

(1962) 03 GUJ CK 0009

In the Gujarat High Court

Case No : Civil Revision Application No. 817 of 1960

Parshotam Parbhudas

APPELLANT

Vs

Bai Moti

RESPONDENT

Date of Decision : 27-03-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, 11 , 122
Transfer of Property Act, 1882 — Section 52

Citation : AIR 1963 Guj 30 : (1963) GLR 204

Hon'ble Judges : V.B. Raju, J

Bench : Single Bench

Advocate : K.B. Padia and H.L. Langhonojia, for the Appellant; K.H. Kaji, for the Respondent

Final Decision : Allowed

Judgement

V.B. Raju, J.—The applicant filed an application for permission to sue in forma pauperis. The suit was for declaration that he was the sole owner of two fields and a bungalow and for possession of the bungalow and for the recovery of rent. He was held not to be a pauper, and his application for permission to sue in forma pauperis was rejected by the 2nd Joint Civil Judge, Junior Division, Ahmedabad, and hence this revision application.

2. The learned Judge held that the two suit fields were in the possession of the applicant. While considering the means of the applicant, he considered these two fields and held that it was not proved that the applicant is a pauper or that he has no sufficient means to pay the court-fees for the suit. Secondly he also held that in the previous litigation between the same parties, namely Civil Suit No. 1328/58 of the Court of the 6th Joint Civil, Judge, Junior Division, Ahmedabad, it was decided that the wife of the applicant was the sole owner and that she recovered the possession of the two fields from the applicant in respect of the suit property and that therefore the applicant had no prima facie case or a cause of action. On these two grounds, the learned Judge dismissed the application for

permission to sue in forma pauperis.

3. In revision, it is contended that the two fields in question being a part of the subject matter of the suit should have been excluded when determining the question whether the applicant was a pauper, in view of the addition made by the Bombay High Court to the Explanation to Rule 1 of Order XXXIII, C. P. Code. Order XXXIII, Rule 1 and the Explanation to it read as follows :

"Subject to the following provisions, any suit may be instituted by a pauper.

Explanation -- A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fees prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred rupees other than his necessary wearing apparel and the subject matter of the suit".

On 9th February, 1925, the Bombay High Court added the following to the Explanation :--

"In determining whether he is possessed of sufficient means the subject matter of the suit shall be excluded".

It is therefore contended that in view of this addition to the explanation made by the Bombay High Court, the lower Court was wrong in considering the two fields on the question whether the applicant was possessed of sufficient means. It is contended by the learned counsel for the opponent that this amendment is outside the competence of the Bombay High Court because the amendment does not relate to a matter of procedure but relates to a rule of evidence or to substantive law. u/s 122, Civil Procedure Code, 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.

4. It is also contended by the learned counsel for the opponent that rules of procedure are matters which are referred to in Section 128(2) of the Civil Procedure Code, such as service of summonses etc. Prima facie, the addition to the explanation which provides that in determining whether an applicant is possessed of sufficient means the subject matter of the suit shall be excluded has a bearing on the question how a Judge should decide a particular matter and prima facie it does not relate to a matter of procedure. As worded, the addition to the explanation therefore is prima facie not a matter of procedure.

5. It is also contended that there is a conflict between the explanation found in the Schedule and the addition to the explanation as made by the Bombay High Court. Under the original explanation the subject matter of a suit can be considered on the question of possession of sufficient means in appropriate cases, whereas under the addition to the Explanation made by the High Court it can be considered in no case. It is contended that when there is such a conflict,

the High Court amendment prevails over the original rule in the C. P. Code, and for this proposition reliance is placed on *Shakir Husain Vs. Chandoo Lal and Others*. In this case it is observed as under : ;

"Under Section 122, the High Court has power to annul, alter or add to any of the rules in the first Schedule. If a new rule that has been added is to some extent in conflict with the previous existing rule the new rule must by application be deemed to have annulled or altered that rule. The new rule if not consistent with the old rule must prevail".

But this question need not be considered in the instant case having regard to the view that I am taking as regards the competency of the High Court to make the addition. u/s 122, C. P. Code, the High Court is given power to make rules regulating its own procedure and the procedure of the civil Courts subject to its superintendence, and may by such rules annul, alter or add to all or any of the rules in the first Schedule. This provision does not say that the High Court may annul, alter or add to all or any of the rules in the Schedule, but the provision says that the High Court may make rules regulating the procedure of the High Court and the procedure of the Civil Courts subject to its superintendence. It is, therefore, clear that in order to satisfy the requirements of Section 122, Civil Procedure Code, the High Court must make rules regulating either its own procedure or the procedure of the civil Courts subject to its superintendence. While making such rules, it may by such rules annul, alter or add to all or any of the rules as contemplated in the first Schedule. A simple power of alteration or addition of the rules of first Schedule is not contemplated, such an annulment, alteration or addition is valid only if it is a part of the rules framed by the High Court regulating its own procedure or the procedure of the civil Courts subject to its superintendence. It is true that Section 124, C. P. Code provides that every Rule Committee shall make a report to the High Court established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to make new rules, and before making any rules u/s 122 the High Court shall take such report into consideration. When making rules regulating the procedure, if the High Court finds it necessary or advisable to annul, alter or add to all or any of the rules in the First Schedule, then the Rule Committee should report to the High Court on such proposal. Section 121, C. P. Code, provides as under :

"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."

