

(1971) 07 GUJ CK 0005

In the Gujarat High Court

Case No : Civil Revision Application No. 836 of 1965

Soni Vrajlal Jethalal

APPELLANT

Vs

Soni Jadavji Govindji and Others

RESPONDENT

Date of Decision : 08-07-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1, Order 7 Rule 10, 11, 115, 151

Citation : AIR 1972 Guj 148 : (1972) GLR 555

Hon'ble Judges : D.A. Desai, J

Bench : Single Bench

Advocate : K.M. Chhaya and J.R. Nanavati, for the Appellant; K.J. Vaidya and K.N. Mankad, for the Respondent

Judgement

1. This is a very unfortunate proceeding in which the plaintiff. A minor at the time of the institution of the suit has been pushed by different orders of different Courts from pillar to post with the result that 15 years after its institution, his suit has not been entertained by any court till today. There is no dispute that his suit is of a civil nature and he complains of a civil wrong done to him for which there must not only be a remedy but there must also be a forum for availing of the remedy.

2. The plaintiff minor through his next friend filed a regular civil suit No.56 of 1956 against one Jadavji Govindji, who died pending the suit and his heirs defendants Nos.1/1 to 1/9 have been brought on record, and defendant No.2 one Parshottam Gagubhai, alleging that they were trustees of a trust created by the father of the plaintiff and they were realising the income of the trust property and that they should render accounts of the income of the trust property received by them and they certain amount out of the income so realised and deposited with the Bank of India at Bhuj. Let it be distinctly made clear that the prayer in the suit was that the defendant trustees should render accounts of the income of the trust property realised by them and the costs of the suit and any other relief ancillary and incidental to the main relief. The suit was instituted in

the Court of Civil Judge (Senior Division) at Bhuj and was transferred to Joint Civil Judge (Junior Division) Bhuj. The defendant appeared in the suit and raised diverse contentions - one of them being that the Court of the Civil Judge Division, Bhuj had no jurisdiction to entertain the suit, but the District court alone had jurisdiction to hear the suit, in view of some of the provisions of the Indian Trusts Act, 1882. In view of this contention taken by the defendants, the learned Joint Civil Judge Junior Division, Bhuj raised an issue as to whether the Court of the Civil Judge, Junior Division, Bhuj, had jurisdiction to hear the suit. The learned Judge held on construction of the plaint that the suit is one for removal and appointment of new trustees as well as for extinguishment of the trust and further held that the principal Civil Court of Original Jurisdiction, meaning thereby the District Court, alone had jurisdiction to entertain the suit and accordingly passed an order that the plaint be returned for presentation to the proper Court. This order was made on 14th April 1959. The plaintiff obeyed the order and accepted the plain and presented it to the District Court at Bhuj where the Civil Suit was registered as Civil Suit No.1 of 1962. The learned District Judge after hearing both the sides came to the conclusion that the suit was a suit simpliciter for accounts from the trustees of a private trust and , therefore, the Court of Civil Judge Junior Division had jurisdiction to entertain the suit. In accordance with this finding, the learned District Judge passed an order on 19th March 1964 that the plaint be returned to the plaintiff for presentation to the proper court. The plaintiff again in obedience to this order accepted the plain and presented it in the Court of the Civil Judge. Senior Division at Bhuj where it was initially instituted. Possibly at that time there was no Court of Joint Civil Judge (Junior Division) at Bhuj and therefore the Civil Judge (Senior Division) took the suit on his file. The Civil Judge (Senior Division) felt doubt whether it would be open to him to entertain the suit until the first order passed by the Joint Civil Judge (Junior Division) has duly set aside by a Court of superior jurisdiction. The learned Civil Judge (Senior Division) passed an order observing that even though he had jurisdiction to entertain the suit but till the first order was set aside, it would not be open to him to entertain the suit. In accordance with this finding, he passed a very curious order which is as follows:-

"For reasons stated above, this court cannot re-entertain this suit, and the plaint should be returned to the plaintiff if he wants".

This order was made on 24th August 1965. The original plaintiff has preferred this Civil Revision Application u/s 115 of the CPC against this order.

