
(1997) 02 GUJ CK 0029
In the Gujarat High Court

Nizar Sadaruddin Khoja

APPELLANT

Vs

Vaibhav Construction and Others

RESPONDENT

Date of Decision : 28-02-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1, Order 6 Rule 17, Order 7 Rule 10, Order 7 Rule 11

Citation : (1998) 1 CivCC 603 : (1997) 2 GLR 1521

Hon'ble Judges : R.R. Jain, J

Bench : Single Bench

Judgement

R.R. Jain, J.—Mr. Bhavsar, learned Advocate, waives service of Rule on behalf of the respondents.

2. Since all these Civil Revision Applications are arising from a common order, passed below Exhs 28,29 and 54 in Regular Civil Suit No. 72 of 1994, are disposed of by this common judgment. Order below Ex. 28 is challenged in Civil Revision Application No. 1234 of 1996, below Ex. 54 in Civil Revision Application No. 1235 of 1996 and below Ex. 29 in Civil Revision Application No. 1236 of 1996.

3. The petitioner/original plaintiff filed Regular Civil Suit No. 72 of 1994 in the Court of learned Civil Judge (J.D.), Visnagar for recovery of Rs. 15,000/- paid to respondents as part-consideration towards purchase of a flat as per agreement and also claimed alternative relief for specific performance of the agreement for sale of flat valued at Rs. 80,000/-.

4. The respondents/defendants, on service of summons, appeared before the Court and raised objections about the maintainability of suit in light of pecuniary jurisdiction of the Court. The respondents/defendants also raised objection about payment of insufficient Court-fee stamps. In this background, vide Ex. 28, the defendants applied Order 7 Rule 11 of the CPC ("Code" for short hereinafter) for rejection of the plaint. Vide application Ex. 29, the defendants applied for dismissal of suit for want of pecuniary jurisdiction and in the alternative for a direction against the plaintiff/petitioner to pay proper Court-fees and for return of

the plaint for presentation in the proper Court. Vide Ex. 54, the petitioner/plaintiff applied for amendment of plaint under Order 6 Rule 17 read with Order 2 Rule 2 of the Code with a view to delete alternative prayer for specific performance so as to bring the suit within the pecuniary jurisdiction of the Court of learned Civil Judge (J.D.). All the three applications are disposed of by the learned Judge by a common order dated 18-7-1996 allowing applications Exhs. 28 and 29 and rejecting application Ex. 54. The effect of the order is that the petitioner/plaintiffs request for amendment of plaint is rejected and the defendants' request for rejection of the plaint is granted. Thus, the suit filed by the petitioner/plaintiff would stand disposed of by way of rejection. Aggrieved by this order, the petitioner/plaintiff has filed these three revision applications.

5. Mr. Jani for the petitioner has argued that as arbiter litis the petitioner has full control over the plaint and has right to add or delete any prayer or relinquish any claim at any stage of trial. Thus, having come to know about the technical objection of pecuniary jurisdiction, the petitioner abandons his alternative claim for specific performance vide Ex. 40 and confines the prayer for a money decree for Rs. 15,000/- paid initially to the defendants/respondents towards part-performance of the agreement. As the Court of Civil Judge (J.D.) has pecuniary jurisdiction upto Rs. 50,000/- the relief claiming money decree for Rs. 15,000/- only would be very much within the pecuniary jurisdiction and thus the suit would be maintainable before that Court on abandoning claim for alternative relief. Mr. Jani has also argued that despite passing Pursis Ex. 40 relinquishing and abandoning the claim for alternative relief for specific performance as an abundant caution the petitioner moved application Ex. 54 under Order 6 Rule 17 read with Order 2 Rule 2 of the Code for carrying out necessary amendment so as to make the record clear bringing the suit within the pecuniary jurisdiction of the Court. According to him the proposed amendment was not to change the nature of suit and, therefore, should have been allowed by the Court.

6. Learned Advocate Mr. Bhavsar for the respondents has argued that a party can abandon his claim before institution of the suit so as to bring within the jurisdiction of a particular forum but nonetheless provisions of Order 2 Rule 2 read with Order 6 Rule 17 of the Code can be invoked after institution for the purpose of investing a Court with jurisdiction which otherwise does not have. As regards applicability of Order 2 Rule 2 and Order 6 Rule 17 of the Code after institution with a view to invest a particular Court with jurisdiction which otherwise does not have, I will deal with rival contentions a little later. But before that I would like to deal with scope of Order 7 Rule 11 of the Code.

