

(1998) 06 OHC CK 0014

In the Orissa High Court

Case No : Miscellaneous Appeal No. 545 of 1993

State Bank of India

APPELLANT

Vs

SABCO Industries and Others

RESPONDENT

Date of Decision : 22-06-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16, 20

Citation : (1998) 2 OLR 291

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : M.N. Das and M.M. Das, for the Appellant; None, for the Respondent

Final Decision : Allowed

Judgement

P.K. Misra, J.—The plaintiff has filed this appeal against the order of the trial Court holding that the suit was not maintainable and directing return of the plaint for presentation before the proper Court having territorial jurisdiction.

2. The appellant filed T.M.S. No. 89 of 1992 in the Court of the Subordinate Judge, Rairangpur, with the following prayers :

"26. The plaintiff therefore prays :

(a) that a decree for Rs. 1,59,214.32 (Rupees one lakh fifty-nine thousand two hundred fourteen and paise thirty-two only) may be passed in favour of the plaintiff and jointly and severally together pendente lite and future interest. On the said sum of Rs. 86,135.79 (Rupees eighty-six thousand one hundred thirty-five and paise seventy-nine only) at the rate of 15.5% per annum and on Rs. 73,078.53 (Rupees Seventy three thousand seventy-eight and paise fifty-three only) at the rate of 17.25% per annum with quarterly rest.

(b) that on failure of the defendants to pay the decretal dues within the time stipulated in the decree by the Honourable Court, a decree may be passed for the sale of the mortgaged properties in Schedule "B" of the plaint and the sale

proceeds of the same may be ordered to be adjusted towards payment of the decretal dues and in case of the said sale proceeds are found insufficient or the mortgaged properties or any part or portion thereof are not available for sale, the other properties of the defendants be ordered to be sold for realisation of the decretal dues.

(c) that the cost of the suit be decreed in favour of the plaintiff

And

(d) any other relief or reliefs to which the plaintiff is entitled in law and enquiry may be also decreed in favour of the plaintiff."

3. Defendant No. 3 after appearing in the suit filed a petition to decide the question of territorial jurisdiction of the trial Court as a preliminary issue. It was contended by him that the suit being one for enforcement of the mortgage in respect of immovable property and the immovable property being admittedly situated outside the territorial jurisdiction of the trial Court, it had no jurisdiction to try the suit. The plaintiff-appellant, in opposition to such prayer, contended that defendants 1 and 3 were residing within the territorial jurisdiction of the trial Court and the cause of action having arisen within the territorial jurisdiction, the suit had been rightly filed at Rairangpur.

4. The trial Court relying upon the provisions contained in Section 16(c) of the CPC (in short, the "C.P.C.") and the decision reported in *Mrs. Rosy Joseph and Others Vs. Union Bank of India, Ernakulam Branch*, held that since the suit was one for foreclosure on the basis of a mortgage and since the property mortgaged was admittedly situated outside the territorial jurisdiction of Rairangpur Court, the suit was not maintainable in Rairangpur Court, the suit was not maintainable in Rairangpur Court and accordingly, it directed that the plaint should be returned to the plaintiff for presentation before the Court having territorial jurisdiction.

5. In this appeal, the learned counsel for the plaintiff-appellant has contended that though a suit for foreclosure can be filed before the Court having territorial jurisdiction over the mortgaged property, in the present case the plaintiff had also sued on the loan transaction and prayed for realisation of money and the prayer for realising the money by selling the mortgaged property was in addition to the main prayer. He has further submitted that in case it was found that relief under paragraph - 26 (b) of the plaint was not available to be granted because of lack of territorial jurisdiction, the plaintiff should have been given an opportunity to delete the said prayer, as the main prayer for realisation of money was entertainable by the trial Court. He has relied upon the decision reported in *State Bank of India Vs. Sanjeev Malik and others*, in support of such contention.

6. Section 16(c), C.P.C. relates to suits for foreclosure. Section 20, CPC is expressly subject to other provisions of the Code and relates to filing of suits which do not come within any of the other sections including Section 16(c). Therefore, there cannot be any doubt that a suit for foreclosure has to be filed in

a Court having territorial jurisdiction over the property mortgaged. However, it is to be borne in mind that a suit for foreclosure is also a suit for realisation of money on the basis of the loan transaction and there may be cases where a mortgage may not be enforceable, but money can be realised on the basis of original transaction. It is seen from the prayer portion which has been extracted earlier, the plaintiff in this case has prayed for a decree for realisation of certain amount and also prayed that in case the defendants fail to pay the decretal amount, direction may be issued for selling the property mortgaged. In the present case, instead of directing straight away the return of the plaint on the ground of lack of territorial jurisdiction, the trial Court should have given an option to the plaintiff to proceed with the suit with the prayer contained in paragraph - 26 (a) of the plaint alone, after deleting the prayer contained in paragraph - 26 (b) and if the plaintiff would not have opted for such a course, the trial Court could have directed for return of the plaint.

7. In the decision reported in *State Bank of India Vs. Sanjeev Malik and others*, , in similar circumstances, a Division Bench of Delhi High Court held that in such a suit the prayer for realisation of money on the basis of the loan transaction can be decided by the trial Court. In the decision reported in ILR 1966 Cut 926 (*Basanta Mishra and Anr. v. Laxmi alias Jagnasini Mishrani*) a suit had been filed claiming maintenance as well as partition of properties. Since the properties sought to be partitioned were admittedly outside the jurisdiction of the trial Court, the trial Court had directed for return of the plaint. The High Court while dealing with the matter observed that the prayer for maintenance was coming within the territorial jurisdiction of the trial Court and as such, the trial Court should have given an option to the plaintiff for continuance of the suit on the prayer for maintenance only, and the prayer for partition could have been deleted by following the provisions contained in Order 6, Rule 16, CPC. Keeping in view the principles in the aforesaid two decisions, in the present case, the trial Court should have given an option to the plaintiff to proceed with the suit so far as it related to prayer contained in paragraph-26 (a) of the plaint and if in spite of such option being given the plaintiff would have insisted upon deciding the question relating to foreclosure, in that case the trial Court could have directed for return of the plaint for presentation before the proper Court.

8. In course of hearing of the appeal, the learned counsel for the appellant has categorically stated that the plaintiff does not intend to proceed with prayer No. 26 (b) and the suit may be tried only in respect of prayer No. 26 (a) and other ancillary prayers and prayer No. 26 (b) may be deemed to have been deleted in accordance with the provisions contained in Order 6, Rule 16, CPC. In view of such categorical statement by the learned counsel for the appellant, it is no longer necessary for the trial Court to give such an option to the plaintiff and it must be deemed that the prayer contained in paragraph - 26 (b) of the plaint stands deleted. The trial Court will now proceed to dispose of the suit on merit in accordance with law in respect of prayers contained in paragraph 26 (a), (c) and (d) of the plaint and the prayer contained in paragraph 26 (b) shall be deemed to

have been deleted.

9. Subject to the aforesaid observation and direction, the appeal is allowed. Since there is no appearance on behalf of the respondents in spite of notice, there would be no order as to costs of this appeal.