

Diksha Rane

DIKSHA
DINESH
RANE

Digitally
signed by
DIKSHA
DINESH
RANE
Date:
2022.10.24
17:02:50
+0530

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO. 922 OF 2022
WITH
INTERIM APPLICATION NO. 18699 OF 2022**

KAIZAR F. PITHAPURWALA & ORS. ..APPELLANTS
VS.

KHURSHID SAFAKAT HUSSAIN LADHI
& ORS. ..RESPONDENTS

Mr. Ashwin Bhadang i/b. Mr. Shabbir S. Kapadia for the
appellants.

Mr. Hasan Sayed a/w. Mr. Rafique Ahmed Shaikh for the
respondent no.1.

**CORAM : M. S. KARNIK, J.
DATE : OCTOBER 12, 2022.**

ORAL JUDGMENT :

- 1.** Heard learned counsel.
- 2.** The order under challenge is dated May 24, 2022 passed below Exhibit '1' by the City Civil Court, Mumbai, thereby refusing to dispose of the suit on merits for the reasons mentioned in the said order.
- 3.** The suit filed by the appellants-plaintiffs, duly contested by the defendants-respondents proceeded till the stage of judgment. When the matter was listed on May 24, 2022, the learned trial Judge was of the opinion that it is not possible to deliver the judgment for the reasons stated in the order. For convenience the order is reproduced, which reads thus: -

ORAL ORDER

(Delivered on 24/05/2022)

1. Matter is kept today for Judgment however, for the reasons stated hereunder, it is not possible to deliver Judgment.

2. Plaintiffs had filed Suit No. 521 of 2009 earlier in this City Civil Court wherein, relief in terms of prayer clause (a) was claimed to declare that plaintiffs have ½ share in the assets of the deceased as per Muslim Personal Law. Contentions for seeking the said relief were raised in para-5 of the plaint in said earlier suit. By raising same contentions in para-6 of the present plaint, plaintiffs have claimed similar relief of declaration and certain other reliefs. Learned advocate for defendant No.1 pointed out that as per order dtd.24/04/2009 passed in said earlier Suit No.521 of 2009, this court has directed to return the plaint to the plaintiffs for proper presentation by holding that this court has no pecuniary as well as inherent jurisdiction to try and entertain the suit. Reasons for holding that this court has no inherent jurisdiction are recorded in para 10 and 11 of the said order. It would be just to reproduce here para 10 and 11 of the said order which read as under;

"10. Secondly, defendant has also challenged the jurisdiction of this court on the ground of specific bar for City Civil Court to deal intestate manner. For this purpose, we have to make reference to section 3 of the Bombay City Civil Court Act, 1948 sub clause () provides that the suit in relation to testamentary intestate of matrimonial aspects are to be dealt by High Court. Thus, City Civil Court is expressly barred from dealing with the matter raising aspect relating to intestate succession.

11. In present case, the plaintiff himself is claiming rights of succession, as per Shia Personal Law by making proposition in para 5 of the plaint. According to plaintiff, due to provisions of Mohammdan Law that are entitled for ½ share in the assets of deceased. Thus virtually plaintiff is

requiring the court to decide intestate succession which is expressly barred by section 3 of the City Civil Court Act therefore this court also does not have inherent jurisdiction to try and entertain the suit..."

3. It is not in dispute that order passed by this court in earlier Suit No.521 of 2009 was not challenged by the plaintiffs. Learned advocate for the plaintiffs submitted that in view of the order passed by this court in the earlier suit, plaintiffs had filed the present suit before Hon'ble High Court in its Original Ordinary Jurisdiction however, on account of the increase in the pecuniary jurisdiction limits of this court, suit has been transferred to this City Civil Court and plaintiffs are not at fault in that regard.

4. It is an admitted fact that this suit is transferred to this City Civil Court on account of increase in pecuniary jurisdiction limits. Plaint in earlier suit was returned to the plaintiffs for presentation in proper court by holding that this court has no inherent jurisdiction also to try and entertain the suit in view of the bar under Section 3 of the City Civil Courts Act. It is not in dispute that order passed by this court in earlier suit that this order has no inherent jurisdiction to try and entertain the suit has not been set aside. Though the plaintiffs have presented a fresh plaint instead of presenting the returned plaint, the relief of declaration claimed in this suit is based on the same grounds which were raised in earlier suit and since this court has recorded a finding that it has no inherent jurisdiction to try and entertain the suit and since it is not the contention of the plaintiffs that said order is set aside, this court is of the opinion that this court cannot dispose off this suit on merits.