7. Essentially both the applications, Exhs. 28 and 29. filed by the respondents defendants are with a prayer to reject the plaint since the subject-matter of the suit is beyond the pecuniary jurisdiction of the Court and that insufficient Court-fee has been paid on the plaint. It is true that Order 7 Rule 11 empowers the Court to reject plaint if it (i) does not disclose cause of action, (ii) the claim is undervalued, (iii) plaint is insufficiently stamped and despite being required by

Court to correct valuation and affix requisite Court-fee stamp within stipulated period the plaintiff fails to do so. The plaint can also be rejected if apparently on the face of record it appears that the plaint is time-barred. It is true that while instituting the suit the plaintiff made following prayers in terms of which decree was prayed:

(i) Money decree for Rs. 15,000/- paid to the defendants.

(ii) Specific performance in the nature of handing over possession of flat valued at Rs. 80,000/-.

There is no dispute that the Court of Civil Judge (J.D.) has pecuniary jurisdiction to try and decide a suit having subject-matter upto Rs. 50,000/-. In this case, since the value of flat is Rs. 80,000/-, i.e., more than Rs. 50,000/- on the face of it, the Court of Civil Judge (J.D.), will not have pecuniary jurisdiction to entertain and decide the suit. It is also an admitted fact that the petitioner paid Court-fee stamp for Rs. 15,000/- and did not pay requisite Court-fee stamp for the alternative relief for specific performance and possession of flat valued at Rs. 80,000/-. In these circumstances, as required under Order 7 Rule 11 of the Code, it was incumbent upon the Court to direct the plaintiff to correct the valuation and/or supply requisite Court-fee stamps within stipulated period before rejecting the plaint. If the plaintiff does not comply with the conditional order then and then only the plaint could be rejected as contemplated under Sub-rules (b) and (c) of Rule 11 Order 7 of the Code. While going through the impugned order, it is crystal-clear that the Court did not require the plaintiff to correct valuation and pay requisite Court-fee stamps within a stipulated period before rejecting the plaint, therefore, on the face of it, the order rejecting plaint is patently erroneous and de hors the provisions of law.

8. Similarly, if the Court is not having pecuniary jurisdiction as contemplated u/s 6 of the Code, the plaint could not have been rejected since Rule 10 of Order 7 provides for return of plaint to be presented to the Court in which the suit should have been instituted. In this case, instead of returning plaint the Court has rejected. In my view, while allowing applications Exhs. 28 and 29 and rejecting petitioner's plaint, the Court below has committed a grave error of law. For want of pecuniary jurisdiction the Court ought to have returned the plaint to the plaintiff for presentation before proper Court and objection with regard to insufficient Court-fee, appropriate direction should have been issued to the petitioner for supplying requisite Court-fee stamps and only upon non-compliance of such direction the plaint could have been rejected.

9. It is an admitted fact that in light of claiming alternative relief for specific performance of agreement for delivery of possession of flat valued at Rs. 80,000/- the suit could not have been entertained by the Court of learned Civil Judge (J.D.) as the pecuniary jurisdiction is confined to Rs. 50,000/- only. Section 6 of the Code is very clear in this regard. Now, the questions arising for consideration of this Court is whether in application of Order 2 Rule 2 of the Code

is it open to the petitioner/plaintiff to relinquish claim and bring the suit within the jurisdiction of the Court? Is it open to the petitioner/plaintiff to apply under Order 6 Rule 17 of the Code for amending the plaint with permission to delete and abandon a part of claim so as to bring the suit within the jurisdiction of the Court which otherwise is not invested with?

10. Order 2 Rule 2 of the Code provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. Thus, it is clear that whenever claim is to be relinquished the same has to be relinquished by the plaintiff before institution to facilitate choosing of forum. This provision cannot be pressed into service after the suit is instituted. On this point, learned Advocate for the respondent has invited my attention to a judgment in the case of *Vishnu v. Jawaher Mall*, AIR 1953 Hyderabad 230, which clearly says that if on the date of institution of the suit the Court has no requisite pecuniary jurisdiction over the subject-matter of the suit, it cannot acquire jurisdiction by reason of the plaintiffs relinquishing a portion of the claim at a later stage. Relinquishment contemplated by Order 2 Rule 2 of the Code in order to bring the suit within the jurisdiction of a Court is before the institution of the suit and not at any subsequent stage. Similar view has also been taken by Madras High Court in the case of *Kannusami v. Jagathambal*, AIR 1919 Madras 1071. It has also been held that if the suit is grossly undervalued and on facts it appears to the Court that it has no jurisdiction and had discovered that the subject-matter of the suit is beyond its jurisdiction, proper step would be to take recourse to Order 7 Rule 10 of the Code and return the plaint but not rejection or withdrawal. Similarly, inherent lack of jurisdiction cannot be cured by subsequent amendment of plaint under Order 6 Rule 17 of the Code. In this regard Patna High Court in the case of *Pandit Rudranath Mishir and Others Vs. Pandit Sheo Shankar Missir and Others*, , has held that granting of amendment postulates an authority of the Court to entertain the suit. But where there is inherent lack of jurisdiction in the Court to entertain the suit itself, it cannot make any order for amendment of the plaint to bring the suit within its jurisdiction. Despite inherent lack of jurisdiction if the Court exercises jurisdiction which is not vested would amount to usurping a jurisdiction not vested in it. In such a case, instead of exercising jurisdiction and allowing amendment of plaint, proper course would be to return the plaint to the plaintiff for presenting before proper Court in which the suit ought to have been instituted.

