

(1965) 12 GUJ CK 0001
In the Gujarat High Court

Rasulmiya Mohmed Umar and Another	APPELLANT
Vs	
Vora Sakurbhai Mohmed and Others	RESPONDENT

Date of Decision : 16-12-1965

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 1, 122, 122

Citation : (1966) 7 GLR 656

Hon'ble Judges : P.N. Bhagwati, J;A.R. Bakshi, J

Bench : Division Bench

Judgement

A.R. Bakshi, J.—The petitioners in this revision application preferred an application under Order 33, Rule 1 of the CPC seeking permission of the Court to file the suit in forma pauperis. The two petitioners claimed that they had one-third share in the suit properties and asked for reliefs for the partition of the properties and for possession of their one-third share therefrom. Petitioner No. 1 is the son of petitioner No. 2 and both of them claimed that they were incapable of paying the requisite Court fee in the suit for partition and possession of their share in the properties mentioned in the application. They filed a list of their movable properties which they valued at Rs. 375/- and in that application they valued the suit properties at Rs. 33000/-, but claimed that they were not possessed of sufficient means to pay the requisite Court fee in suit. Petitioner No. 1 was in service and was drawing Rs. 125/- as salary per mensem, but claimed that he had no sufficient means to pay the Court-fees on the plaint. The learned Civil Judge, Senior Division, Mehsana who heard the application held that the properties in respect of which the suit for partition was brought must be considered while deciding an application under Order 33, Rule 1, Civil Procedure Code. Considering the share of the petitioners in that property, the learned Civil Judge came to the conclusion that the value of the share of the petitioners in those properties was about Rs. 11000/- and that therefore, it could not be said that the petitioners were not possessed of sufficient means to raise an amount of Rs. 1107-00 which were required to pay the requisite Court-fees. This finding of the learned Civil Judge was based on a decision of this Court reported in

Parshotam Parbhudas v. Bai Motiwlo Parshotam Parbhudas IV G.L.R. 204 in which it was held that the addition to the Explanation to Rule 1 of Order XXXIII, Civil Procedure Code, that "in determining whether he is possessed of sufficient means the subject matter of the suit shall be excluded" was outside the scope of Section 122 of the Civil Procedure Code. The main question therefore that arises in this revision application is whether the sentence "In determining whether he is possessed of sufficient means the subject matter of the suit shall be excluded" added to the Explanation to Rule 1 of Order XXXIII is ultra vires and outside the scope of Section 122 of the CPC as has been held in IV G.L.R. 204. That decision Court seems to proceed on two grounds:

1. That Section 122 empowers the High Court to frame rules that relate to procedure and that prima facie the addition to the Explanation does not relate to a matter of procedure.
 2. That the addition in the Rule contravenes the provisions of Section 122 of the CPC because the power to annul, alter or add to all or any of the rules in the first Schedule could be exercised by the High Court only when it proceeds to make rules regulating its own procedure or the procedure of the Civil Courts.
2. In the case of Parshotam Parbhudas v. Bai Moti w/o Parshotam Parbhudas IV G.L.R. 204 it has been observed at page 206 that-

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.

Section 121 of the CPC provides that the rules in the First Schedule shall have effect as if enacted in the body of the Code until annulled or altered in accordance with the provisions contained in Part X of the Code. This section refers to the words "body of this Code" and as is apparent from the arrangement of the enactment, it is divided into two parts, viz. body of the Code and the rules. The re-arrangement of the Code into the "body of the Code" and "Rules" appears to be for the purpose of giving elasticity to judicial procedure and to enable minor defects to be remedied from time to time without the necessity of having a frequent resort to the legislature. The rules that were incorporated in the First Schedule were therefore made liable to be amended, annulled or added to by the High Courts and were given the same effect as if they were enacted in the body of the Code. Under the former Code, the High Courts had certain rule making powers in regard to procedure, but in order to facilitate annulment, amendment or addition to rules which was found necessary to suit peculiar local conditions, a re-arrangement of the Code was made by dividing it into two parts,

viz. the body of the Code and the rules. The rules were included in the First Schedule and by Section 122 a provision was made that the High Courts may, from time to time 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. These rules, of course, were subject to the provisions contained in Sections 124, 126, 127 and 128. But subject thereto the High Court has been given the powers to make rules annulling, altering or adding to all or any of, the rules in the First Schedule. As is apparent from the preamble of the Code of Civil Procedure, which reads as under "Whereas it is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, it is hereby enacted as follows", the Code is essentially a law relating to the procedure of Civil Courts. Section 122 of the CPC provides that the High Courts may, from time to time, 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. Section 128 provides that such rules shall be not inconsistent with the provisions in the body of the Code, but, subject thereto, may provide for any matters relating to the procedure of Civil Courts. Section 127 provides that the rules so made and approved 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. The scope of Section 122 of the CPC is wide enough to imply that every rule in the First Schedule can be annulled, altered or added to by the High Court, the same being a rule relating to procedure. As stated above the CPC itself, as its preamble shows, relates to the procedure of Civil Courts and more particularly the rules contained in the First Schedule. The wording of Section 122 also suggests that the Rules in the First Schedule relate to procedure because otherwise, the list portion of Section 122 of the Code of Civil Procedure, viz. "may by such rules annul, alter or add to all or any of the rules in the First Schedule" would not have found place in Section 122. Having regard to the clear wordings of Section 122, there can hardly be any doubt about the power of the High Court to annul, alter or add to all or any of the rules contained in the First Schedule. Moreover, Order XXXIII of the CPC relates to institution of a suit in forma pauperis. The principle subject matter of Order XXXIII relates to the institution of suits by paupers, the manner in which applications should be made to sue in forma pauperis and other incidental matters relating to the institution of such suits and the trial and disposal of such applications. By the explanation provided under Rule 1, it is shown therein as to who is to be considered a pauper. The subject matter of the sentence added by the present amendment clearly relates to and is incidental to the original unamended explanation and by the mere fact of an addition to the explanation, the explanation would not lose its character of being of a procedural nature. The very object of dividing the Code into two parts and of enabling the High Court to make rules to annul, alter or add to the rules contained in the First Schedule was to provide for making such incidental amendments as would be found necessary, having regard to the local requirements in a State. It could not

