PATNA HIGH COURT

Ram Kishun Rai

Vs

Ashirbad Rai

A.F.O.O No. 217 of 1948

(Ramaswami and Sarjoo Prasad, JJ.)

03.05.1950

JUDGMENT

Sarjoo Prasad, J.

1. This is an appeal by the plaintiffs against a decision of Mr. Radha Prasad Singh, Subordinate Judge of Arrah, dated 28th July 1948, This appeal raises an interesting question of law as to the recording of a compromise under Order 2 Rule 3, Civil Procedure Code.

2. To lead up to the points for discussion, I may indicate the essential facts. On 8th November 1945, a plaint was presented before the Munsif, Third Court, Arrah, which was registered as Title Suit No. 182 of 1945. In the said suit, the Court directed issue of summonses on the defendants which were duly served, and defendant 1 filed his written statement on 21st February 1946. The issues in the suit were settled in March 1946, and 22nd August 1946 was the date fixed for hearing. The case was, however, adjourned on that date for 16th January 1947. In the meantime on 29th October 1946, a petition of compromise was filed, and the plaintiffs applied that the compromise should be recorded. This petition along with the compromise filed in the case was ordered to be put up in the presence of the parties on the date fixed for hearing. The petition of compromise is dated 3rd September 1946 and purports to be between the plaintiffs and the defendants to the suit. Although the heading of the compromise petition shows that it is by the plaintiffs and defendants 2 to 6, it also purports to have been signed by Ashirbad Rai, defendant 1, in his own pen. The plaintiffs and defendants 2 to 6 in their petition for recording the compromise alleged that defendant 1 had affixed his signature to the compromise on getting a sum of Rs.3000 by way of consideration for the compromise as recited in the terms thereof. The plaintiffs and the pleader for defendants 2 to 6 signed the compromise petition but it did not bear the signature of the pleader of defendant 1, and it appears from the allegation in the petition for recording the compromise that defendant 1 told the parties that he would get the compromise by his pleader signed on the re-opening of the Court which promise he did not actually carry out. On 16th January 1947, the pleader for defendant 1 intimated to the Court that he had not been served with a copy of the petition filed by the plaintiffs and defendants 2 to 6 for recording the compromise, and the Court directed the plaintiffs to serve a copy of that petition at once on the pleader of defendant 1. On the same day at a later stage defendant 1 thereafter filed a rejoinder to

the plaintiff's petition for recording the compromise. In this rejoinder, it is alleged, defendant 1 repudiated the aforesaid terms and his signature thereon, and the Court after a few adjournments directed that the matter should be put up for hearing regarding the compromise on 1st February 1947. In the meantime the plaintiffs were permitted to take photographs of the signature of defendant 1 on the compromise petition, the vakalatnama and the written statement filed in the case for getting them compared by an expert. They also in the meantime took out dasti summons for the witnesses as per isimnavasi filed by them. Defendant 1 also applied for direction on the plaintiffs and defendants 2 to 6 to supply him with copies of their petitions for obtaining photographs in order to enable him to make necessary pairvis. I understand from the parties that the signatures in question were examined by an expert who has submitted a report favour of the plaintiffs and against defendant 1. While these stops were being taken when the matter was put up for consideration by the Court on 1st February 1947, defendant 1 filed a petition praying to the Court to decide the issues regarding the question of jurisdiction, and to postpone the examination and cross-examination of the expert to some future date after the issue regarding the jurisdiction of the Court to entertain the suit had been decided. The Court adjourned the case on that date and eventually after various adjournments, it took up the issue as to jurisdiction for decision on 21st April 1947. It held that the value of the suit was Rs. 15 000 both for the purpose of jurisdiction and court fees and much beyond the pecuniary jurisdiction of the learned Munsif. In that view of the matter, the learned Munsif held that he had no alternative but to find that the suit was clearly beyond the pecuniary jurisdiction of that Court and hence the plaint was liable to he returned. He, therefore, ordered the plaint to be returned to the plaintiffs for being presented to the proper Court competent to entertain the suit. The plaintiffs brought up the matter in revision before this Court but their application was dismissed, and the decision of the learned Munsif on the point of jurisdiction and court-fees was affirmed. This brought to a close the first phase of the litigation between the parties. It is apparent from the above that the compromise filed on 28th October 1946, before the learned Munsif was not recorded as it could not be recorded by him, he having no jurisdiction to entertain the suit itself.