5. As mentioned above, learned advocate for the plaintiffs submitted that plaintiffs had properly presented the suit in proper court and plaintiffs are not at fault in respect of its transfer to this court. He submitted that plaintiffs will take appropriate steps for transfer of the suit back to the Hon'ble High Court. In

the result, since advocate for the plaintiffs submitted that plaintiffs will take appropriate steps, matter is adjourned for steps to 21/06/2022.”

4. Learned counsel for the respondent no.1 raised a preliminary objection regarding the maintainability of this appeal under Order XLIII Rule 1(a) of the Code of Civil Procedure (hereafter ‘the CPC’ for short). In his submission, the appeal is not maintainable as the City Civil Court has refused to dispose of the suit on merits for reasons stated in the order which are in consonance with law. He submits that the order is not of returning the plaint to be presented to the proper Court. In his submission, such a challenge is not tenable under Order XLIII Rule 1 of the CPC.

5. Responding to the preliminary objection regarding maintainability of the appeal, learned counsel for the appellants-plaintiffs submitted that the impugned order passed by the City Civil Court has to be construed as one returning a plaint. In his submission, there was an earlier suit filed by the plaintiffs before the City Civil Court in which the plaint was returned for presentation in the proper Court. Thereafter, the plaintiffs filed a fresh suit in the High Court. On account of increase in the pecuniary jurisdiction, the suit was transferred to the City Civil Court. He submits that a fresh suit is maintainable. Relying on the decision of this Court in the case of **Aasif Ahmedally Porbunderwalla vs. Mrs. Daulat Akbarali Porbunderwalla**¹, it is contended

1 N.N. 1085/11 in S.C.Suit No. 2393/2001 decided on 22/8/2013.

that a fresh suit can always be filed which could proceed in accordance with law from the stage of its presentation. In his submission, the learned Judge was not justified in refusing to entertain the suit on merits. Further, relying on the decision in the case of **Jagdish Hari Thatte vs. Municipal Corporation of Greater Bombay & anr.**², learned counsel submitted that all the issues which are framed in the suit should have been decided. Learned counsel submitted that at the stage of judgment, the learned Judge was not justified in observing that as the plaint in an earlier instituted suit was returned, the suit cannot be decided on merits, completely overlooking that the earlier suit was not disposed of on merits. In his submission, this is not a proper course adopted by the trial Court.

6. Heard learned counsel on the maintainability of the appeal.

7. There is no disputing the proposition of law laid down by this Court in **Aasif Ahmedally Porbunderwalla** (supra) and **Jagdish Hari Thatte** (supra) relied upon by learned counsel for the appellants. The question that arises for consideration is whether the impugned order has the effect of returning a plaint in terms of Order VII Rule 10 so as to maintain the present appeal under Order XLIII Rule 1(a) of the CPC.

8. There is no dispute that in the year 2009, a suit

² (2007) 1 Bom CR 577

(hereafter 'prior suit' for short) came to be filed by the plaintiffs in the City Civil Court. An objection to the jurisdiction of the City Civil Court in view of the bar in Section 3 of the Bombay City Civil Court Act, 1948, as well as pecuniary jurisdiction was raised whereupon the plaint was returned for presentation in the proper Court. The plaintiffs thereafter filed a fresh suit (hereafter 'subsequent suit' for short) in the High Court. In view of the increase in the pecuniary jurisdiction limits of the City Civil Court, the 'subsequent suit' was transferred to the City Civil Court. The 'subsequent suit' was heard by the City Civil Court and the stage reached when the matter was posted for judgment. It is at this stage that the City Civil Court noticed that the plaint in the 'prior suit' was returned for presentation before the proper Court. Instead of presenting the plaint in the proper Court, the plaintiffs instituted the 'subsequent suit' in the High Court.

9. The learned Judge observed that "though the plaintiffs have presented a fresh plaint instead of presenting the returned plaint, the relief of declaration claimed in this suit is based on the same grounds which were raised in earlier suit and since this court has recorded a finding that it has no inherent jurisdiction to try and entertain the suit and since it is not the contention of the plaintiffs that said order is set aside, this court is of the opinion that this court cannot dispose off this suit on merits."

