appear and answer the claim and may be served in manner prescribed".

The argument which found favour with Raju J., was that Rules 142 to 148 were inconsistent with Section 27 and they were, therefore, beyond the rule-making power of the High Court u/s 122 read with sub-section (1) of Section 128. We shall deal with this argument a little later.

(3) Turning to the Rules in the First Schedule, we find that the Rules are classified in various Orders. There was as many as 51 Orders but the only Orders with which we are concerned is Order 37 prescribes summary procedure. Rule 1 of that Order provides:--

"1. This Order shall apply only to--

- (a) the High Courts of Judicature at Fort William, Madras and Bombay;
- (b) any District Court or other Court specially empowered in this behalf by the State Government;

xx xx xx xx"

Then follow Rules 2 to 7 which lay down the actual procedure to be followed when a suit is instituted under the summary procedure. O. 37 as originally enacted was headed "Summary Procedure on Negotiable Instruments" and the summary procedure provided in that Order was applicable only to suits on negotiable instruments and the essential and basic feature of the summary procedure was that in a suit instituted under the summary procedure the defendant should not be entitled to appear and defend the suit unless he obtained leave from the Judge so to appear and defend. But on 29th September 1936 the existing sub-rules (1) and (2) of R. 2 of Order 37 were substituted by new sub-rules (1) and (2) by the Bombay High Court in exercise of its powers u/s 122 and under the new sub-rules (1) and (2) the summary procedure which was until then limited in its application only to suits on negotiable instruments was extended to suits of other categories specified in Section 128(2)(f) save the last part of Clause (i) of that provision and the rigour of the summary procedure was relaxed in that the defendant could thereafter appear without leave of the Judge though he was still precluded from defending the suit unless he entered an appearance and obtained leave from the Judge so to defend. Certain further amendments in the Rules in Order 37 were also thereafter made by the Bombay High Court in exercise of its powers u/s 122 but they are not material for the purpose of the present discussion and we need not, therefore, refer to them. This was the state of the rules in O. 37 when the State of Bombay was bifurcated by the Bombay Reorganization Act, 1960.

(4) By the Bombay Reorganization Act, 1960, certain territories were carved out from the State of Bombay and were constituted into the State of Gujarat from 1st May 1960 and the State of Bombay with the residuary territories continued as the State of Maharashtra. Now as the aforesaid resume which we have given shows, the rules of Order 37 which were in force in the State of Bombay at the date of the bifurcation, that is, the appointed day, were not the rules as originally enacted but the rules as amended by the Bombay High Court and the amended rules were, therefore, law in force within the territories now forming part of the State of Gujarat on the appointed day and they were continued in force in those territories by virtue of Section 87 of the Bombay Reorganization Act, 1960. On 15th May 1961 the Legislature of the State of Gujarat passed the Ahmedabad City Courts Act, 1961, providing inter alia for the constitution of a City Civil Court for the City of Ahmedabad and in accordance with the provisions of this Act, the City Civil Court was established by the State Government with effect from 4th November 1961 by a notification issued u/s 3 of the Act. The State Government also issued a notification dated 4th November 1961 in exercise of its powers under Clause (b) of Rules 1 of Order 37 of the Code specially empowering the

City Civil Court for the purpose of O. 37. The result was that the amended Rules of Order 37 became applicable to the City Civil Court with effect from 4th November 1961. But at the same time this High Court called "The Ahmedabad City Civil Court Rules" in exercise of its powers under Art. 227 of the Constitution and Section 122 of the Code and all other powers enabling it to make such Rules. These Rules contain Chapter XI which is headed "Summary suits" and this Chapter contains various rules numbering from 142 to 148-A prescribing the summary procedure applicable in the City Civil Court. The amended Rules of Order 27 in their application to the City Civil Court have, therefore, to be read subject to Rules 142 to 148-A. Vide *Sam v. Samson* (1965) 6 Guj LR 934. Rules 142 to 148-A do not make any departure so far as the basic and essential feature of the summary procedure provided in the amended Rules of Order 37 is concerned. Even under Rules 142 to 148-A, the defendant can appear but he is not entitled to defend unless he enters an appearance and obtains leave from the Judge to defend and such leave may be granted unconditionally or subject to conditions if the defendant by affidavit or declaration satisfies the Judge that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend. There is no doubt a slight difference in procedure made by Rr. 142 to 148-A but that difference is not very material and it is not necessary to refer to the same. It is against the background of these provisions of the Code and the Rules that we have to consider whether Rules 142 to 148-A are ultra vires the rule-making power of the High Court.

