

(1961) 02 BOM CK 0002
In the Bombay High Court
Case No : Suit No. 412 of 1958

Manalal Rikhbaji and Others

APPELLANT

Vs

Mohanlal Harilal Rathi and Others

RESPONDENT

Date of Decision : 03-02-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 49 Rule 3, Order 7 Rule 10, Order 7 Rule 10(1), 20
Supreme Court Rules, 1966 — Order 11 Rule 1

Citation : AIR 1963 Bom 94 : (1961) 63 BOMLR 969

Hon'ble Judges : K.K. Desai, J

Bench : Single Bench

Advocate : K.M. Vakil and Bhonkar, for the Appellant; C.C. Sheth and M.M. Bhatt, for the Respondent

Judgement

1. This is a suit to enforce a mortgage dated June 19, 1952. The mortgage is an English mortgage.

2. At the instance of the parties, I directed that the first issue as regards jurisdiction of this Court should be tried as preliminary issue. The relevant facts that need be noticed in this connection are as follows:

The Plaintiffs who carry on business in Bombay as shroffs and commission agents in the firm name of Messrs. Rikhbaji Manalal and Co., were appointed shroffs and commission agents by the Defendants' firm of Messrs Laxminarayan Bankatlal and Co. to effect certain transactions in Bombay. Admittedly, Defendants Nos. 1, 2, 3 and 4 are brothers. Their business is situate at Lasalgaon in Niphad Taluka in Nasik District.

The Plaintiffs' case is that accounts of the previous transactions between the parties were settled and adjusted and at the foot of the accounts a sum of Rs. 25,000/- was found due as on June 15, 1952. The Defendants requested for a further loan of Rs. 10,000/- and ultimately by the indenture of Mortgage dated June 19, 1952, an immovable property of the Defendant situate at Lasalgaon was

mortgaged to the Plaintiffs to secure repayment of the aggregate sum of Rs. 35,000/- and interest as mentioned in the mortgage. According to the Plaintiffs, after giving credit for repayments, a sum of Rs. 21,017.65 nP. remained payable to the Plaintiffs as on May 5, 1958, as per particulars annexed as Ex. A to the plaint. The Plaintiffs have filed this suit to enforce the claim for that balance due at the foot of the mortgage. The Plaintiffs have also claimed Interest at 6 per cent on the outstanding principal amount of Rs. 13,505-1-6. The reliefs claimed are usual reliefs for declarations that the amount is due under the mortgage and that the Plaintiffs have a first charge on immovable property and for a decree against the defendants for the amount claimed and in default of payment within the date fixed for redemption for sale of the property. The Plaintiffs have also claimed Receiver of the Immoveable property as and by way of interim relief.

3. The defendants have raised diverse questions at law and facts by their written statement. It is unnecessary to summarise those contentions here, as the only Issue that I am trying is whether this Court has Jurisdiction to try and entertain the suit. The contention that is made on behalf of the Defendants in that connection is that all the Defendants are admittedly residing outside Bombay and are not carrying on business or working for gain at Bombay. The immovable property mortgaged to the Plaintiffs is also admittedly situate outside Bombay. The Plaintiffs have failed to obtain leave under Clause 12 of the Letters Patent. The Defendants' submission is that having regard to the Plaintiffs' failure to obtain such leave, this Court, has no jurisdiction to try the suit.

4. In connection with the arguments advanced on behalf of the Defendants, Mr. Vakil for the Plaintiffs has relied upon the decision of the Full Bench of this court in the case of Hatimbhai Hassanally v. Framroz Eduljee Dinshaw, 29 Bom LR 498 : AIR 1927 Bom 278. Mr. Vakil has contended that the Plaintiffs' suit is primarily for recovery of debt. in such a suit the only essential facts-which the Plaintiffs are bound to prove are the loan advanced, the debt due at the date of the suit and the facts which are relevant in that connection, in this suit according to Mr. Vakil, the situation of the property outside Bombay is irrelevant. The situation of the property is not a part of the cause of action of the plaintiffs in this suit. He has in this connection emphasised that admittedly the indenture of mortgage was executed by the parties at Bombay. The loan was advanced By the Plaintiffs to the Defendants at Bombay. Under the mortgage the loan is repayable to the Plaintiffs at Bombay, Apart-from that, Plaintiffs by their Attorneys' letter dated August 17, 1957, called upon the Defendants to pay to the Plaintiffs' Attorneys or the Plaintiffs at Bombay the amount due under the mortgage. Mr. Vakil has accordingly contended that the whole of the cause of action has arisen at Bombay. The property was transferred to the Plaintiffs by way of mortgage at Bombay. He contends that under these circumstances having regard to the provisions in Clause 12 of the Letters Patent, it was unnecessary for the Plaintiffs to obtain leave under Clause 12.

