

(1988) 12 BOM CK 0061
In the Bombay High Court
Case No : Suit No. 2277 of 1987

Rhoda Jal Mehta and Others

APPELLANT

Vs

Homi Framroze Mehta and Others

RESPONDENT

Date of Decision : 20-12-1988

Acts Referred:

Bombay High Court (Original Side) Rules, 1980 — Rule 283

Citation : AIR 1989 Bom 359 : (1989) MhLj 124

Hon'ble Judges : H. Suresh, J

Bench : Single Bench

Advocate : S.D. Parekh and K.L. Desai, instructed by Malvi Ranchoddas and Co, for the Appellant; D.J. Khambatta and R.A. Kapadia, instructed by Maneksha and Sethna and Co., for the Respondent

Judgement

1. The plaintiffs having filed this suit without obtaining leave under CI , XII of the Letters Patent, when admittedly such leave ought to have been obtained , prior to the lodging of the plaint., now seek an order that the plaint be returned to them for presentation in a proper Court and if the presentation is to this very Court, to present it after obtaining the necessary leave under CI XII of the Letters Patent. Ordinarily. I thought that there could be no opposition to this, However. Mr.Khambatta appearing for the defendants. Relying on an unreported judgment of Mridul J. dt,8th Dec. 1976 in Suit No. 130 of 1977 (sic) (Shiv Silk Millsv. B.M. Khanna) , objects to this course of action and submits that the suit will have to be necessary dismissed. In this connection he says that there is a long line of decisions taking a similar view and it starts with the case of In re Bai Amrit, reported in ILR (1884) Bom 380. .

2. I find from the copy of the judgment of Mridul J. that the matter before him had been extensively argued. The main argument before him was that the question of leave under CI.XII of the Letters Patent was not a question relating to jurisdiction but that it was only a question of the plaintiffs obtaining a prior permission and if no such permission was obtained , the proceedings would

become a nullity and on that basis the suit will have to be dismissed.

3. Mr. Khambatta submitted that since a Judge of this Court has taken this view, it is not possible for me to differ from the same and that , therefore , the proper course for me would be to refer this question to admission Bench. As against this, Mr. Parekh appearing for the plaintiffs, submitted that an earlier Division Bench of this Court consisting of Chief Justice Beaumont and Justice Rangnekar, has in the case of Devidatt Ramniranjandas v. Shriram Narayandas, reported in 34 Bom LR 236: (AIR 1932 Bom 291) ,in terms held that the question of obtaining leave under CI. XII of the Letters Patent and the lodging of a plaint without such a leave is one relating to jurisdiction and in that connection he pointed out that there are certain observations which are directly opposed to what Mr. Justice Mridel has said in his Judgment referred to above.

4. Undoubtedly obtaining of leave under CI, XII of the Letters Patent is a condition Precedent to the entertaining by this Court of a suit in which the cause of action has arisen, in part, outside the jurisdiction of this Court and this condition is not the one which this Court can ignore or for that purpose waive, Justice Rangnekar then said this: (supra at page 250) (of 34 Bom LR) : a (at p. 300 of AIR 1932 Bom 291).

" The question then is whether the granting of leave under CI. 12 is a condition precedent going to the root of the jurisdiction of the Court or a mere matter of procedure capable of being waived by conduct or agreement of the parties.

Clause 12 of the Letters Patent provides that the High Court of judicature at Bombay in the exercise of its ordinary original civil jurisdiction shall be empowered to receive, try and determine suits of every description, I f in the case of suits for Land Acquisition Act (omitting unnecessary words) the Land Acquisition Act is situate, 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 civil jurisdiction of the High Court. (The rest of the clause is not material) . the words "empowered to receive" seem to me to be important and the meaning is that the Court on the ordinary original civil jurisdiction has no jurisdiction even to receive a plaint where a part of the cause of action only shall have arisen within the local limits of its jurisdiction unless leave of the court shall have been first obtained".

