

A SMT. PATASIBAI & ORS.

v.

RATANLAL

JANUARY 30, 1990

B [M.H. KANIA AND J.S. VERMA, JJ.]

Code of Civil Procedure: Order 7 Rules 11 and Order 23 Rule 3A—Maintainability of suit—Issuance of summons by trial court—Whether a bar to trial when no triable issue is shown to arise.

C One Motilal who owned Goyal Talkies entered into a partnership with respondent Ratanlal representing the joint family firm of M/s. Ratanlal Damdoolal and Bros., for the purpose of running the cinema business. Later, the said Motilal together with his wife and children filed a civil suit for dissolution of partnership, rendition of accounts, etc., against respondent Ratanlal, as defendant No. 1, the firm "M/s Damdoolal and Bros." as defendant No. 2, and one Puranmal as defendant No. 3. Motilal subsequently filed an application for correction of the description of defendant No. 2 firm, which was allowed.

E The suit was compromised. According to one of the terms of the compromise, plaintiff was to pay to defendant Nos. 1 and 2 a sum of Rs. 15,700 in full satisfaction of their claim, subject to final accounting. The plaintiff paid this sum within the specified period and thereupon the receiver gave possession. Subsequently, the Court passed a final decree dated 16.11.1959 stating that the partnership stood dissolved, and directing defendant Nos. 1 and 2 to refund to the plaintiff the amount of Rs. 5,470 which was the excess amount paid by the plaintiff to them. Defendant Nos. 1 and 2 filed an appeal against the final decree which was dismissed, and their second appeal in the High Court was also dismissed on 2.12.1972.

G Thereafter, Civil Suit No. 1699 of 1980 was filed by Ratanlal, respondent herein, against the appellants, who are the legal representatives of Motilal, assailing the consent decree after taking the entire benefit thereunder. The reliefs claimed were for a declaration that the final decree dated 16.11.1959 was a nullity, and for possession of Goyal Talkies, etc. The appellants resisted the suit *inter alia* on the ground that it was barred by *res judicata*, and further that the suit was also H barred by virtue of Rule 3A Order 23, C.P.C. The Trial Court framed a

preliminary issue regarding maintainability and held the suit to be maintainable. The High Court dismissed the civil revision against that order.

Before this Court it was contended on behalf of the appellant that the suit was barred by virtue of Rule 3A of Order 23 and even otherwise the plaint averments did not disclose any cause of action in order to raise a triable issue. In reply, it was contended that Rule 3A of Order 23, C.P.C., had no application since the decree assailed in the suit was of a date much prior to insertion of Rule 3A by amendment with effect from 1.2.1977; and that the question of examining the frame of the suit to determine its maintainability on any other ground did not arise since the appellant's case was based on the bar under Order 23, Rule 3A, and no specific objection for rejection of the plaint under order 7 Rule 11 C.P.C., was taken earlier.

During the course of hearing of the appeal, the respondent filed an application for amendment of the plaint.

Allowing the appeal, this Court,

HELD: (1) On the admitted facts appearing from the record itself, counsel for the respondent was unable to show that all or any of the averments in the plaint disclose a cause of action giving rise to a triable issue. [179F]

(2) Since the plaint suffers from this fatal defect, the mere issuance of summons by the Trial Court does not require that the trial should proceed even when no triable issue is shown to arise. Permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation. This can not be done. [179G-H]

(3) It being beyond dispute that the plaint averments do not disclose a cause of action, the plaint is liable to be rejected under Order 7 Rule 11, C.P.C. without going into the applicability of Order 23 Rule 3A, C.P.C. to the present suit. [180A]

(4) There is no ground to allow the application for amendment of the plaint which apart from being highly belated, is clearly an after-thought for the obvious purpose of averting the inevitable consequence of rejection of the plaint on the ground that it does not disclose any cause of action or raise any triable issue. Moreover, the proposed amendments in the plaint are to raise two grounds which are concluded

- A** by the earlier adjudication ending with dismissal of Ratanlal's Second Appeal against the impugned decree. [177E-F]

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 1043 of 1990.

- B** From the Judgment and Order dated 10.8.1989 of the Bombay High Court in C.R.A. NO. 521 of 1985.

V.A. Bobde, S.D. Mudaliar, Mrs. Ranjana Bobde and C.K. Ratnaparkhi for the Appellants.

- C** V.P. Salve, and Ms. Bina Gupta for the Respondent.

The Judgment of the Court was delivered by

VERMA, J. Special Leave granted.

- D** The short question involved is the maintainability of the suit which gives rise to this appeal. The appellants contend that the Suit is not maintainable even on the plaint averments. The Trial Court held the suit to be maintainable and the High Court has dismissed the appellants' revision affirming that view. Hence this appeal by special leave.