3. I now come to the second phase of the litigation which started on 10th April 1948, when the plaint was presented afresh to the learned Subordinate Judge, Third Court, Arrah. The suit was then registered as Title Suit No. 26 of 1948. The deficit court-fees were duly paid and summons were ordered to be issued to the defendants fixing 20th May 1948, for settlement of issues. In the meantime on 1st May 1948, the plaintiffs filed a petition that the compromise petition filed in Title Suit No. 182 of 1945 of the Munsif, 3rd Court Arrah, he called for and kept in a closed cover. On 10th May 1948 summonses were served on defendant 1 who appeared on that date and asked for time to file his written statement which was accordingly granted. On 24th May the plaintiffs applied for recording the compromise called for from the Court of the learned Munsif. This application for recording the compromise was opposed by defendant 1 though the other defendants do not appear to have taken any exceptions to the same. Defendant 1 denied that there was any compromise between the parties, or that he signed the petition of compromise. His allegation was that the compromise petition was a forgery, and the allegations contained therein were false. The question whether the Court was competent to record the compromise filed before the learned Munsif, Third Court, Arrah, was taken up for hearing on 24th July 1948 and the learned Subordinate Judge by his order under appeal passed on 28th July 1948 held that when the compromise was filed, there was no suit pending between the parties, and that being so, the alleged compromise could not be recorded under Order 23 Rule 3 by the learned Subordinate Judge, and the remedy of the parties, if any, was to bring a suit on the basis of the alleged

compromise, and for the enforcement thereof. The learned Subordinate Judge, however, did not enter into the merits of the question whether the compromise was genuine or otherwise, It is against this order of the learned Subordinate Judge that the present appeal is directed.

4. The question in my opinion, is not free from difficulty. The specific provision of the Code of Civil Procedure under which the Court has power to record a compromise is Rule 3 of Order 23 which runs as follows:

> "Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit."

If it is held that this suit was pending at the time when the compromise petition was filed, in other words, if it is found that the present suit, namely, Title Suit No. 26 of 1948 before the Subordinate Judge, First Court, Arrah, is nothing but a continuation of Title Suit No.182 of 1945 filed before the Munsif Third Court, Arrah, then the compromise filed in the suit cannot but be recorded under Order 23 Rule 3, provided it otherwise on merits satisfies the requirements of the rule. If, on the other hand, it is held that the title suit before the learned Subordinate Judge in which the prayer for recording this compromise is made is distinctly a fresh suit and not a continuation of the previous suit then evidently the compromise in question was arrived at when the present suit was not pending, and the Court then will have no jurisdiction to record such a compromise under this provision. The party affected in such a case may enforce the rights by a separate suit.

5. Mr. G.P. Das for the appellants contends that the present suit should be taken to be a continuation of the suit filed before the learned Munsif, the plaint and the parties being the same, and as such, the compromise should be recorded. He also contends that in any case the learned Subordinate Judge was in error in trying the matter piecemeal, and he should have also taken evidence to find whether the compromise was genuine or otherwise. Mr. Awadh Bihari Saran for the respondents presses the contrary view. According to his submission, the suit before the learned Subordinate Judge was altogether a fresh suit and could not be in any sense a continuation of the former suit. He accordingly supports the decision given by the learned Subordinate Judge.