therefore be said that the addition that has been made and that has been challenged in this matter was such as could not fall within the ambit of Section 122 of the Code of Civil Procedure, For the reasons aforesaid, we are unable to agree with the view taken in IV G.L.R. 204 that the addition to the explanation to Rule 1 of Order XXXIII of the CPC was outside the scope of Section 122 of the Civil Procedure Code, because it did not to a matter of procedure.

3. It was observed at page 206 in the case of Parshotam Parbhudas v. Bai Moti that in order to satisfy the requirements of Section 122, the High Court must make rules regulating either its own procedure or the procedure of the Civil Courts subject to its superintendence and that a simple power of alteration or addition of the rules of the first Schedule was not contemplated by Section 122, but that such an annulment, alteration or addition would be valid if it was a part of the rules framed by the High Court. It was observed that Section 122 made it clear that the power to annul, alter or add to all or any of the rules in the First Schedule could be exercised by the High Court only when it proceeded to make rules regulating its own procedure or the procedure of the Civil Courts and that the power of amendment or alteration as such was not given as contemplated by Section 122 of the Civil Procedure Code. On this view of the matter, it was held in that case that as the addition to the explanation was made by the High Court without setting out to make rules regulating the procedure of the Civil Courts subject to its superintendence the addition was there-for outside the scope of Section 122, Civil Procedure Code. There is no mode or form prescribed in the Code in which the High Courts may make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence or may make such rules annulling, altering or adding to all or any of the rules contained in the First Schedule. The Code also does not require that when one single rule of any order contained in the First Schedule is to be annulled, amended or added to, it must be made by making it as a part of and as one of the rules framed by the High Court and that if it was not so made, it could not be considered as an effective rule within the meaning of Section 122. The rule that has been made is that the following sentence shall be added to the explanation viz. "In determining whether he is possessed of sufficient means, the subject matter of the suit shall be excluded" and there is nothing in Section 122 or any other section of the CPC which would entitle us to hold that such a provision could not be considered as a part of the rule within the meaning of Section 122 of the Code of Civil Procedure.

4. For the reasons afforesaid, we are unable to agree with the reasoning that has been adopted in IV G.L.R. 204 in holding the addition to the Explanation to Rule 1 of Order XXXIII as outside the scope of Section 122. Mr. S.N. Patel appearing on behalf of the opponent had urged that the rule in question would be contrary to the provisions of Sub-section (2) of Section 128 which provides that the rules framed u/s 122 may provide for all or any of the matters which relate to the matters of procedure mentioned in Sub-clauses (a) to (j) of that sub-section. But it has to be remembered that Sub-section (2) to Section 128 provides that-

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.

The matters therefore referred to in Sub-clauses (a) to (j) are merely illustrative and not exhaustive. This argument of Mr. Patel therefore cannot be accepted.

4.1 In view of our filing this the section to the Explanation to Rule 1 of Order XXXIII is within the scope of Section 122 of the CPC and is not ultra vires, the Court, while considering an application under Order XXXIII, Rule 1 would be bound to exclude the subject matter of the suit in determining whether the applicant was possessed of sufficient means. It appears from the order of the learned Civil Judge that he was principally guided in his decision by the ruling reported in IV G.L.R. 204 and therefore, he proceeded On the basis that the subject matter of the suit should not be excluded front his consideration while determining the question of pauperism. It appears that in the view he took, he did not examine the question that has now been raised by Mr. Patel on behalf of the opponent as to what property should be considered as the subject matter of the suit which would be capable of exclusion under the amended explanation. It would therefore be necessary to send back the case to the learned Civil Judge, Senior Division, Mehsana for coming to an appropriate finding as regards the pauperism of the petitioners after having excluded what he considers to be the subject matter of the suit after bearing in mind the provisions contained in the explanation as amended to Rule 1 of Order XXXIII of the Civil Procedure Code. It is true that the learned Civil Judge has considered the fact that the first petitioner before him was earning an amount of Rs. 125/- per mensem as salary, but as it appears from the judgment, the learned Civil Judge was principally influenced by the fact that the value of the share of the petitioners was sufficient to enable the petitioners to pay the requisite court-fees.

5. We, therefore, allow this revision application and set aside the order dated 3rd January 1964 passed by the learned Civil Judge, Senior Division, Mehsana and send back the matter to the learned Civil Judge, Senior Division who will decide the question of pauperism of the petitioners after talking into consideration the amended explanation to Rule 1 of Order XXXIII according to law. In view of the circumstances of the Case, we make no order as to costs.