

Arjun

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO.272 OF 2023

Rakesh Pragji Patel

...Applicant

V/s.

Usha Dhiraj Varia

...Respondent

WITH
INTERIM APPLICATION NO.7941 OF 2023

IN
CIVIL REVISION APPLICATION NO.272 OF 2023

Rakesh Pragji Patel

...Applicant

In the matter between :

Rakesh Pragji Patel

...Applicant

V/s.

Usha Dhiraj Varia

...Respondent

Mr. Amrut M. Vernekar, for the Appellant/Applicant.

Dr. Abhinav Chandrachud a/w Mrs. Leena Shah & Mr.
Dipen Furia i/b. M/s. Shah & Furia Associates, for the
Respondent.

CORAM : MADHAV J. JAMDAR, J.
DATED : JULY 07, 2023

P.C.:

1. Heard Mr. Amrut Vernekar, learned counsel appearing
for the Applicant and Dr. Abhinav Chandrachud, learned
counsel appearing for the Respondent.

2. The impugned order in the present Civil Revision

Digitally
signed by
ARJUN
VITTHAL
KUDHEKAR
Date:
2023.07.28
20:10:45
+0530

Application is order dated 4th February, 2023 passed by the Appellate Bench of the Small Causes Court at Mumbai [Bandra Bench] in (Misc) Appeal No.159 of 2022 in Exhibit-71 in L. E. Suit No.118/151 of 2009 as also order dated 21st October, 2022 passed below Exhibit-71 in L.E. Suit No.118/151 of 2009 by learned Judge, Small Causes Court, Mumbai [Bandra Branch]. The Applicant i.e. original Defendant filed Application bearing Exhibit-71 in said L.E. Suit No.118/151 of 2009 seeking dismissal of suit. The said Application was rejected by the learned Trial Court and the Appeal challenging the same is dismissed by the learned Appellate Court.

3. Before considering the rival submissions, it is necessary to set out certain factual aspects.

[i] The Respondent had filed Suit No.754 of 2008 on the Original Side of the High Court of Bombay. The said suit was filed for declaration that the Plaintiff is a lawful owner and for eviction of the Defendant i.e. present Applicant. It was the claim of the Respondent-Plaintiff in the said suit that the Defendant i.e. the present Applicant is the friend of the Plaintiff's brother-in-law and he was given the suit premises

temporarily for residence. Therefore, it is the contention of the Respondent that the Applicant is the gratuitous licensee of the Respondent.

[ii] The said Suit No.754 of 2008 filed on the Original Side of the High Court of Bombay was withdrawn in view of the decision of the Full Bench of this Court in the matter of *Prabhudas Damodar Kotecha & Anr. Vs. Smt. Manharbala Jeram Damodar & Ors.*¹ Accordingly, by order dated 15th June, 2009 passed by a learned Single Judge, plaint in Suit No.754 of 2018 was directed to be returned for its presentation before the appropriate Court.

[iii] Thereafter, instead of filing the plaint as returned by the High Court for presentation before the Appropriate Court, the Respondent filed fresh L. E. Suit No.118/151 of 2009 in the Court of Small Causes at Mumbai [Bandra Bench].

[iv] The written statement has been filed by the present Applicant in that suit in November, 2009.

[v] Thereafter, the trial of the suit has begun. Presently cross-examination of the Plaintiff's witness is going on.

[vi] At this stage of the trial, the Applicant i.e. Defendant

1 2007 (5) Mh.LJ. 341 (Full Bench)

filed Application bearing Exhibit-71 on 13th August, 2021. In the said Application the provision of Order VII, Rule 10 of the C.P.C., 1908 is invoked. The prayer is made in the said Application for dismissal of the suit on the ground that the High Court order is violated.

[vii] By order dated 21st October, 2022 the learned Trial Court dismissed the said Application.

[viii] The Applicant/Defendant filed Misc. Appeal No.159 of 2022 challenging said order dated 21st October, 2022 and the same was dismissed by the order dated 4th February 2023.

4. It is the contention of learned counsel appearing for the Applicant that in view of the law laid down by this Court in the case of *St. George Shipping Co. Ltd., Vs. M. V. "Irene P" a Foreign Flag Vessel & Ors.*², the said action of the Plaintiff of filing some different suit, when order passed by this Court is return of the plaint for filing the same in the appropriate Court is not only improper but the same is also illegal and, therefore, the said plaint is liable to be rejected. The learned counsel appearing for the Applicant has relied on the following observations in paragraphs 20 and 21 of the said decision in *St. George Shipping Co. Ltd. (supra)* :

2 (AIR 1999 BOM 280)

“20. It is therefore clear that the Bhavnagar Court returned the plaint by resorting the provisions of Order VII, Rule 10. If this was so it was not only improper but it was also illegal because Order VII, Rule 10A makes special provision about the procedure to be followed by the Court ordering return of the plaint. This procedure is very elaborate and it provides where, in any suit, after the appearance of the defendants, the Court is of opinion that the plaint should be returned, it has to intimate its decision to the plaintiffs. After receiving such an intimation, three options have been given to the plaintiff under Order VII, Rule 10(2) to make applications under any of the options. Sub-rule (3) of Rule 10A further provides that if such an application is made by the plaintiffs and the plaint is returned on the ground that the Court had no jurisdiction then the Court can fix the date for appearance of the parties in the Court in which the plaint is proposed to be presented and give to the plaintiff and the defendant notice of such date for appearance. Further provisions of Rule 10A are about the contingencies where notice of the date of appearance is given.