6. There are no decisions of this Court directly bearing upon the point, and at any rate none has been cited at the Bar. A great deal will depend upon the meaning of the term "suit" used under Order 23 Rule 3 of the Code. Section 15, Civil Procedure Code, provides that the suit shall be instituted in the Court of the lowest grade competent to try it. This shows that if the Court before whom the plaint-is presented finds that it is not competent to try it, it shall at any stage return the plaint to be presented to the Court in which the suit should have been instituted. This is provided for in Rule 10 of Order 7. The combined effect of the two rules is that a suit cannot be said to be instituted so long as the plaint is not presented before the Court competent to try the suit. It may be that for certain purposes the Court before whom a plaint is originally filed may have jurisdiction to entertain the plaint and to pass certain orders with refer once to it. But when the

Court before whom the plaint was filed returns it to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation. A reference may be made in this connection to a decision in *Hedlot Khasia v. Karan Khasiant*[1], That case was under the old Code of Civil Procedure, and Section 57 of the old Code corresponds to Order 7 Rule 10 of the present Code. Their Lordships, in dealing with the first and second contentions on behalf of the appellant which dealt with the question of the frame of the suit and the plea of limitation, held that the combined effect of Section 57, Civil Procedure Code, and Section 14, Limitation Act, is that when the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date on such presentation. They also held that if a contrary view were adopted, the inference would follow that the provisions of Section 14, Limitation Act were superfluous

> "It would have been needless," their Lordships observed, "to formulate the rule embodied in Section 14, unless the theory were adopted that the suit was instituted only when the plaint was presented in the Court of competent jurisdiction."

Another decision of the Calcutta High Court bearing upon the point is *Bimala Prasad v. Lal Moni Devi*[2], In that case it was held that when the plaint which has been returned is presented in a Court of competent jurisdiction, the suit, even for purposes of court fee, must be taken to be instituted on the date of such representation and therefore on such plaint the court-fee should be leviable under she law which was in force at the titer) when the plaint was represented, and if the Act is amended in the meantime increasing the amount of fee payable thereunder the plaintiff should be credited with fee originally paid. In that case their Lordships relied upon the earlier decision of the Court referred to above in the case of *Hedlot Ehasia v. Karan Khastam*[3],

7. There are decisions of other Courts which accept the view taken by the Calcutta High Court. A reference may be made to the decision in *Hirachand Succaram v. G.I.P. Ry. Co*[4], and also to a recent decision of the Madras High Court in *T. Chandrayya v. V. Seethanna*[5], In the Bombay case, their Lordships relying upon the Calcutta view held that when the plaint is returned to be presented in a Court of competent jurisdiction, the suit is to be considered as instituted on the date of such presentation, and it could not be said that "the previous suit instituted in a Court having no jurisdiction was continued in the Court which had jurisdiction to try the suit." In the Madras case the original plaint was filed within time but for want of pecuniary jurisdiction it was returned by the Court for presentation to the proper Court. The plaintiff with a view to bringing the claim within jurisdiction amended the plaint by striking out part of his claim and represented it to the same Court. It was found, however, that the claim on the date of the representation had become time-barred. The learned Munsif before whom the plaint was filed held that it was barred, but the learned Subordinate Judge on appeal took a different view which was affirmed by a single Judge of the High Court they being of the opinion that the amended plaint filed on 6th august 1930, must be deemed to be a continuation of the suit which was filed on 30th October 1929 and as such, was within time. In Letters Patent appeal their Lordships disagreed with this view and held that a Court which had no jurisdiction could not pass orders in the suit beyond directing the plaint to be presented to the proper Court and giving a direction with regard to the costs incurred up to the time of the return of the plaint, and that the suit must be deemed to have been instituted on the date of representation of the amended plaint which the Court had jurisdiction to accept and was, therefore, barred. Their Lordship also refused to grant the benefit

of Section 14, Limitation Act to the plaintiff under those circumstances. The view therefore held by all these Courts is that after the plant has been returned for representation to the proper Court, the institution of the suit commences from the date on which the plaint is presented to the proper Court, and that the suit so instituted is not a continuation of the suit before the Court which had really no jurisdiction to entertain it and transferred it for representation to the proper Court.

