

Vshnu Horticultural Pvt. Ltd. and anr. Vs. Shampiyani Viniyard Ltd. and ors.

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Court : Mumbai

Decided On : Oct-06-2009

Reported in : 2010(1)BomCR328

Judge : D.B. Bhosale, J.

Acts : Code of Civil Procedure (CPC) - Order 5, Rule 1 - Order 6, Rule 17 - Order 7, Rule 10, 10A and 10A(2) - Order 8, Rule 1

Appeal No. : Writ Petition No. 1163 of 2009

Appellant : Vshnu Horticultural Pvt. Ltd. and anr.

Respondent : Shampiyani Viniyard Ltd. and ors.

Advocate for Def. : P.S. Dani, Adv.

Advocate for Pet/Ap. : A.B. Borkar, Adv.

Judgement :
ORDER

D.B. Bhosale, J.

1. Heard learned Counsel for the parties.

Rule. By consent, rule made returnable forthwith. Learned Counsel appearing for the respondents waives service. By consent of the learned Counsel for the parties,

the petition is taken up for hearing and final disposal at the admission stage itself.

2. Where, in any suit, after the defendant has appeared and filed written statement, the plaint is returned under Order VII Rule 10 of the Code of Civil Procedure, whether the defendant can file fresh written statement with the averments which did not find place in the original written statement filed before the Court which had no jurisdiction to entertain the suit, is the question raised in this petition.

3. The petitioners are original defendants (for short, 'the defendants'). The respondents-plaintiffs (for short, 'the plaintiffs') instituted a suit being Special Civil Suit No. 18 of 2008 in the Court of Civil Judge, Jr Dn, Kolhapur for recovery of an amount and in the alternative for specific performance of the agreement dated 3.3.2004. The suit was instituted in January, 2007. In February, 2007 the defendants appeared and filed written statement in the suit, raising an objection as to the jurisdiction of the court at Kolhapur. Accordingly, a preliminary issue was framed and decided vide order dated 29.2.2008 holding that the Court at Kolhapur, has no jurisdiction to entertain the suit, and as a consequence thereof the plaint was returned under Order VII Rule 10A(2) of the Code of Civil Procedure (for short, 'the Code'). The plaintiffs thereafter presented the plaint in the court at Sindhudurg on 18.3.2008. There, the defendants filed fresh written statement, which, according to the plaintiffs, was not consistent with the written statement that was filed in the court at Kolhapur, where the suit was initially instituted. It was also contended that the defendants have no right to file fresh written statement. The Civil Judge, Sr.Dn., Sindhudurg-Orus, vide order dated 14.10.2008, rejected the written statement (Exh.10), holding that the defendants have no right to file fresh written statement and hence it cannot be accepted.

4. Mr Borkar, learned Counsel for the petitioners, submitted that when a plaint is returned for its presentation to the proper court and is presented in that court, the suit can be deemed to be instituted in the proper court only when the plaint is presented in that court. In other words, he submitted, after the suit is presented in the proper Court, it cannot be treated as a continuation of the suit filed in the court, which returned the plaint and therefore, it being a fresh suit, the defendant is

entitled to file fresh written statement, irrespective of the fact whether it is consistent with the earlier written statement. In support of his contention, he placed heavy reliance upon the Judgment of the Supreme Court in *Harshad Chemical Mody (II) v. DLF Universal Ltd. and Anr.* : 2006(1) SCC 364, *Amar Chand Inani v. Union of India* : AIR 1973 SC 313 and in *Hanamanthappa and Anr. v. Chandrashekharappa* : AIR 1997 SC 1307. Mr Dani, on the other hand, vehemently submitted that since the defendants filed written statement with the amended averments without seeking permission for amendment of the written statement as required under Order VI Rule 17 of the Code, it has been rightly rejected by the court below. He further submitted that it is not open to the defendants to file fresh written statement and at the most they could have sought amendment of the written statement after it was filed in the court at Kolhapur. In support of his submissions, Mr. Dani placed reliance upon the judgment in *Sogivdan Tuli v. S.C. Bhatia* (1997) Scc 502.

5. The Code of Civil Procedure contains the law relating to the procedure in suits and civil proceedings. It provides the procedural formalities, which the parties to a suit require to comply with, right from the stage of institution of a suit. The limitation for every procedural formality is provided for in the Code and it starts with the institution of a suit.

6. It would be relevant to look into the provisions contained in Rule 10 and 10-A of the Code. Rule 10 provides for return of plaint in all cases where a Court is unable to entertain it for want of territorial or pecuniary jurisdiction to the court in which the suit should have been instituted. Under this provision, if the Court is satisfied that it has no jurisdiction to entertain the suit, it is its duty to suo motu return the plaint for its presentation before the proper court. In such a case, there is no need even to frame a preliminary issue on the question of jurisdiction. In other words, it is mandatory on the part of the court to return the plaint for being presented to the proper court when it comes to the conclusion, at any stage of the suit, that it has no jurisdiction over the subject matter of the suit. Dismissal of the suit for want of jurisdiction, in such a situation, is not proper.