But this does not mean that rules in the First Schedule can be annulled or altered as such. Such annulment or alteration should be in accordance with the provisions of Part II or Part X of the Code of Civil Procedure, and, in particular, the provisions of Section 122, C. P. Code. Section 122 makes it clear that the power to annul, alter or add to or any of the rules in the First Schedule can be exercised by the High Court only when it proceeds to make rules regulating its own procedure or the procedure of the civil Courts. The power of amendment or

altera-tion as such is not given as contemplated by Section 122. C. P. Code.

6. In the instant case there has been an addition to the explanation. The High Court did not set out to make rules regulating its own procedure or the procedure of the civil Courts subject to its superintendence while making the addition to the exception to Rule 1 of Order XXXIII, C. P. C. The addition is, therefore, outside the scope of Section 122, C. P. Code and must be excluded from consideration.

7. The contention that the learned Judge below should have excluded the two fields, which were the subject matter of the suit when considering the question of possession of sufficient means, is, therefore, not correct. But, it is contended that in regard to the two fields, there was previous litigation between the parties and that the matter is still pending in appeal and that therefore the principle of *lis pendens* is applicable and that the mere fact that the applicant is in possession of these two fields does not enable the applicant to raise money on the security of these two fields or by alienating or by transferring these two fields. Section 52 of the Transfer of Property Act, which relates to the transfer of property pending suit relating thereto, provides that the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made there, except under the authority of the Court and on such terms as it may impose. When the matter is pending in appeal, the rule applies, because an appeal is a continuation of a suit. It is conceded by the learned counsel for the appellant that the two fields and the question involved relating to those fields is the subject matter of an appeal filed by the applicant himself and that the appeal is still pending. The two fields will, therefore, have to be excluded from consideration when deciding the question of possession of sufficient means under Order 33, Rule 1, C. P. Code, and the learned Judge will have to decide the question of sufficient means after excluding these two fields.

8. It is, however, contended that another ground on which the learned Judge dismissed the application was that there was no *prima facie* case and no cause of action in the application of the applicant. Under Order 33, Rule 5, C. P. Code, an application for permission to sue as pauper should be rejected where the applicant's allegations do not show a cause of action. But, there is no provision in this rule whereby an application can be rejected on the ground that the applicant does not make out a *prima facie* case. The application can, however, be rejected if the allegations do not show a cause of action. It is contended that no cause of action has been shown because there is a decision in a previous civil suit, namely Civil Suit No. 1328 of 1958 declaring the wife of the applicant as the sole owner of the property in question and that this decision is *res judicata*. But it is, however, contended that a decree passed in that suit is not *res judicata*, because an appeal has been filed against the decision in that suit, and reliance has been placed on *Ram Prasad v. Shiromani Gurdwara Parbandhak Committee, Amritsar* AIR 1931 Lah 161. A judgment would be *res judicata* when it is heard

and finally decided by the Court which has tried the suit. So the judgment would be res judicata as soon as the judgment is given, but when the appeal has been filed, the judgment loses its finality, because the judgment may be reversed in appeal, and, therefore, the judgment would not be res judicata if an appeal has been filed against the judgment. This was the view taken in *Annamalay v. Thornhill* AIR 1931 SC 263. The learned counsel for the applicant does not challenge the view that the judgment has ceased to be res judicata because an appeal has been filed and is pending. The learned Judge below held that the previous judgment can be looked at although it was not res judicata for deciding whether the applicant had a prima facie case and whether he had a cause of action, and from the copy of the judgment he held that the applicant had no prima facie case and he had no cause of action. Unless the judgment is res judicata, it was not open to the learned Judge to refer to that judgment u/s 43 of the Evidence Act, all judgments other than those mentioned in Sections 40 41 and 42 of the Evidence Act are irrelevant. In the instant case, obviously the judgment did not invite the application of Sections 40 41 and 42 of the Evidence Act, and having held that the judgment was not res judicata, it was not open to the learned Judge to refer to the judgment at all and to come to a conclusion on its basis that there was no cause of action and no prima facie case. The view therefore that the applicant had no cause of action is not correct.

The order of the lower Court dismissing the application of the applicant is, therefore, set aside and the matter is remanded to the Court below for deciding the question of sufficient means in the light of the observations in this judgment. There will be no order as to costs.