- E** The appellants are the legal representatives of Motilal who purchased the disputed property, namely, 'Goyal Talkies' at Kamptee in the year 1946. The said Motilal entered into a partnership on 31.12.1953 with respondent Ratanlal representing the joint family firm "M/s. Ratanlal Damdoolal and Bros." for the purpose of running the
- F** cinema business in 'Goyal Talkies'. Some disputes having arisen between the parties, the said Motilal together with his wife and children filed Civil Suit No. 19A of 1955 on 4.8.1955 in the Court of Civil Judge, Class I, Nagpur, against respondent Ratanlal as defendant No. 1, the firm "M/s. Damdoolal and Bros." as defendant No. 2 and one Puranmal as defendant No. 3. The suit was for the dissolution of
- G** partnership, rendition of accounts and ancillary reliefs. On discovery of the misdescription of defendant No. 2-firm, an application was made by the plaintiff for correction of that misdescription. The misdescription being obvious, the Trial Court allowed the plaintiff's application on 19.8.1955 permitting defendant No. 2 firm to be correctly described as "M/s. Ratanlal Damdoolal and Bros." instead of "M/s. Damdoolal
- H** and Bros." It appears that the correction even though permitted was

not actually incorporated in the plaint. However, the parties were not misled in any manner by the misdescription of defendant No. 2 made initially in the plaint which is evident from the fact that defendant No. 1 Ratanlal who filed the separate written statement in the suit on behalf of defendant No. 2 also correctly described defendant No. 2 as "Ratanlal Damdoolal and Bros." This suit was compromised between the parties and a compromise petition dated February 20, 1956 signed by the plaintiff, Motilal, Ratanlal for himself as defendant No. 1 and also on behalf of defendant No. 2 firm, and the counsel for defendant Nos. 1 and 2 was filed in the Trial Court. This compromise was recorded by the Court on 5.3.1956 after the statements of defendant No. 1 Ratanlal and the counsel for defendant No. 2 firm were recorded accepting the compromise. One of the agreed terms was that defendant No. 3 Puranmal should be discharged from the suit apparently because he had no interest in the suit. According to the terms of the compromise, plaintiff was to pay to defendant Nos. 1 and 2 a sum of Rs.15,700 in full satisfaction of their claim subject to final accounting, which included the sum of Rs.2,600 paid to Puranmal by defendant Nos. 1 and 2. It was also agreed that on payment of this amount by the plaintiff to defendant Nos. 1 and 2 within the specified period, the partnership would be deemed to be dissolved and that defendant Nos. 1 and 2 gave up all their rights including the interest acquired by them from defendant No. 3, Puranmal under the sale-deed executed in their favour. It was agreed that the plaintiff would be entitled to possession of the talkies immediately on payment of the amount due to defendant Nos. 1 and 2. The Receiver Shri K.S. Mishra Advocate, was required to act in terms of the compromise between the parties which required confirmation of accounts from the account-books of the partnership and thereafter distribution of the surplus between the plaintiff and defendant Nos. 1 and 2.

The plaintiff paid this sum of Rs.15,700 on 5.3.1956 well within the specified period; the receiver rendered accounts on 19.3.1956 and an application for correction was made on 3.4.1956. It may be mentioned that full compliance having been made by the plaintiff on 5.3.1956, the receiver gave possession of the Talkies to the plaintiff on 5.3.1956 according to the compromise since the only thing remaining to be done thereafter was to refund to the plaintiff the amount of Rs.5,470 paid in excess by plaintiff to defendant Nos. 1 and 2. Accordingly, on 16.11.1959 the Court passed the final decree in the suit stating that the partnership stood dissolved with effect from 27.4.1959 and the defendant Nos. 1 and 2 were directed to refund to the plaintiff the amount of Rs.5,470 which was the excess amount paid by the plaintiff to them.

- A Notwithstanding the above facts, defendant Nos. 1 and 2 filed an appeal against the final decree dated 16.11.1959 in the Court of the Extra Assistant Judge, Nagpur which was C.A. No. 413 of 1962 decided on 27.12.1962. Thereafter, a second appeal No. 293 of 1963 was also filed by these defendants in the High Court which too was dismissed on 2.12.1972. The final decree dated 16.11.1959 based on the compromise which was fully satisfied become final inasmuch as the defendants did not challenge the same by a further appeal to this Court.
- B