21. All these provisions of Rule 10A of Order VII will clearly show that the order of return of the plaint has to be followed by the mandatory procedure of Rule 10A. **This will also make it clear that the plaintiff has no option to file a fresh suit in that eventuality i.e. when the plaint is returned under Rule 10 of Order VII and particularly on the ground of jurisdiction.** The submissions made by Ms. Sethna that the plaintiffs were entitled to file a fresh suit under Rule 13 of Order VII cannot therefore be accepted.”

(Emphasis added)

5. Learned counsel appearing for the Respondent relied on the decision of the Supreme Court in the case of *Hanamanthappa & Anr. Vs. Chandrashekharappa & Ors.*³ In the said case, an Application was filed under Order VII, Rule 10 of C.P.C. for dismissal of the plaint as the same was materially altered without seeking permission for amendment of the plaint as required under Order VI, Rule 17 of C.P.C.. The Supreme Court in the light of the said objection has held that, the said suit can be treated as a fresh suit filed subject to the limitation, pecuniary jurisdiction, and of the payment of the Court fee and, therefore, such suit cannot be dismissed on the ground that the Plaintiff made averments which did not find place in the original plaint. It has been held that at the best if some amendments are made, the same can be treated to be a fresh suit and the matter can be proceeded with according to law.

6. Learned counsel appearing for the Respondent has also relied on the decision of a learned Single Judge in the case of *Vishnu Horticultural Pvt. Ltd. & Anr. Vs. Shampiyani Viniyard Ltd. & Ors.*⁴. In the said decision of *Vishnu*

3 (1997) 9 SCC 688

4 2010 (2) Mh.L.J. 244

Horticultural Pvt. Ltd. & Anr. (supra), the Court has observed as follows :

“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.”

Thus, it is settled legal position that when a plaint is returned for presentation to the appropriate 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 and that such suit can be treated to

be a fresh suit and the matter can be proceeded with according to law.

7. Learned counsel appearing for the Respondent has also relied on the decision of a learned Single Judge in the case of *Asif Ahmedally Porbunderwalla Vs. Daulat Akbarali Porbunderwalla & Ors.*⁵, and more particularly on paragraphs 25 to 28 of the same. In the said case of *Asif Ahmedally Porbunderwalla (supra)* a learned Single Judge has taken into consideration that the Plaintiff in that case has not only referred to the plaint filed before the City Civil Court, Bombay but has also annexed copy of the order passed by the City Civil Court for return of the plaint. In the present case, extensive reference has also been made in paragraph No.8 of the fresh plaint regarding the earlier Suit No.754 of 2008 filed on the Original Side of the High Court of Bombay and order dated 15th June, 2009 passed by a learned Single Judge of this Court, returning the plaint for presentation before the appropriate Court. Therefore, as per the law laid down by the Supreme Court at the most, the said fresh suit bearing L. E. Suit No.118/151 of 2009 can be treated as a fresh plaint and the matter can be proceeded with according

5 2014 (2) Mh.L.J. 210

to law. Therefore, there is no substance in the present Civil Revision Application.

8. The Civil Revision Application is dismissed in above terms with no order as to costs.

9. In view of dismissal of the Civil Revision Application, nothing survives in the Interim Application and the same is also dismissed.

10. It is significant to note that as per the contention of the Respondent, the Applicant is gratuitous licensee and the suit has been filed on the Original Side of the High Court of Bombay on 13th February, 2008 and in terms of the law laid down by the Full Bench of this Court in *Prabhudas Damodar Kotecha & Anr. (supra)*, the plaint was returned for its presentation to the appropriate Court. The present suit was filed in the year 2009, the written statement was filed in November, 2009 and the Application to reject the plaint by invoking the provision under Order VII, Rule 10 of the C.P.C. is filed on 13th August, 2021 i.e. after more than twelve years when the trial of the suit has started. Thus, it is clear that the said Application was filed for delaying the trial. Therefore, in the facts and circumstances of this case, the

learned Trial Court is requested to expedite the hearing of the L. E. Suit No.118/151 of 2009 and to make endeavour to dispose of the same within a period of two years.

[MADHAV J. JAMDAR, J.]