Mr. Justice Mridul found nothing in these observations to buttress the submission that it is the leave which confers jurisdiction. But in my view he missed the significance of the words " empowered to receive" occurring in CI XII of the Letters Patent, which words cannot, in any terms be considered as a matter relating to the obtaining of a mere permission. If I am not empowered to receive a plaint, I cannot deal with such a plaint. If I am not empowered to receive, I cannot keep it in the records of this Court. I must necessarily return the plaint to the person who has tendered such a plaint. I cannot understand how on this basis I can dismiss a plaint when I am not empowered to receive the same.

5. It is interesting to note that in the case of *In re Bai Amrit* ILR 1884 Bom 380 (supra) , the Division Bench takes note of the fact that there is a long line of cases supporting the practice invariably followed, whereby the plaint was not returned to the plaintiff, though I must say that the practice could at best be of a duration of about two decades or so. But in the body of the Judgment, the learned Judges have, in terms, said that the Court have passed such orders directing that the plaint be returned to the plaintiff but the plaint was, however , not returned to the plaintiff nor did the order as drawn up point out such a direction having been incorporated . the judgment refers to several instances where in spite of the orders passed by the Court, the Registry of the Prothonotary's Office had not complied with the same, all on the basis that this Court is a Court of Record and what was presented to this Court , being the record of this Court, cannot be returned or handed over to anyone, Whether be the reason earlier, since the amendment of the Original Side Rules by the introduction of R. 269-A (which came into force on 27th Dec.1962) it cannot be said that the plaint shall not be returned under any circumstances .the rule expressly says that where a plaint has to be returned for want of jurisdiction the plaint shall be returned to the plaintiff only after the plaintiff has furnished, for the record of the Court, a copy of the plaint and the said copy has been certified as a true copy by the Office of the Prothonotary and Senior Master. To the same effect is the present Rule, namely, R, 283 which came into force with the introduction of the present Original Side Rules on 1st May, 1980. I may also mention that the case of *In re Bai Amrit* (supra) is not a case of the Original Side of the high court. The question arose at the stage of the Second Appeal when an application was made for return of the plaint. And the Court said that the application should be refused. What was challenged was the jurisdiction of the subordinate court, on the ground of want of pecuniary jurisdiction . In that context the practice of the High Court on the Original Side was referred to say that the practice was not to return the plaint except on presentation.

6-7. In this connection, a reference can be made to the Full Bench decision in the case of *Prabhakarbhat v. Vishwamber Pandit*. Reported in ILR (1884) Bom 313, where we have the following passage from West J. at pp. 316 to 318:

" The practice this, as of the other High Courts, from the time of their institution has it is admitted , been to return ,or direct the return.,of the plaint in ordinary cases when , in the course of the plaint in ordinary cases when in the course of the trial either of the original suit had been entertained by a court without jurisdiction: but, by a recent judgment of a Division Bench, this practice has been pronounced wrong. It might have been well had the Division bench referred such a matter to a full Bench. The established practice of the court in matters of procedure is the law of the Court. ,unless it be inconsistent with some higher law or legal principle: and a series of precedents ought not, we think to be overruled without deliberate consideration of the matter by a Bench more numerous or differently constituted from the one to which the objection has occurred. It is a general principle that a Court, on finding it has no jurisdiction , should decline to

proceed further in a cause placed before it, An objection on this ground may be taken at any stage (Com. Dig., Abatement: 1 TR 552), and a judgment which is a determination *cum non* Judaic. It would , therefore be a futile proceeding for the Judge in such a case to go on which could have no jural effect. The obvious course would seem to be that the plaintiff, who had been suing in a wrong Court, should go to the right one, paying to the defendant the costs occasioned by his abortive suit, Apart from fiscal considerations, the courts ought to aid rather than obstruct, a plaintiff in thus placing his case before the proper tribunal, and the fiscal interest of the government do not, in such cases. Need guarding beyond the necessary sense of the laws made for the that purpose. Where a court-fee on the institution of a suit has been paid in a court which cannot possibly afford the relief sought, it does not it seem consistent with sound principle tha the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without paying a second fee for an adjudication from a court which can really give one. Apart, therefore, from any special rules prescribed by the Legislature the return of a plaint in the case supposed would be, at least an allowable and unobjectionable course. Where court had to Act judicially on the plaint , whether in favour of the plaintiff or against him, the plaint must obviously be retained him, the plaint must obviously be retained as part of the record of the judicial relation established between the parties . Even if an investigation of the merits is prevented by the operation of some bar as that of limitation still the plaint, as part of the subject-matter judicially dealt with, should be retained . But when the decision is that the court has no jurisdiction, that is a decision that the plaint ought not really to have been admitted . It ought to have been returned under S. 57 of the civil PC. and as the proceedings subsequent to its admission have been purely abortive, there seems to be no good reason why those proceedings should make any difference. A copy retained in returned the plaint would indicate what had been done."