5. The relevant part of the provisions in Clause 12 of the Letters Patent runs as

follows:

". . . shall be empowered to receive, try and determine suits of every description, if, in the case of suits for land or other immovable property such land or property shall be situated, or in all other cases if the cause of action shall have arisen either wholly, or in case the leave of the Court shall have been first obtained, in part within the local limits of the ordinary original jurisdiction of the said High Court or if the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain, within such limits"

6. It must be stated that it is not contended on behalf of the Defendants that this is a suit for land". That is direct result of the decision of the Full Bench of this Court in the case of 29 Bom LR 498 : AIR 1927 Bom 278. That was a suit for enforcing mortgage of immovable properties which were all situated outside Bombay. The defendants in the suit, however, were all residents of Bombay. A contention was made on behalf of the Defendants in the suit that the suit was a suit for land and this Court had no jurisdiction. The finding of the full Bench was that a suit to enforce mortgage by sale of property was primarily and essentially a suit to recover debt and could not be considered as a suit for land, in connection with the discussion that took place, certain observations were made in paragraph 40 of the judgment and on the basis whereof Mr. Vakil contends that the situation of the property outside Bombay cannot be considered as part of the cause of action in mortgage suit. The observations are as follows:

"In this Court service out of the jurisdiction is regulated by Clause 12 of the Letters Patent. We have no provisions corresponding to the Supreme Court Rules, Order XI Rule 1. But unless the whole cause of action arises in Bombay, the leave of the Court has to be obtained to a mortgage suit where both the land and the defendant are out of the jurisdiction. Accordingly, in my opinion, this leave is a safeguard intended by the framers of the Letters Patent against an unfair use of the jurisdiction in mortgage as well as in other suits."

Mr. Vakil has relied upon the statements in the above observations that both the land and the defendant must be out of the jurisdiction for leave being necessary, according to him, the true construction of the above observation is that leave is not necessary where the whole of the cause of action arises in Bombay. 2nd that the situation of the land has no relevance to the cause of action in a mortgage suit.

7. The relevant further discussion in that case is in paragraph 41 of the judgment, (at p. 288 of AIR) where it is observed as follows;

"It was, however, contended that the cases might arise where the whole cause of action arose in Bombay. It was said that if the mortgage was executed in Bombay, and the money was paid and to be repaid in Bombay, then the whole cause of action would arise there, and that no leave of the Court would be necessary. I express no opinion on the question whether the fact that the suit

related to land outside the jurisdiction would make a part of the cause of the action without the jurisdiction."

8. Having regard to the above observations, it is clear that it was not intended to be held by the Full Bench in that case that the existence of property outside Bombay or out of the jurisdiction was irrelevant to the purposes of) the cause of action in a suit to enforce mortgage by sale.

9. Under the circumstances of this case, the only question that falls to be decided is as to whether the whole of the cause of action as contained in the plaint in this suit arose within the original jurisdiction of this Court. Now, the phrase "cause of action" has been repeatedly construed in several cases. The ultimate ratio as to the true construction of the phrase "cause of action" has been held to be bundle of all facts essential and necessary to be proved by the plaintiff for the purpose of succeeding in his litigation. Having regard to that construction, the question is not only to find out what is the primary object and purpose of the suit, but to consider the whole nature of the suit by referring to the necessary reliefs claimed in the suit. As I have already related above, the Plaintiffs in this suit seek a declaration that the amount claimed in the suit is due at the foot of the mortgage mentioned in the plaint. They further seek a declaration that they have a first charge on the property mentioned in the plaint. In default of payment of the amount declared to be due within the time fixed for redemption, the Plaintiffs also seek sale of the immovable property mentioned in the Plaint. The Plaintiffs also seek Receiver of the property in suit as and by way of Interim relief. The Plaintiffs claim all these reliefs mainly on the ground that in respect of the debt claimed in the suit they became mortgagees under the indenture of mortgage dated June 19, 1952. It is apparent that in this suit it is essential for the Plaintiffs to prove that the property mentioned in the plaint belonged to and was of the ownership of the Defendants and that the property was transferred by the Defendants as owners as and by way of mortgage to secure repayment to the Plaintiffs of the amount mentioned in the mortgage and claimed in the suit. In connection with all these facts necessary to be proved, the Plaintiffs have alleged in the plaint that the property was of the ownership of the Defendants and that they had transferred the property by way of mortgage to secure repayment to the Plaintiffs of the amount claimed in the suit. It appears to me to be very clear that in the matter of a claim on a mortgage, it would be essential for the Plaintiffs to prove transfer of interest in the property to the Plaintiffs and also to prove that the transfer was by the owners of the property. In other words, the Plaintiffs would have to prove that the debtors (Defendants) were owners of the property. In connection with the proof of the ownership of the Defendants in the property, it is clear that the question of the situation and existence of the property at a particular place must arise to be proved on behalf of the Plaintiffs in a claim to enforce a mortgage. In fact, the question directly relates to the title of the Defendants in the suit to the property in the suit.