8. The seal of approval appears to have been set upon this view of the law by a decision of the Privy Council in *Ramdutta Ramkissendass v. E.D. Sassoon and Co*[5]*.,* The relevant passage is at P.1057 of the report. There the question was whether limitation applied to bar the claim of the respondents under the award which they had obtained. The Judges of the High Court held that the arbitration proceedings which resulted in the award under consideration before the Privy Council were in effect a mere continuation of the proceedings which had been instituted on nth July 1915, but which proved abortive through want of jurisdiction of the arbitrator appointed The Privy Council disagreed with that view of the High Court and observed as follows:

> "They think that these proceedings came to an end with the decision of the single arbitrator whose award was ultimately Section 4 aside and that the proceedings instituted at a later date, after the decision in the Privy Council had been announced, cannot be regarded as a mere continuation of the first proceedings It is quite clear that where a suit has been instituted in a Court which is found to have no jurisdiction and it is found necessary to raise a second suit in a Court of proper jurisdiction, the second suit cannot be regarded as a continuation of the first, even though the subject- matter and the parties to the suits were identical."

Their Lordships then referred to Section 14, Limitation Act, as providing an alleviation of the hardships that might arise in such cases In view of those clear and
categorical pronouncements of the Judicial Committee the matter is hardly left in the region of doubts at all.

9. I shall, however refer to some of the decisions on which reliance has been placed by the learned Advocate for the appellants. One of them is the decision in *Khellat Chunder Ghose v. Nusseebunnissa Bibee*[6] In that case, a Division Bench held that the date of a suit must be taken to be that on which the plaint was originally filed and not that on which it was filed in another Court either as an amended plaint or as a plaint returned to be filed in that Court. But this observation must be read subject to the facts of the case in which the decision was given. In that case the plaint was originally filed before a Munsif but the Munsif estimated the value of the claim stated by the plaintiff as beyond the jurisdiction of his Court. He accordingly returned the plaint to the plaintiff in order to its being presented in a proper Court. The plaintiff then presented the plaint in the Court of the Subordinate Judge, sand the Subordinate Judge tried the case and gave the plaintiff a decree. It was contended that when the suit was brought in the Munsif's Court, Act 26 of 1867 was replaced by another Act, Act 6 (7 of 1870, under which the valuation was 15 times the net profits. That being so, the suit would be within the jurisdiction of the learned Munsif. It is quite clear, therefore that here the suit had been decided by the Subordinate Judge who although not the court of the lowest grade competent to try the suit, was nevertheless competent to entertain the suit and to try it, and therefore it made no difference whether the plaint was presented to him under the new Act or presented to the learned Munsif. Of course, the proper

course should have been to present it before the learned Munsif after the change in the law. Nevertheless if the learned Subordinate Judge proceeded to decide the matter it was quite competent for him to decide and the date of the institution of the suit, therefore, did not really matter at all.

10. The next case on which reliance has been placed is the decision in *Ramaswami Iyer v. Veerarayan Raja*[7], There also the facts were almost parallel to the facts in the Weekly Reporter case so far as the point of jurisdiction is concerned. Indeed when their Lordships' attention was drawn to the decision in *Hirachand Succaram v. G.I.P. Ry. Co*[8], they distinguished the case on the following grounds:

> "The difference between Bombay suits and the suit now before us is that in the Bombay suits the Subordinate Judge had no jurisdiction to try them, but in the case before us the Subordinate Judge had jurisdiction, although after the suit bad been instituted it was found that another Court also had jurisdiction and that the Code of Civil Procedure required the suit to be tried by the other Court as the Court of first instance."

Therefore, that decision also is distinguishable. Where there is another Court also having jurisdiction the jurisdiction of the Court before when the suit is tried is not affected by the mere fact that the other Court is the Court of the lo vest grade competent to try it The cases of this class, therefore, stand on a different footing, and do not support the argument of the learned counsel for the appellants.