3. First contention raised was that if the order sought to be revised is one under Order 7. Rule 10 of the CPC an appeal would lie against that order under O. 43. 1 to the District Court and , therefore. It is not a case in which no appeal lies and, therefore, this Court cannot exercise its revisional jurisdiction u/s 115 of the Code of Civil Procedure. This contention can be disposed of by observing that the impugned order could not be said to be one under Order 7. Rule 10. Order 7. Rule 10 provides that the plaint shall at any stage of the suit be returned to be

presented to the Court in which the suit should have been instituted. Where a suit instituted in Court and if that Court is of the opinion that it has no jurisdiction to entertain the suit, it is not open to that Court to dismiss the suit on that account, but the Court is required to proceed under Order 7. Rule 10 directing that the plaint should be returned to the plaintiff for presentation to the proper Court. In the present case, learned Civil Judge (Senior Division) does not say in the impugned order that he had no jurisdiction to entertain the suit/ in fact in para 13 of the impugned order, the learned Judge agrees with the remarks made by the learned District Judge in his order dated 19th March 1964 to the effect that the Court of Civil Judge (Junior Division) has jurisdiction to try the suit. Therefore, it is not a case in which the Court before whom the plaint is presented is of the opinion that it has no jurisdiction to try the suit. The situation is exactly to the contrary. That Court is definitely of the opinion, reasons for the opinion at this point of time being immaterial, that it has jurisdiction to try the suit. But as on an earlier occasion in respect of the same suit, an order was made that the Court had no jurisdiction to try the suit, and as that order was not set aside by any superior Court the learned Judge felt difficulty in entertaining the suit. Faced with this peculiar situation, the learned Judge passed an order which can by no stretch of imagination be said to be one made under Order 7. Rule 10. A formal order under Order 7. Rule 10 would be that the plaint be returned to the plaintiff for presentation to the proper Court. In the present case, the learned Judge has passed an order that as the Court is unable to re-entertain the suit the plaint be returned to the plaintiff if he wants it. This can hardly be said to be an order under Order 7. Rule 10 and therefore, on the fact of it, no appeal against it could have been preferred to the District Court. Therefore, revision application would lie to this Court if other conditions of Section 115 are satisfied and no question is raised that the other conditions of Section 115 are not satisfied. Shortly, stated, once the impugned order is made, the Court will not entertain and proceed with the suit with the result that the case is decided against the plaintiff and if it ultimately transpires that the Court of Civil Judge (Junior Division) alone had jurisdiction to entertain the suit, it would mean that the learned Civil Judge (Senior Division) failed to exercise jurisdiction vested in him. Therefore, Section 115 would in terms be attracted and this Civil Revision Application against the impugned order would be quite competent.

4. Once it is held that this Revision Application is competent, it would be necessary to examine the impugned order on its own merits. By a chain of curious events, the plaintiff has been knocking from door to door for the last 15 years finding out the proper forum which may at best entertain the suit and adjudicate upon his prayers. When the suit came up before the learned Civil Judge (Junior Division). Bhuj, to whom it was assigned by the Civil Judge (S. D.) in whose Court it was instituted, it was held that that Court had no jurisdiction to entertain the suit on the ground that the District Court would have jurisdiction to entertain it. When the plaint was presented in the District Court, the District Court held that it had no jurisdiction to entertain the suit but the Court of the