(5) The first question which must arise for consideration is under what provision are Rules 142 to 148-A made by the High Court. The preamble of the Ahmedabad City Civil Court Rules refers to two provisions under which those Rules are made, namely, Art. 227 of the Constitution and Section 122 of the Code. Now obviously so far as Rules 142 to 148-A are concerned, they cannot be justified under Article 227 of the Constitution for though under that Article the High Court has power to make rules regarding the practice and proceedings of the City Civil Court, there is a limitation on the exercise of that power imposed by the proviso to that Article, namely, that the power cannot be exercised to make rules inconsistent with the provisions of any law for the time being in force and since Rules 142 to 148-A are admittedly inconsistent with the amended Rules of Order 37, albeit to a limited extent, the High Court cannot make those Rules in the exercise of its power under Art. 227. Rules 142 to 148-A must, therefore, find their justification in Section 122 of the Code if they are to be held valid. *Raju J.*, examined the validity of Rules 142 to 148-A by reference to Section 122 of the Code and he came to the conclusion that they were not supportable under that Section. There were two grounds on which he reached this conclusion and of the two grounds, one was, to quote his own words:--

"It may also be said that Article 227 of the Constitution which by its proviso provides that the rules made by the High Court must not be inconsistent with any law would prevail over Section 122 of the Code of Civil Procedure".

Raju J., took the view that the proviso to Article 227 of the Constitution would prevail over Section 122 of the Code and the High Court could not, therefore, even while exercising its power u/s 122 of the Code make rules inconsistent with the provisions of any law for the time being in force. But with the greatest respect to the learned Judge, this view does not commend itself to us and we find ourselves unable to accept it. The proviso to Article 227 being a constitutional provision is undoubtedly paramount and it must prevail against any statutory provision to the extent to which such statutory provision may come into clash with it but we do not find any clash or conflict between the proviso to Article 227 and Section 122 of the Code. The proviso to Art. 227 declares that any rules made by the High Court in exercise of its rule-making power under Article 227 Clause (2) shall not be inconsistent with the provisions of any law for the time being in force. The limitation imposed by the proviso to Article 227 which requires that the rules must not be inconsistent with the provision of any law for the time being in force is, therefore, by the clear and specific language of the proviso applicable only where rules are made by the High Court in exercise of its rule-making power under Article 227 Clause (2) and has no application where rules are made by the High Court in exercise of rule-making power under some other statutory provision. The proviso to Article 227 also does not operate as a limitation on the exercise of the rule-making power belonging to the High Court u/s 122 of the Code. Article 227 Clause (2) and Section 122 of the Code are two distinct and different provisions conferring rule-making power on the High Court and the limitation imposed by the proviso to Article 227 is applicable only to the exercise of the rule-making power conferred under Article 227 Clause (2) and cannot be imported so as to restrict the scope and ambit of the rule-making power conferred u/s 122 of the Code. If there is any limitation on the exercise of the rule-making power u/s 122 of the Code it must be found in the provisions of Part X of the Code itself. We cannot, therefore, accede to the argument of the petitioner that by reasons of the proviso to Article 227 the High Court was not entitled to make Rules 142 to 148-A in exercise of its rule-making power u/s 122 of the Code.

(6) The second ground relied on by Raju J., was- and that ground formed the subject matter of the second argument of the petitioner -that Rules 142 to 148-A were inconsistent with Section 27 which was a provision in the body of the code and, therefore, offended against the limitation imposed by Section 128 sub-section (1) and they were consequently beyond the rule-making power of the High Court u/s 122 of the code. This ground is equally unsustainable and there are three very good reasons why we must reject this ground. In the first place Rules 142 to 148-A do no more than make certain minor changes in the summary procedure provided in the amended rules of Order 37. They do not deny to the defendant a right to defend in cases in which he possessed such right prior imposition of any condition on the right to defend in cases in which it could not be imposed before they were made. We have already pointed out above that the amended rules of Order 37 became applicable to the City Civil