This case was referred to In Bai Amrit ILR 1984 Bom 380 . but this was not acted upon on the basis that S. 57 of the Code did not apply to the High court. But the main reason for observing that the plaint shall not be returned was that the plaint was a part of the record of the high court., and the same cannot be parted with. At the same time they would stop all "further proceedings..... for want of jurisdiction" . the practice cannot now prevail, after the Original Side Rules stood amended.

8. As rightly pointed by Mr. Justice Rangnekar in the case of Devidatt Ramniranjandas v. Shriram narayandas AIR 1932 Bom 291 (supra) the most important words in CI, XII of the Letters Patent are " empowered to receive". If I am not empowered to receive a plaint, it must necessarily mean that I ought not to have really admitted the plaint. If I have admitted the plaint, that is per se without jurisdiction and , if that is so. I must necessarily return the plaint to the person who has lodged the same.

9. I am aware of the procedure, which the Office of the Prothonotary and Senior

Master has evolved, namely that if a plaint's is lodged without obtaining such leave where such leave was required and if the same is not numbered, the plaint would be returned to the plaintiff for presenting the same after Bom LR 236: AIR 1932 Bom 291 correctly obtaining leave. This is on the assumption that the suit is not admitted till it is numbered , and till then it remains under objection, not being "eligible" for entry, absence of leave under CI, XII of the Letters Patent being also considered as one such objection. This was considered a by Sawant J. in the case of Union Bank of India Vs. Sunpac Corporation and Others, and he directed that in such circumstances, it is not necessary to return the plaint, but only require the plaintiff to obtain leave under CI, XII of the Letters Patent and admit the suit thereafter. I find no difference between "lodging" of a plaint and "admitting" a suit in so far as it has any relation to the "powers" of the court. While the date of "lodging" may be relevant for the purpose of limitation , admission and numbering of a suit becomes relevant for the purpose of issue of further process of the Court. In either case these provisions do not circumscribe the "powers" of the court. If I am not empowered to receive a plaint, before or after admission of a suit, it should not make any difference, as I cannot deal with such a suit at all.

10. Mr. Khambatta relied on the observations of K.K. Desai, J. in the case of Manlal Rikhabji and Others Vs. Mohanlal Harilal Rathi and Others, . but I find that this point has not been argued,. In fact, the question arose at the fag-end of the judgment and the learned Judge apparently followed the practice of not returning the plaint and that is how the suit was dismissed . but in any case, that was prior was to the amendment of the R. 269-A.

11. On the question whether I am bound by the judgment given by Mridul J., Mr. Parekh has drawn my attention to the case of Young v. Bristol Aeroplane Co. Ltd., reported in (1944) 1 KB 718, and points out that if there are two conflicting judgments , I am entitled to decide which of the two conflicting decisions I will follow. In my view, the full Bench judgment in the case of Parbhakarbhat v. Vishwambhar Pandit ILR 1884 Bom 313 referred to above, read with the Division Bench judgment in the case of Devidtt Ramniranjandas v. Shriram Narayandas, 34 lays down the principle involved in this case. Therefore, in my view, it is not necessary that I should refer this question to any larger Bench.

12. In the result, I pass the following order:

ORDER

13. I order that the plaint be returned to the plaintiffs as this Court was not empowered to receive the plaint at the time when it was presented to this Court.

14. Prothonotary & Senior Master to return the plaint after complying with R. 283, sub, rule (iii) of the Original Side Rules of the Court.