Civil Judge (Junior Division) alone had jurisdiction to entertain the suit. At this stage, in my opinion, the learned District Judge committed a serious error with the result that the plaintiff suffers on account of some lapse on the part of the Court. The learned District Judge was aware of the fact that the learned Civil Judge (Junior Division) at Bhuj, who according to him, was competent to try the suit already held that he had no jurisdiction to try it. Therefore, once the learned District Judge held that the plaint be returned to the plaintiff for presentation to the proper Court, meaning thereby to the Court of the Civil Judge (Junior Division) it should have been realised that, that Court would find difficulty in entertaining the suit because the previous order was not set aside, even though its validity was questioned and in fact that order could be said to have been set aside. If at this stage, the learned District Judge would have entertained an appeal against the original order of the learned Civil Judge (Senior Division) returning the plaint for presentation to the proper Court made under Order 7. Rule 10 which order was unquestionably appealable to the District Court under Order 43. Rule 1 (a) and set aside the order of the learned Civil Judge (Junior Division), the difficulty could have been very easily solved and such a long lapse of time could have been easily avoided. That having not been done, the plaintiff pursuant to the order of the learned District Judge again knocked at the door of the Civil Judge (Senior Division) and has again been rebuffed. The plaintiff suffers on account of this situation and not on account of any fault of his own. It was very strenuously suggested that the plaintiff has to thank himself for this peculiar situation. It was urged that the plaintiff should have immediately appealed against the order of the learned Civil Judge (Junior Division) holding that he had no jurisdiction to entertain the suit. This remedy is far from satisfactory. Assuming that if a suitor went to a Court bona fide believing that that Court has jurisdiction to entertain his suit, and filed the suit in the Court and upon a contention being taken by the other side, that Court by a reasoned order holds that it has no jurisdiction to entertain the suit, and the plaintiff may on reading it feel convinced that the reasoning is correct and he was in error in coming to that Court. Obviously, in such a situation, the plaintiff could not be expected to prefer an appeal. In due compliance with or in obedience to the order, the plaintiff accepts his plaint and goes to the Court directed, namely the District Court and presents the plaint,. To his utter surprise of chagrin again a question of jurisdiction is raised and he is told that that is not the Court competent to try suit, but that very Court to which he had approached in the first instance is the Court competent to try the suit. Again he complied with the same and approached the Court of first instance to be told that there is in his way an order which has not been set aside by appropriate proceeding in a higher Court and, therefore, his suit cannot be entertained. Now, if this revision application cannot also be entertained, one has to visualise the position in which the plaintiff would be placed. The learned Civil Judge (Senior Division) will not entertain his suit on account of the order made by him and the District Court will not entertain his suit on account of the order made by, it where on earth, should this plaintiff go is a question which has remained unanswered

throughout the discussion at the hearing of this application.

5. But before proceeding further with this discussion I should point out that looking to the nature of the suit, learned Civil Judge (Junior Division) at Bhuj had jurisdiction to entertaining the suit. The suit is one for accounts by a beneficiary alleging that the defendants were trustees and they have been collecting the income of the trust property. Section 19 of the Indian Trusts Act, 1882 provides that a trustee is bound (a) to keep clear and accurate accounts of the trust property, and (b) at all reasonable times, at the request of the beneficiary, to furnish him with full and accurate information as to the amount and state of the trust property. This is a suit by a beneficiary for accounts from trustees in respect of a trust governed by the Indian Trusts Act, 1882, such a suit would definitely lie in the Court of the Civil Judge (Junior Division) within whose jurisdiction the suit property is situate. The learned Joint Civil Judge (Junior Division) was in error in holding that the suit was one for removal and appointment of new trustees and for extinguishment of the trust. How, the learned Civil Judge could reach that conclusion looking to the plaint is difficult to understand. The findings of the learned District Judge, that the Court of the learned Civil Judge (Junior Division) had jurisdiction to entertain the suit, appears to be correct. On this findings, the conclusion is that the Court of the Civil Judge (Junior Division) has jurisdiction to entertain the suit.

6. Now, if the Court of the Civil Judge (Junior Division) had jurisdiction to entertain the suit, the impugned order by which suit is not entertained will have to be set aside. But it was pointed out to me that merely setting aside the impugned order would not improve the matter at all because once the suit goes back to the learned Civil Judge. (Junior Division), he would still be faced with the decision recorded at the earlier stage in the same suit that that Court has no jurisdiction to entertain the suit and till that order is set aside, the learned Civil Judge would be bound by it. It was urged that as between the parties to the suit, the finding on the issue of jurisdiction at the earlier stage of suit after a contest will be res judicata and cannot be re-opened at a later stage in the same proceeding. It was urged that unless the previous decision of the learned Civil Judge (Junior Division) is set aside by a competent higher Court, cannot revise that order u/s 115 of the Code of Civil Procedure. This contention can be disposed of on the short ground that the previous erroneous order as to jurisdiction need not be set aside and yet it would not come in the way of further proceeding with the suit. Even then I will examine the contention on merit. Section 115 provides that the High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears etc. etc. It was urged that the High Court can revise only those orders against which no appeal lies. The expression used is "in which no appeal lies thereto". The important word is "thereto". The word "Thereto" on a plaint grammatical construction would indicate that the appeal envisaged in the section must lie directly to the High Court against the order sought to be revised. One