Court as soon as the notification dated 4th November 1961 was issued by the State Government in exercise of its power under Clause (B) of Rule 1 of Order 37 of the order code specially empowering the city Civil Court and under the amended rules of Order 37 the defendant was entitled to file an appearance but he was precluded from defending the suit unless he entered an appearance and obtained leave of the Judge to defend and such leave could be refused by the Judge or granted unconditionally or subject to conditions in the exercise of Judicial discretion. The restriction, if any, on the right of the defendant to defend a suit falling within any of the categories specified under the amended Rules of Order 37 was, therefore already there under the amended rules of Order 37 and this restriction was not imposed for the first time by Rr. 142 to 148-A, Rr. 142 to 148-A merely made certain procedural changes keeping within the basic framework of the amended Rules of Order 37 and it is not possible to say that in so doing, Rules 142 to 148-A were inconsistent with section 27. It is undoubtedly true that R. 148-A provided that Rules 142 to 148-A shall be in suppression of the amended rules 2 and 3 of Order 37 but that does not make any difference for Rr. 142 and 143 reproduced substantially the provision contained in the amended rules 2 and 3 of Order 37 and the effect of rules 142 to 148-A was not to introduce any restriction of the right to defend which did not exist before those rules were made but merely to embody the provisions restrictive of the right to defend which were already there in the amended rules of Order 37 and to re-arrange them with certain changes of procedure in a proper intelligible form. Rules 142 to 148-a cannot, therefore, be regarded as in any way inconsistent with Section 27.

(7) Faced with this difficulty the learned advocate appearing on behalf of the defendants contended that the amended rules of Order 37 were also ultra vires the rule-making power of the High Court u/s 122 of the Code and the rules which continued to prevail were the rules as originally enacted in the Code. It was also urged by the learned advocate appearing on behalf of the defendant in one of the other Revision Applications on Board that even the Rules of Order 37 as originally enacted were void and of no effect as they were inconsistent with Section 27 which was a provision in the body of the Code. We will presently examine the contention whether the amended Rules made by the High Court of Bombay in exercise of its power u/s 122 were ultra vires on the ground of being inconsistent with Section 27 but so far as the contention as to the invalidity of the rules of Order 37 as originally enacted in the Code is concerned, it is difficult to understand it, much less to accept it. Section 121 in terms declares that the Rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled Order 37 altered in accordance with the provisions of Part X and, therefore, the rules of Order 37 as originally enacted in the Code must be given effect as if they were enacted in the body of the Code. No distinction can be made between Section 27 and the original rules of Order 37 so far as force and efficacy of these provisions are concerned. Since these two provisions form part of the same Code, they must be construed just as two Sections in a statute

would be construed and they must be read together and harmonised so as to give effect to both the provisions. There is, as we shall presently point out, no conflict between Section 27 and the original rules of Order 37 but even if there were any such conflict, it can be resolved by resort to the well-known principle of construction *generalia specialibus non derogant*. Of that more hereafter.

(8) The argument of the defendants was that Section 27 confers an absolute right on the defendant to defend a suit instituted against him and, therefore, any provision which derogates from such right to defend would be inconsistent with Section 27. If such a provision occurs in the rules in the First Schedule, it would have to give way to Section 27 and would be void and ineffective to the extent to which it conflicts with that Section and if it occurs in the rules made by the High Court u/s 122, it would be ultra vires the rule-making power of the High Court u/s 122. This was the basis on which it was contended that the original rules in O. 37 were void and ineffective and the amended rules made by the Bombay High Court were ultra vires the rule-making power conferred u/s 122. It, therefore, becomes necessary to consider whether any right is conferred on the defendant by Section 27 and if so, what is the nature of that right. Section 27 appears to be intended to give effect to the principle *audi alteram partem*. When it says that on the institution of a suit a summons may be issued to the defendant to appear and answer the claim, it does postulate that the defendant should have an opportunity to appear and answer the claim and provides that a summons may be issued to the defendant for such purpose. We may, therefore, proceed on the basis that Section 27 postulates a right in the defendant to appear and answer the claim. But the question is; what is the content of the expression "answer the claim". Now on a plain natural construction this expression cannot connote anything more than an opportunity to meet the claim or to show cause against the claim made in the suit. This right Order 37 opportunity, the defendant must have, but now is this right or opportunity to be exercised? What is to be the manner in which the defendant can answer the claim? That is not laid down in the body of the Code but is left to be regulated by the rules of the First Schedule. There is no provision in the body of Code which says that the defendant shall be entitled to answer the claim by filing a written statement, asking the Court to raise issues, leading evidence and making submissions at the close of the evidence. The right to any particular procedure for answering the claim is thus not conferred on the defendant by any provision in the body of the Code. When we turn to the rules in the First Schedule we find that a certain procedure for answering the claim is set out and the defendant is entitled to avail himself of that procedure for answering the claim made in the suit. But the rules in O. 37 provide for a departure from this ordinary procedure and lay down a summary procedure is applicable, the defendant appears and files in affidavit showing that he has a good defence to the suit on the merits or disclosing such facts as maybe deemed sufficient to entitle him to defend and on the strength of such affidavit asks the Judge to grant him leave to defend. The defendant thus gets an opportunity to answer the claim made against him. Of course the opportunity to