- Thereafter, Civil Suit No. 1699 of 1980 in the Court of Civil Judge, Senior Division, Nagpur, was filed by respondent Ratanlal against the petitioners who are the legal representatives of the aforesaid Motilal assailing the above consent decree after taking the entire benefit thereunder. The reliefs claimed in this suit are for a declaration that the aforesaid final decree dated 16.11.1959 passed on the basis of the order dated 5.3.1956 in Civil Suit No. 19A of 1955 by the Civil Judge, Senior Division, Nagpur, is a nullity; that the partnership under the partnership-deed dated 31.12.1953 between the said Ratanlal and Motilal continues to subsist; that Ratanlal is entitled to possession of the said Goyal Talkies; and the other ancillary reliefs. This suit was contested by the petitioners, *inter alia* on the ground that it was barred by *res judicata* by the earlier adjudication between the parties and also that it was not maintainable. It would suffice to say that as a result of the High Court's direction, the Trial Court framed preliminary issue regarding maintainability of the suit and by its order dated 15.4.1985, it held the suit to be maintainable. On behalf of the petitioners the suit was claimed to be barred also by virtue of Rule 3A of Order 23, C.P.C. The Trial Court rejected these contentions and held the suit to be maintainable. The petitioners then preferred a Civil Revision in the High Court which has been dismissed by the Order dated 10.8.1989. Hence this appeal by special leave.
- C
- D
- E
- F

- The contention of Shri V.A. Bobde, learned counsel for the appellant is that the suit is barred by virtue of Rule 3A of Order 23, C.P.C. and even otherwise the plaint averments do not disclose any cause of action in order to raise a triable issue. He also contended that even if Rule 3A inserted in Order 23, C.P.C. by the C.P.C. Amendment Act, 1976 with effect from 1.2.1977 does not apply to the present suit challenging the decree passed prior to the amendment, this suit is barred also in accordance with the unamended provision existing earlier. In reply, Shri V.P. Salve, learned counsel for the respondent contended that Rule 3A of Order 23, C.P.C. has no application since the decree assailed in the suit is of a date much prior to insertion of
- G
- H

Rule 3A by amendment with effect from 1.2.1977. He also contended that the question of examining the frame of the suit to determine its maintainability on any other ground does not arise since the petitioners' case was based on the bar under Order 23, Rule 3A, C.P.C., which too was an objection raised after the filing of the written statement in which the plea of *res judicata* had been taken. However, in all fairness Shri Salve made no attempt to contend that the suit as framed raises any triable issue on the basis of the only grounds on which the decree dated 16.11.1959 is alleged to be a nullity. He urged only two additional grounds, not pleaded in the existing plaint, which were raised unsuccessfully on behalf of the present respondent in the First Appeal and the Second Appeal against the compromise decree to contend that the suit is triable. He also urged that no specific objection for rejection of the plaint under Order 7 Rule 11 C.P.C. was taken earlier and, therefore, the matter be remanded for a fresh consideration on this basis.

To avoid protracting this litigation any longer, we gave opportunity to learned counsel for the respondent to prepare the case on this point. Shri Salve then filed an application for amendment of the plaint on the next day in any attempt to plead the additional grounds on which alone he claimed the suit to be triable.

We may first dispose of the application for amendment to the plaint filed by Shri Salve on January 12, 1990 during the course of hearing of the appeal. We do not find any ground to allow this application which apart from being highly belated, is clearly an after-thought for the obvious purpose of averting the inevitable consequence of rejection of the plaint on the ground that it does not disclose any cause of action or raise any triable issue. Moreover, the proposed amendments in the plaint, as summarised by Shri Salve, are to raise two grounds which are concluded by the earlier adjudication ending with dismissal of Ratanlal's Second Appeal against the impugned decree. The first is the consequence of rejection of the plaint under Order 7, Rule 11, C.P.C. in the earlier suit on 26.3.1959 and its revival on payment of court-fee by plaintiff, Motilal, in terms of that order itself. It is sufficient to mention that the High Court's order dismissing the Second Appeal arising out of that decree considers and rejects this argument and that order has become final between the parties since it was not challenged thereafter. The second point relates to delivery of possession of the Talkies on 5.3.1956 to plaintiff, Motilal, which is alleged to have been made under a wrong procedure. The facts narrated above clearly indicate that delivery of possession by the

- A Receiver, Shri K.S. Mishra, Advocate, to plaintiff, Motilal, was in pursuance of the Court's order dated 5.3.1956 after plaintiff Motilal had already deposited the sum of Rs.15,700 which was really in excess of the amount required to be paid by the plaintiff, Motilal, to defendant Nos. 1 and 2 resulting in subsequent refund of Rs.5,470 to plaintiff and the express compromise between parties which was
- B accepted by Ratanlal in his statement recorded by court on 22.2.1956. This contention also was rejected in the earlier adjudication ending with the High Court's dismissal of the Second Appeal which has become final. Moreover, this appeal is not against that decision of the High Court. There is no ground to allow the belated attempt to amend the plaint for taking these grounds. The application for amendment is,
- C therefore, rejected.