10. It is pertinent to note that the plaint was returned in

the 'prior suit' in view of the observations made that the jurisdiction of the City Civil Court is expressly barred under Section 3 of the Bombay City Civil Court Act, 1948 in respect of matters relating to intestate succession. In the 'prior suit', the learned Judge held that the City Civil Court does not have inherent jurisdiction to try and entertain the suit. In the 'prior suit', the plaint was returned by the trial Court on two counts; firstly pecuniary jurisdiction and secondly, lack of inherent jurisdiction as in view of the express bar, the aspect of intestate succession cannot be gone into by the trial Court. The plaintiffs upon return of plaint in the 'prior suit', instead of presenting the plaint in the proper Court, were well within their rights to institute a fresh suit in the High Court, which they did. It is on account of enhancement of the pecuniary jurisdiction of the trial Court that the 'subsequent suit' stood transferred from the High Court. Even learned counsel for the appellants-plaintiffs submitted that it is not the fault of the appellants that the suit came to be transferred from the High Court.

11. I find that the trial Court did not entertain the suit on merits, as the finding in the 'prior suit', as to the inherent lack of jurisdiction in view of the bar under Section 3 of the Bombay City Civil Court Act, 1948, has not been set aside. As the findings recorded by the trial Court that it has no inherent jurisdiction to try and entertain the suit is not set aside, learned Judge opined that the trial Court cannot dispose the 'subsequent suit' on merits. The impugned

order, no doubt, was passed at the stage of judgment. The trial Court has taken a position that the bar still applies as the earlier order in the 'prior suit' stands and hence it cannot decide the 'subsequent suit' on merits. This the trial Court noticed at the stage of judgment.

12. I find that the City Civil Court refused to decide the 'subsequent suit' on merits in view of its observations in the 'prior suit'. Order VII Rule 10 of the CPC which makes provisions for 'return of plaint' reads thus:-

"10. Return of plaint. - (1) [Subject to the provisions of rule 10-A, 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.

[*Explanation.*- For the removal of doubts, it is hereby declared that a Court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint, under this sub-rule.]

(2) **Procedure on returning plaint.** - On returning a plaint the Judge shall endorse thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it."

13. An appeal under Order XLIII Rule 1 (a) is maintainable against an order under Rule 10, returning a plaint to be presented to the proper Court. A reading of Rule 10(1) of Order VII reveals 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. Rule 10(2) of Order VII provides that on returning a plaint, the Judge shall endorse

thereon the date of its presentation and return, the name of the party presenting it, and a brief statement of the reasons for returning it.

14. On a reading of the impugned order, it is not at all indicative about the plaint being returned in the 'subsequent suit' to be presented to the Court in which the suit should have been instituted. The impugned order, in my opinion, cannot be construed as the one of return of a plaint for presentation in the proper Court. The trial Court, for the reasons recorded, refused to decide the 'subsequent suit' on merits as the relief of declaration claimed in the 'subsequent suit' which was based on the same grounds which were raised in the 'prior suit' and since the trial Court had recorded a finding in the 'prior suit' that it has no inherent jurisdiction to try and entertain the suit, moreover, as the order in the 'prior suit' has not been set aside. It is because of the decision of the trial Court in the 'prior suit', wherein the plaintiffs had prayed for the same reliefs as in the 'subsequent suit', that the learned Judge refused to decide the 'subsequent suit' on merits. The impugned order by no stretch of imagination can be construed as one of return of plaint within the meaning of Rule 10 of Order VII of the CPC. The plaint was already returned once in the 'prior suit'. Noticing that the findings in the 'prior suit' are not set aside, the trial Court refused to decide the 'subsequent suit' on merits in view of the earlier order.

15. Consequently, I have no option but to uphold the objection of the learned counsel for the respondent no.1 that this appeal under Order XLIII Rule 1(a) of the CPC is not maintainable. The submissions advanced by learned counsel for the appellants are on merits which may be raised in appropriate proceedings, but not by way of an appeal from order.

16. The appeal from order is held not maintainable, reserving the liberty of the appellants to challenge the impugned order in appropriate proceedings.

17. It is made clear that I may not be understood to have expressed any opinion on the merits of the contentions raised by learned counsel for the appellants and the same are kept open.

18. Learned counsel for the appellants submitted that the statement recorded in paragraph 5 of the impugned order was not made by them before the learned Judge. If that is so, it is for the appellants to approach the City Civil Court and obtain necessary clarification.

19. This appeal is disposed of as not maintainable. No order as to costs.

20. The interim application is also disposed of.

(M.S.KARNIK, J.)