11. While dealing with provisions of Order 2 Rule 2 and Order 6 Rule 17 of the Code, Nagpur High Court in the case of *Sobhagsingh v. Ramjitsingh*, AIR 1943 Nagpur 293, has held that Order 2 Rule 2 of the Code does not apply after the suit is filed but has application before institution. When there is inherent lack of jurisdiction the Court should not allow amendment simply and solely for the purpose of depriving itself either to divest or invest with jurisdiction which otherwise not.

12. Mr. Jani for the petitioner has relied upon the judgment of Bombay High Court in the case of Shobha Venkat Rao Vs. K.R. Mahale, wherein it is held that Order 2 Rule 2 of the Code is not the only provision in the Code for voluntary relinquishment of claims or parts of claims but can also be relinquished at any stage of the suit under Order 23 Rule 1 of the Code and by invoking the provisions of Order 23 Rule 1 and abandoning a part of claim the Court be invested with pecuniary jurisdiction. For doing so even a statement is sufficient and amendment of plaint is not necessary. It is true that after institution of suit the plaintiff may as against all or any one of the respondents abandon his suit or abandon a part of claim. By making this provision the intention of the legislature is very clear that the plaintiff can abandon a part of his claim at any stage of suit after institution but nonetheless contemplates divesting or investing with jurisdiction which otherwise does not have. The moment the suit is filed the plaintiff requires the Court to decide the entire claim arising from the cause of action but if during pendency the plaintiff for some reasons desires to abandon a part of claim, may abandon his claim and by doing so requests the Court not to decide that part of the claim as he does not press against the defendant. Such an abandonment does not relate back to the date of institution and affect the jurisdiction. By abandonment under Order 23 Rule 1 the institution of suit remains unaffected, that is, the jurisdiction of the Court to try the claim as a whole does not get vitiated but simpliciter the Court is requested not to apply mind to that particular part of claim which is sought to be abandoned under Order 23 Rule 1 of the Code. In this view of facts, I do not agree with the view subscribed by Bombay High Court in Shobha's case (supra).

13. As per well settled principle of law, suit is to be instituted in a proper Court having jurisdiction, may be pecuniary, territorial or statutory. Institution of a suit in a Court with inherent lack of jurisdiction, the institution itself will be bad and the Court cannot entertain. Since this is the legal position the Court cannot deal with any application under Order 6 Rule 17 of the Code with a view to invest or divest with jurisdiction which otherwise the Court did not have initially at the time of institution. Any such order would be without jurisdiction. Once the suit is filed, in a Court having proper jurisdiction, it is always open to the plaintiff, at any stage of the suit, to relinquish or abandon a part of claim under Order 23 Rule 1 of the Code. This can be done by mere declaration which Court may record. Such abandonment/relinquishment shall not have any effect upon jurisdiction because on the date of institution the Court enjoyed jurisdiction and still enjoys but the plaintiff does not want the Court to exercise jurisdiction qua that claim. Hence, the Court has to proceed with the remaining claim for which the plaintiff requires to adjudicate. The simple analogy is that if on the date of institution of the suit the Court was invested with jurisdiction by subsequent abandonment the jurisdiction is not usurped or taken away but simpliciter the Court is required not to apply mind to that part of the claim. Thus, when suit is instituted in a Court with jurisdiction by subsequent abandonment of a part of the claim even if such an abandonment has effect of divesting with pecuniary

jurisdiction then also the institution of suit does not get affected and the Court shall decide the matter in accordance with law.

14. In light of the aforesaid facts, the Court below has not committed any error of law in rejecting the petitioner's application Ex. 54 for amendment in the plaint under Order 6 Rule 17 of the Code with a view to invest the Court with jurisdiction which otherwise the Court did not have at the time of institution.

In the result, the impugned order is required to be quashed and set aside party to the extent it has allowed applications Exhs. 28 and 29 and is required to be upheld to the extent of rejection of Ex. 54 refusing amendment. Accordingly, the order passed below applications Exhs. 28 and 29 is hereby set aside and stands modified to the effect that the plaint is ordered to be returned to the plaintiff petitioner for presenting to the proper Court. Order passed below application Ex. 54 is hereby confirmed. All the applications are disposed of accordingly. Rule is made absolute to the aforesaid extent. There shall be no order as to costs.