construction suggested was that the word "thereto" would imply an appeal to the High Court directly or through the mediate Court, namely. District Court. At any rate, it cannot be gainsaid that an appeal must lie to the High Court directly or mediately through the District Court and only then the High Court cannot exercise revisional jurisdiction u/s 115. But if no appeal either directly or mediately through the District Court lie to the High Court against a particular order the High Court will have revisional jurisdiction u/s 115 to revise such an order. There was a cleavage of opinion on this point. But the matter has been concluded by a recent decision of the Supreme Court in Major S.S. Khanna Vs. Brig. F.J. Dillon, . It is observed in that case as under :-

"Nor is the expressions "in which no appeal lies thereto" susceptible of the interpretation that it excludes the exercise of the revisional jurisdiction when an appeal may be competent from the final order. The use of word "in" is intended to distinguish orders passed in proceedings not subject to appeal from the final adjudication, from those from which no appeal lies. If an appeal lies against the adjudication directly to the High Court, or to another Court from the decision of which an appeal lies to the High Court, it has no power to exercise its revisional jurisdiction, but where the decision itself is not appealable to the High Court directly or indirectly, exercise of the revisional jurisdiction by the High Court would not be deemed excluded".

It is thus well settled that where an appeal may directly lie to the High Court or an appeal may lie to the first appellate Court and then second appeal would lie against the appellate decree to the High Court, the High Court cannot exercise its revisional jurisdiction u/s 115. But if no appeal lies to the High Court either directly or mediately from some appellate decree this Court can certainly exercise its revisional jurisdiction u/s 115. Now, when an order is made under Order 7. Rule 10, undoubtedly an appeal would lie under Order 43. Rule 1 to the appellate Court. But indisputably no second appeal would lie against the order made by the appellate Court in exercise of its appellate jurisdiction. In such a case. I should feel no difficulty and hesitation in exercising revisional jurisdiction conferred on the High Court. Viewed from this angle. I will not only set aside the impugned order against which revision application is preferred but even the earlier order in exercise of the revisional jurisdiction which can be either exercised at the instance of a party or suo motu. I would, therefore, set aside both the orders one dated 14th April 1959 holding that the Court of the Civil Judge (Junior Division) Bhuj had jurisdiction to entertain the suit as well as the order dated 24th August 1965 holding that the Court of Civil Judge (Senior Division) could not re-entertain the suit.

8. Again assuming for a moment that there is some procedural wrangle about this Court exercising jurisdiction for setting aside some orders which were clearly wrong and which come in the way of the plaintiff invoking Court's jurisdiction, in my opinion. I can set aside the aforementioned two orders or especially the earlier order in exercise of the inherent jurisdiction vested in this Court. It

appears well settled that no procedural irregularity can come in the way of justice being done. Conversely all procedure has been devised to advance justice and not to retard the same. Where there is no express bar or any express provision of the CPC fettering the Court's power or precluding the Court from doing some thing, the Court to advance substantial justice can and must interfere so as to set aside the procedural irregularity to achieve the desired primary object for which the Court exists, namely, to do justice between the parties. As observed in *Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal*, , the inherent power, has not been conferred upon the Court, it is a power inherent in the Court by virtue of its duty to do justice between the parties before it. One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "the act of the Court" is used, it does not mean merely the act of the Primary Court, or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case. It is the duty of the aggregate of those Tribunals to take care that no act of the Court in the course of the whole of the proceedings does an injury to the suitors in the Court (vide *Rodger v. The Comptoir D' Escompte De Peris* (1871) 3 PC 465 at P. 475). It is undoubtedly true that no order should be made in the inherent powers of this Court unless necessarily for the ends of justice or to prevent abuse of the process of Court. I have already set out above the most unenviable position in which would be in a position to entertain his suit unless this Court interferes and sets right the matter. Therefore, even apart from procedural wrangle. I would have interfered and set aside the order herein - before mentioned but I am on firmer ground when I can do it within the prescribed procedure of law.

9. Accordingly, this revision application is allowed and the aforementioned two orders dated 14th April 1959 and 24th August 1965 are set aside of the suit is remanded to the Court of Civil Judge (Senior Division) Bhuj to proceed further according to law, Rule made absolute with no order as to costs.

10. Revision allowed.