- We do not consider it necessary to decide the applicability of Rule 3A of Order 23, C.P.C. to the present suit since the matter can be disposed of even otherwise. The plaint averments specify the grounds on which the decree dated 16.11.1959 is alleged to be nullity. The
- D question is: whether any of these grounds raises a triable issue in the suit or in other words does the plaint disclose any cause of action? The specific case of the respondent as clearly mentioned in Para 3 of the impugned order dated 10.8.1989 of the High Court is as under:

- E "The plaintiff has never claimed that some fraud, coercion or misrepresentation is played. On the other hand, he says that due to the lapses while deciding the matter, decree passed by the Court below has become a nullity.

- It is, therefore, clear that the respondent/plaintiff does not challenge validity of the decree dated 16.11.1959 on the ground of fraud, coercion or misrepresentation but merely on the basis of lapses in deciding the earlier suit which have been specifically mentioned in para 6 of the plaint. It is, therefore, only on these limited grounds that the question of maintainability of the present suit has to be decided.
- F

- We shall, therefore, now refer to the grounds mentioned in para
- G 6 of the plaint which alone are relied on to disclose a cause of action for the suit. The first ground of nullity averred in para 6 of the plaint is that the decree was passed against a non-existent person — "M/s. Damdoolal and Bros." It is not the respondent's case that "M/s. Damdoolal and Bros." is a legal entity distinct from "M/s. Ratanla Damdoolal and Bros." so that the decree was against another person
- H As earlier stated, in the written-statement filed by respondent Ratan-

l, the description of defendant No. 2 was correctly given by respondent Ratanlal himself as "M/s. Ratanlal Damdoolal and Bros." and not "M/s. Damdoolal and Bros." Moreover, an order dated 19.8.1955 was made by the trial court permitting the correction to be made even though it was not duly incorporated in the plaint thereafter. It is significant that the first appeal and the second appeal filed against the compromise decree made by the respondent in which the firm as one of the appellants was correctly described as "M/s. Ratanlal Damdoolal and Bros." and not "M/s. Damdoolal and Bros". The decree was, therefore, against "M/s. Ratanlal Damdoolal and Bros." and this is how it was admittedly understood throughout by the respondent himself who represented the firm at every stage of the earlier suit till the final decision by the High Court, describing the firm correctly as "M/s. Ratanlal Damdoolal and Bros." Obviously this ground is non-existent.

The next ground of nullity pleaded is that the decree does not direct discharge of defendant No. 3, Puranmal. Admittedly, no relief was claimed or granted against defendant No. 3, Puranmal who was treated by all to be only a formal party. This ground also is, therefore, non-existent. The next ground is that there is no consideration for abandonment of the interest of Puranmal which renders the corresponding term void. Admittedly, the terms of compromise show payment of Rs.2,600 to Puranmal and execution of a sale-deed by Puranmal in favour of defendant Nos. 1 and 2 who alone thereafter remained the interested parties. This is how Shri Salve, learned counsel for the respondent summarised the entire grounds of nullity pleaded in the plaint.

On the admitted facts appearing from the record itself, learned counsel for the respondent, was unable to show that all or any of these averments in the plaint disclose a cause of action giving rise to a triable issue. In fact, Shri Salve was unable to dispute the inevitable consequence that the plaint was liable to be rejected under Order 7 Rule 11, C.P.C. on these averments. All that Shri Salve contended was that the Court did not in fact reject the plaint under Order 7 Rule 11, C.P.C. and summons having been issued, the trial must proceed. In our opinion, it makes no difference that the Trial Court failed to perform its duty and proceeded to issue summons without carefully reading the plaint and the High Court also overlooked this fatal defect. Since the plaint suffers from this fatal defect, the mere issuance of summons by the Trial Court does not require that the trial should proceed even when no triable issue is shown to arise. Permitting the continuance of such a suit is tantamount to licensing frivolous and vexatious litigation. This cannot be done.

- A It being beyond disput that the plaint averments do no disclose a cause of action, the plaint is liable to be rejected under Order 7 Rule 11, C.P.C. without going into the applicability of Order 23 Rule 3A, C.P.C. to the present suit. Having reached this conclusion, it is unnecessary to adopt the technical course of directing the Trial Court to make the consequential order of rejecting the plaint and, instead,
- B we adopt the practical course of making that order in this proceeding itself to avoid any needless delay in conclusion of this futile litigation.

Consequently, the appeal is allowed. The impugned orders of the Trial Court and the High Court holding the suit to be maintainable are set aside and the plaint is rejected under Order 7 Rule 11, C.P.C.

- C The respondent shall pay the appellants' costs throughout.

R.S.S.

Appeal allowed.