10. Now, in this connection, one may notice that generally in all cases jurisdiction

is stated to exist in a Court by reason of the situation of the property within the jurisdiction or by reason of the Defendants being within the limits of ordinary jurisdiction of the Court and thus liable to obey all commands of the Court. The scheme of Clause 12 of the Letters Patent as regards suits for land is that the Court will not assume jurisdiction unless and until the property is situate within the jurisdiction of the Court or a part of the property is situate and leave has been obtained. In all other cases, the Court assumes jurisdiction either because the Defendant carries on business or works for gain or resides within the jurisdiction of the Court, or because the whole of the cause of action arises within the original jurisdiction of the Court or a part of the cause of action arises and leave has been obtained.

11. In the Plaintiffs' suit admittedly all the Defendants are residing outside the jurisdiction and do not carry on business or work for gain within the jurisdiction of this Court. Admittedly, the immovable property mortgaged to the Plaintiffs is situate outside the jurisdiction. It appears to me, having regard to what I have already discussed, that the existence and situation of the property is essential part of the cause of action in a suit to enforce a mortgage. In this connection, one may usefully refer to the observations of Chief Justice Chagla in the case of Shiv Bhagwan Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others, . That was a suit for partition. A question as regards the jurisdiction of the Court arose. Dealing with that question, it was observed as follows:--

"..... .Dealing with the first point, it is difficult to understand, with respect to the learned Judge, how the existence of property in a partition suit is not a part of the cause of action. It is necessary for the plaintiff to allege that there is same property of which he is seeking partition. The mere fact that there was a joint family 2nd that the plaintiff is a member of the joint family would not be sufficient to entitle him to maintain the suit.the averment as to the existence of property would be the averment of a necessary and material fact. This necessary and material fact would undoubtedly be part of the cause of action. It is suggested that it would not be necessary to allege where the property existed and that it would be sufficient if the property existed irrespective of the location of the property. This argument is based upon a misunderstanding of the true meaning of the expression "where the cause of action arises". The first duty of the Court is to ascertain what facts constitute the cause of action. Having ascertained that, the next duty of the Court is to ascertain where these facts arose, it is perfectly true that the existence of a property at a particular place is not a part of the cause of action, what is a part of the cause of action is the existence of the property. But having ascertained that, the next question is, "where did that fact, viz., the existence of the property, arise?" And if the property is situated in Bombay, then, to the extent of that particular fact constituting the cause of action, the cause of action arises in Bombay. Certain facts constitute a cause of action irrespective of where they arise. But the importance of where they arise arises only in connection with the question of jurisdiction. It is only in order to determine the jurisdiction that the question has

to be considered as to where certain fact; arose. Therefore, in my opinion, if the existence of property is a material fact constituting a part of the cause of action in a partition suit, then the location of the property must be considered in order to determine the jurisdiction of the Court. If the property or part of the property is situated within jurisdiction, then the cause of action or a part of the cause of action has arisen within jurisdiction. It is contended by Mr. Maneksha that the situs of movable property is irrelevant in a suit for partition of movables, xxx xxx But the question of location of movables does not arise from the point of view of its situs; it arises from the point of view of the cause of action."

That submission of Mr. Maneksha was negatived and it was found:

"Therefore, in holding that the Court has jurisdiction to try a suit for partition of moveables if the moveables are situated within jurisdiction, I am not so holding on the ground that the situs of the moveables is within jurisdiction, but solely on the ground that the location of the moveables within jurisdiction constitutes a part of the cause of action of a partition suit for movables".