7. Rule 10A is comparatively new. Under this rule, where, in any suit, after the defendant has appeared, the court is of the opinion that it has no jurisdiction, should return the plaint and before doing so shall intimate its decision to the plaintiff. The plaintiff, thereupon may make an application as contemplated by Sub-rule (2). If the plaintiff makes such an application, the court shall fix the date of appearance by the parties in the court in which the plaint is to be presented and give notice of such date to the parties. Since the defendant by such notice is made aware of the suit against him and the date when he has to appear, the notice can be treated as a summons within the meaning of Rule 1 of Order 5. A date of notice to the defendant, therefore, would be the date of service of summons and the time to file written statement as contemplated by Order 8 Rule 1 would, therefore, start to run from the date of notice subject to the plaintiff presenting the plaint in the Court which has jurisdiction.

8. Reliance to the judgments relied upon by the learned Counsel for the parties will have to be made at this stage. In *Amar Chand Inani v. Union of India* : AIR 1973 SC 313, the Supreme Court was dealing with the submissions by the learned Counsel for the appellant that the suit instituted in the Trial Court by the presentation of the plaint after it was returned for presentation to the proper court was a continuation of the suit filed in the Karnal Court and, therefore, the suit filed in the Karnal Court must be deemed to have been filed in the Trial Court. The Supreme Court, after having considered the submission of the learned Counsel for the appellant, made the following observations:

We think there is no substance in the argument for, when the plaint was returned for presentation to the proper court and was presented in that court, the suit can be deemed to be instituted in the proper court only when the plaint was presented in that court. In other words, the suit instituted in the trial Court by the presentation of the plaint returned by the Panipat Court was not a continuation of the suit filed in the Karnal Court See the decisions in *Hirachand Succaram Gandhi v. G.P Rly Co.* : AIR 1928 Bom 421, *Bimla Prasad Mukerji v. Lal Moni Devi* : AIR 1926 Cal 355; and *Ram Kishan v. Ashirbad* : ILR 29 Pat 699 : AIR 1950 Pat 478 therefore, the presentation of the plaint in the Karnal Court on March 2, 1959, cannot be deemed to be a presentation of it on that day in the trial Court.

9. In Hanamantthappa's case (supra) a civil suit had been filed. The plaintiff was returned for its presentation to the proper court. The plaintiff after making necessary amendment in the plaint represented it. The defendant took up the plea that amendment could not be made in the plaint. The Supreme Court held that it is a fresh plaint and the amendment could be made in the plaint presented. In paragraph 3 of the Judgment, the Supreme Court observed thus:

The object of Order VII, Rule 10-A is that the plaintiff, on return of the plaint, can either challenge in an appellate forum or represent to the court having territorial jurisdiction to entertain the suit. In substance, it is a suit filed afresh subject to the limitation, pecuniary jurisdiction and payment of the Court fee as had rightly been pointed out by the High Court. Therefore, it cannot be dismissed on the ground that the plaintiff made averments which did not find place in the original plaint presented before the Court of District Munsiff, Navalgund. It is not always necessary for the plaintiff to seek amendment of the plaint under Order VI, Rule 17, CPC. At best it can be treated to be a fresh plaint and the matter can be proceeded with according to law. Under those circumstances, we do not think that there is any error of law committed by the High Court in giving the above direction.

10. The Punjab and Haryana High Court in Pawan Kumar Sethi v. Kiran alias Hema and Ors. : AIR 1999 Punjab and Haryana 251, while dealing with similar situation, after relying upon the judgments in the cases of Amarchand Inani (supra) and Hanmant Appa (supra), allowed the defendant to file fresh written statement after the plaint was re-presented in the appropriate court. This Court in Tata Finance Limited v. Smt Nasib Kaur w/o Jogindar Singh Saini : 2009(1) Bom C.R 846 relying upon the judgment in Amar Chand Inani (supra) and the judgment of Privy Council, observed that the suit instituted by presentation of the plaint in pursuance of an order under Order VII Rule 10 of CPC, cannot be said to be continuation of suit as instituted in the court which had no jurisdiction to entertain it.