11. Another decision cited on behalf of the appellants is the decision in *Ganga Prasad v. Ramanand*[9], In that case their Lordships held that representation of a plaint in accordance with the order of the former Court before a Court of competent jurisdiction within the period of limitation amounts to a continuance of the suit, and therefore no question of limitation aries. No reasons have been assigned in the judgment for arriving at this conclusion and in any case so far as this Court is *Firm Jiwan Ram Ramachandra v Jagernath Sahu*[10], that concerned, it has been held in a Court returning a plaint for want of jurisdiction has got no authority to grant any time to the plaintiff for presenting it to the proper Court. The decision in *Ganga Prasad v. Ramanand*[11], therefore does not commend itself to me as a current decision.

12. Another contention which has been urged in support of the view that the present suit could be taken to be a continuation of the first suit is that, it could not be said that the learned Munsif had completely no jurisdiction in the matter. The argument is that if the point of jurisdiction had not been raised, and the Court had proceeded to decide the suit, the decision would not be open to question in a collateral proceeding on the ground that the learned Munsif had no jurisdiction to decide the suit. Of course if the question of jurisdiction had not been raised, then the matter could not be collaterally re-opened in a subsequent suit and the decision of the Court challenged on the ground of jurisdiction. It is really for that Court to decide whether he has jurisdiction to entertain the suit or not, and whether having regard to the value of the subject matter of the suit it falls within his pecuniary jurisdiction. But once the jurisdiction of the Court has been challenged and the Court has decided that it has no jurisdiction to entertain the suit and he directs the plaint to be presented before a Court competent to entertain it the matter ends there. The Court thereafter is functus officio. The plaint when it is returned to the plaintiff for being presented to the proper

Court may or may not be so presented by him. It may be subject to limitations. It may be also subject to payment of proper court-fees. Therefore this argument of the learned counsel for the appellants does not in any manner lead to the inference that the subsequent institution of the suit in a Court of competent jurisdiction is a mere continuation of the previous proceedings.

13. I have already dealt with the relevant oases bearing on the point and after a detailed analysis of the matter, I have no hesitation in coming to the conclusion that the suit pending before the learned Subordinate Judge at Arrah was in no sense a continuation of the suit filed before the learned Munsif.' The position then is that the compromise petition which was presented to the learned Munsif was filed not during the pendency of the present suit but at some stage before the suit came to be instituted. Under those circumstances it seems difficult to hold that the provisions of Order 23 Rule 3 applied, and that the Court could record such a compromise under that provision. It is unfortunate that the exigencies of the case may have deprived the plaintiffs of enforcing a right to which they possibly may have been entitled if it had not been held that the suit was beyond the competence of the learned Munsif. There are also no materials before us, and in fact it would be unnecessary to go into those materials in the view of the law which I have taken affirming the view of the learned Subordinate Judge to hold whether the 'compromise is genuine. If genuine, the
plaintiffs may have their remedies by way of a suit. But in my opinion, for the reasons discussed above, I must uphold the decision of the learned Subordinate Judge and agree with him that the compromise in question cannot be recorded in the present suit.

14. The appeal, therefore, fails and must be dismissed. In the circumstances, however, I would not order any costs to defendant 1 who is the contesting respondent here,
either of this Court or of the Court below.

Ramaswami, J.

15. I agree.
Appeal dismissed.

Cases Referred.

[1]15 C.L.J. 241: (13 I.C. 377)
[2] AIR (13) 1926 cal. 955 : (30 C.W.N. 90)
[3]15 C.L J. 241: (13 I. C. 317) 5 AIR (27) 1940 Mad. 689 : (194 I.C. 646**)**
[4] AIR (15) 1928 Bom. 421: (52 Bom. 548)
[5]56 Cal.1048: (AIR (16) 1929 P.C. 103)
[6]16 W.R.47
[7] AIR (28) 1941 Mad 711: (196 I.C 521)
[8]52 Bom 48: (AIR (15) 1928 Bom. 421)
[9] AIR (2) 1915 ALL. 344: (30 I.C. 544)
[10]18 P.L.T 250: (AIR (241 1937 Pat 495)
[11] AIR (2) 1915 ALL. 344 :(80 I.C. 544)