It appears to me that except for the fact that the discussion in the above observations relates to suit for partition, there is no principle of distinction so as to distinguish the above observations from the facts in this case Each and every word as contained in the above observations is applicable to this suit to enforce mortgage by sale, that the suit before the appeal Court in the case of Shiv Bhagwan and Onkarmal was a partition suit, does not, in my view, make any difference in the principle which has been elaborately discussed in the above observations. In the same case, Bhagwan J. (as he then was) at p. 360 (of Bom LR): (at p. 378 of AIR) also observed as follows:

"The principle which emerges from the above is that the situs or location of the movable property within jurisdiction invests the Court with jurisdiction. The cause of action is the bundle of facts which are necessary for the plaintiff to establish in order to obtain the relief which he seeks at the hands of the Court and the jurisdiction of the Court is determined by the fact of the cause of action wholly or in part having arisen within its jurisdiction, xxx xxx In a suit for partition of movable property the cause of action consists of the existence of the movable property, the interest of the parties in the movable property, the demand for partition and the non-compliance therewith, the existence of movable property would be an essential part of the cause of action, and if that movable property is situated within the jurisdiction of a particular Court, that part of the cause of action would certainly arise within the jurisdiction of that Court, it is clear therefore that the situs or location of the movable property within jurisdiction would, by reason of a part of the cause of action having arisen within local limits, invest the Court with Jurisdiction."

Again at the bottom of p. 361 (of Bom LR) : (at p. 379 of AIR), the further observations are;

"These observations therefore do not militate against the position which we have

laid down above, viz. that the existence of the movable properties is a part of the cause of action, and if that cause of action has arisen within the jurisdiction of this Court by reason of the situs or location of the movable properties within the local limits, this Court would have jurisdiction to entertain the suit for partition of the movable properties within jurisdiction. Looking at the matter from this point of view, it is clear that this Court has jurisdiction to entertain the suit for partition of movable properties which are situated within jurisdiction, and with leave granted under Clause 12 of the Letters Patent it would also have jurisdiction to partition movable properties belonging to the joint family outside jurisdiction."

12. The above observations also are applicable to the question that has arisen for determination in this suit. For the same reasons as appear in the case of Shiv Bhagwan and Onkarmal, it appears to me that in a suit for enforcing mortgage by sale, the existence of property is an essential fact required to be proved by the plaintiffs and the existence of the property at a particular place is a part of the cause of action in the suit which necessarily arises at the place where the property is situate.

13. In the result, I must come to the conclusion that the property that was mortgaged to the plaintiffs In this suit being situate outside Bombay, a part of the cause of action arose outside Bombay and outside the ordinary limits of jurisdiction of this Court. It is true that the indenture of mortgage was executed in Bombay and a material part of the cause of action also arose in Bombay. If the plaintiffs had obtained leave under Clause 12 of the Letters Patent, I have no doubt that this Court would have had jurisdiction to try the suit; As the plaintiffs altogether failed to obtain leave under Clause 12, the con-elusion to which I have arrived at is that this Court has no jurisdiction to try the suit.

14. Mr. Vakil for the plaintiffs applies that in the result I should direct that the plaint be returned to the plaintiffs with liberty to file another suit in a Court with jurisdiction. He has in that connection relied upon the observations made in the case of R.P. O'Connor Vs. P.G. Sampath Kumar, . In that case, similar application was made on behalf of the plaintiffs in a suit which was filed on the Original Side of the High Court of Madras. The Court referred to the practice on me Original Side of not returning plaints, where suits failed on the issue of jurisdiction. The provisions of Order 7 Rule 10(1) of the CPC were also considered. The Court came to the conclusion that though the High Court was a Court of record, it was permissible to the High Court under inherent powers reserved in Section 151 of the CPC to order return of the plaint where suits failed on the issue of jurisdiction. The practice on the Original Side of this Court as is universally known has been to dismiss suits where the Court has no Jurisdiction to entertain or try the suits. This court does not return plaints at all. The application made on behalf of the plaintiffs is contrary to that well established practice. The practice came to be considered in great detail In 1884 in the case of Bai Amrit In re, reported at ILR Bom 380. Both the learned Judges sitting in Division Bench in

that case referred to the practice in a large way and refused an application made on behalf of the plaintiffs In that suit for return of the plaint. That the court-fees have been paid, in this suit, does not appear to me to be sufficient reason why the well established practice of the Court should not be followed in this case and new precedent should be made for which there is no warrant at all. In the case of Bai Amrit, ILR 8 Bom 380, the Court came to the conclusion that the High Court being Court of record, it would be wrong to return the plaint filed in that Court on the ground that the Court had no jurisdiction to entertain and try the suit. With respect I am of the same view and do not see how I can accept the suggestion made on behalf of the plaintiffs.

15. Issue No. 1 is answered in the negative.

16. The suit will be dismissed with costs.

17. Suit dismissed.