11. There is yet another judgment of the Supreme Court in Harshad Chimanlal Modi II v. DLF Universal Limited : 2006 (1) SCC 364. In this case, the Supreme Court was dealing with an interlocutory application filed by the appellant in a

disposed of appeal seeking direction to the Gurgaon court to take up the suit from the stage at which it was transferred and to decide it expeditiously. I do not propose to give the facts in detail of this case. In short, the defendant after about eight years of filing of the written statement, filed application under Order VI Rule 17 of CPC seeking an amendment in the written statement by raising an objection as to the territorial jurisdiction of the court. The amendment was allowed and the objection as to the jurisdiction was upheld. That order was confirmed by the High Court as well as by the Supreme Court. The Supreme Court, however, during pendency of the appeal against that order, directed the trial Court to proceed with the suit, however, it was stated that the Court would not deliver judgment until further orders. Accordingly, the suit proceeded till the stage of pronouncement of the judgment. It is against this backdrop, the application was filed by the appellant seeking direction to the Gurgaon Court to take up the suit at which it was transferred and to decide it expeditiously. It appears that the Court in which the suit was filed had no territorial jurisdiction and hence the plaint was returned for its presentation to the proper court. According to the respondent-defendant in that case, the plaint could not be treated as continuation of the proceedings of the court which had no jurisdiction but the suit would commence on the day when the plaint would be presented to the proper court. This submission of the respondent-plaintiff was ultimately endorsed by the Supreme Court after relying upon the Judgment in the Amar Chand Inani case.

12. Reliance placed by Mr Dani, learned Counsel for the respondent-plaintiff on the decision in *Joginder Tuli v. S.C. Bhatia* : (1997) 1 Supreme Court Cases 502 in my opinion, does not carry the case any further. He relied upon the observations made in the judgment stating that 'when the plaint is directed to be returned for presentation to the proper court, perhaps, it has to start from the beginning but in this case, since the evidence was already adduced by the parties, the High Court directed to proceed from the stage at which the suit was transferred'. The basic difference needs to be noticed. In that case, the suit, when filed, was within the territorial jurisdiction of the Court and it was properly entertained. In view of the amendment in the plaint, during the pendency of the suit, however, the plaint was returned for presentation to the proper court taking into account the pecuniary jurisdiction of the court. Such is not the situation in the present case.

13. The law is now clear. When a plaint is returned for presentation to the proper court and is presented in that court, the suit can be deemed to be instituted in the proper court only when the plaint is presented in that court. In other words, after the plaint is presented in the proper Court, it cannot be treated as continuation of the proceedings of the court which had no jurisdiction, but a suit would commence from the stage of its institution on the date when the plaint would be presented to the proper court. In substance, it is a suit filed afresh subject to the limitation, pecuniary jurisdiction, and payment of the court fee. Such a suit cannot be dismissed on the ground that the plaintiff made averments in the plaint, which did not find place in the original plaint presented before the court which had no jurisdiction to entertain the same or which returned the plaint. Similarly a written statement also cannot be rejected on the ground that the defendant made averments in the written statement, which did not find place in the original written statement filed in the suit before it was returned. It is not always necessary either for the plaintiff or for the defendant to seek amendment of the plaint/written statement under Order VI Rule 17 of CPC. In short, where, in any suit, after the defendant has appeared, the plaint is returned and it is presented in the appropriate court the suit will have to be treated as a fresh suit and it can proceed in accordance with the law from the stage of its presentation subject to the provisions contained in Rule 10-A of Order VII of C.P.C.

14. In the present case, the plaint was returned by the court of Civil Judge, Junior Division, Kolhapur for its presentation in the appropriate court, namely, the Court at Sindhudurg. The order returning the plaint was passed on the application at Exhibit-32 filed by the plaintiffs-respondents under Order VII Rule 10A(2) of the Code directing the plaintiffs to remain present before the Civil Judge, Senior Division, Oras, Sindhudurg at 11 am on 25.3.08. The petitioner-defendant, therefore had a notice as contemplated by Rule 10A of Order VII of the Code and time to file written statement in this case would start from the date of re-presentation of the plaint in the court at Sindhudurg-Oras. In other words, the service of summons to the defendant would be the date fixed by the court while returning the plaint under Order VII Rule 10. Therefore, the Court at Sindhudurg-Oras in which the plaint was presented was required to follow the procedure contemplated by the provisions of the Code as if it was a fresh suit. The

defendant, therefore, has a right to file a fresh written statement in the suit irrespective of the fact whether it is consistent with earlier written statement filed in the court which had no jurisdiction to entertain the suit. The question, therefore, raised in paragraph 2 of this Judgment must be answered in the affirmative. At the most, the plaintiff, in such a case, may be able to use the contents of earlier written statement, if it is inconsistent with the fresh written statement, for confronting the defendant's witness during cross-examination. In the circumstances, rule is made absolute. The impugned judgment is set aside. The written statement filed by the petitioner-defendant at Exhibit 10 is directed to be taken on record. There shall be no order as to costs.

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