answer the claim which he gets at his stage is not as elaborate as that which a defendant gets under the ordinary procedure but it is nonetheless an opportunity to answer the claim. If the defendant fails to effectively answer the claim by saying that he has a good defence to the action of merits of that there are facts which are sufficient to entitle him to defend, the Judge would proceed to pass a decree against him but if he satisfies the Judge that he has a good defence to the suit on the merits or that there are facts sufficient to entitle him to defend and that the answer to the claim made by him is prima facie good, the Judge would grant him leave to defend either unconditionally or subject to conditions and then he would be entitled to avail himself of the ordinary procedure for meeting the claim of the plaintiff. The manner of answering the claim thus follows a different pattern under the summary procedure than what it follows in the ordinary procedure but merely because different patterns of answering the claim are provided in the rules in the First Schedule, it does not mean that in cases where summary procedure is applicable, there is denial of an opportunity to answer the claim. There is therefore, no inconsistency between Section 27 and the rules in Order 37. Section 27 merely lays down the general principle of audi alteram partem and the rules in the first Schedule regulate the exercise of the right to be heard in answer to the claim by providing how it shall be exercised according as the case falls in one category or the other. This view avoids conflict between Section 27 on the one hand and Section 128(2)(f) and the original Rules of order 37 on the other and accords with the well-known rule of construction that the provisions of a statute must be so construed as to avoid conflict and make a consistent and harmonious enactment of the whole statute. The provision of summary procedure as contrasted with the ordinary procedure is, therefore, not inconsistent with Section 27 and on that ground neither the original rules of O. 37 nor the amended Rules of Order 37 can be said to transgress the limitation imposed u/s 128 sub-section (1) and equally Rules 142 to 148-A cannot be regarded as violative of the inhibition contained in that sub-section.

(9) The same conclusion must also follow even if we regard Section 27 as conferring a right on the defendant to defend the suit by following the ordinary procedure of filing a written statement, raising issues, leading evidence and making submissions. The Rules of Order 37 have, by reason of Section 121, effect as if enacted in the body of the code and, therefore, Section 27 must be read along with the rules of Order 37 for the purpose of determining the scope and ambit of Section 27. Another provision which must also be read along with Section 27 and the Rules of O. 37 is Section 128(2)(f). The Rules of Order 37 as originally enacted provided for summary procedure in suits on negotiable instruments and Section 128(2)(f) read with Section 122 empowers the High Court to make rules providing for the introduction of summary procedure in certain other suits of the categories specified in Section 128(2)(f) is not defined in the body of the Code but it is clear from the provision of Order 37 that the Legislature used the expression "summary procedure " to mean the procedure

indicated in the rules of Order 37 . The position which, therefore, merges on a consideration of Section 27, Section 128(2)(f) and the rules of Order 37 is that the Legislature enacted a general rule in Section 27 but provided that the summary procedure which precludes the defendants from defending the suit without obtaining the leave of the Judge to defend should be applicable in suits on negotiable instruments and that the High Court should have the power under S. 122, to introduce this summary procedure in other suits of certain categories specified in Section 128(2)(f). When, therefore, the High Court , in the exercise of its power u/s 122, makes rules extending the summary procedure to suits of the categories specified in Section 128(2)(f), the High Court would not be doing anything inconsistent with the provisions in the body of the code. As a matter of fact, Section 128(2)(f), which empowers the High Court to extend the summary procedure to suits of the categories specified in that provision, being itself a provision in the body of the code, the amended rule was of Order 37 as also rules 142 to 148-A would be rules made in pursuance of the provisions in the body of the code and would not be inconsistent with such provisions. If the rules made by the High Court u/s 122 extending the summary procedure to suits of any of the categories described in sec 128 (2) (f) were inconsistent with the Section 27 and, therefore, beyond the rule-making power of the High Court u/s 122, the result would be that Section 128(2)(f) would be rendered nugatory. We must, therefore, harmonise these provisions and the only way in which they can be harmonised is by reading Section 27 as enacting a general provision not affecting the special provision of summary procedure in suits on negotiable instruments and suits of other categories described in sec 128 (2) (f) on the principle of *generalia speciali bus non derogant*.

(10) Our answer to the question referred to us, therefore, is that neither the amended rules of Order 37 nor Rules 142 to 148-A of the Ahmedabad City Civil Rules are *ultra vires* the rule-making power of the High Court u/s 122 of the Code.

(11) Ordered accordingly.