

IN THE HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT SRINAGAR

Reserved on: 28.02.2023
Pronounced on: 12.05.2023

CM (M) No. 27/2023
CM No.s 826/2023 & 827/2023
Caveat No. 2583/2022

Abdul Aziz Bhat & Ors

.....**Petitioner(s)**

Through: Mr. Ateeb Kanth, Adv.

V/s.

Hilal Ahmad Bhat

.....**Respondent(s)**

Through: Mr. M.A. Qayoom, Adv.

CORAM:

HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

1. This Petition arises from the order dated 08-12-2022 delivered by the Court of Principal District Judge Budgam. The Supervisory jurisdiction of this Court under Article 227 of the Constitution of India has been invoked for challenging the order, *supra*.

FACTS: -

2. The Respondent has instituted a suit being number 'File 122/N' challenging the family settlement deed executed on 15th July 2012 and registered on 19th July 2012 with further consequential reliefs. The Respondent made the following averments in the plaint: -

- (i) The mother of the Respondent was divorced by the Petitioner no. 1. At the time of pronouncement of divorce, a consensus was made between the mother of the Respondent and the Petitioner no. 1, whereby and whereunder, 12 Kanals and 7 Marlas of land were gifted to the Respondent by Petitioner No. 1. It has been further pleaded in the suit that the 12 Kanal & 7 Marlas land fall under different survey numbers viz Survey No. 644/307 (18 Marlas), Survey No. 41 (2 Kanal and 15 Marls), Survey No. 21 (1 Kanaland Half Marla), Survey No. 131 (13 Marlas), Survey No. 132 (10 Marlas), Survey No. 386 (2 Marlas), Survey No. 303 (1 Kanal 10 Marlas), Survey No. 304 (1 Kanal 15 Marlas), Survey No. 644/302 (10 Marlas), Survey No. 17 (7 Marlas), Survey No. 518 (13 Marlas), Survey No. 582/42 (12 Marlas). Further it has been pleaded that the said land is situated at village Agrikalan, Tehsil Pattan.
- (ii) Also, after negotiations, the possession of the land, *supra* and the residential house measuring 13ft. x 35 ft. and three shops measuring 10 ft. x 5 ft. situated under Survey No. 138 at village Agrikalan were also given to the Respondent and the Respondent is enjoying the physical possession of the land, residential house and three shops; however, the Petitioner no. 4 has now illegally taken possession of 18 Marlas of land falling under survey no. 644/307, situated in village Agrikalan, Tehsil Pattan.
- (iii) In 2012, the Petitioner No.1 behind the back of the Respondent executed a family settlement deed on 18th July 2022 and the same has been registered on 19th July 2022 before Sub Registrar,

Magam; it has been pleaded that the purpose of execution of the impugned family settlement is to disentitle the Respondent from 18 Marlas of land falling under survey no. 644/307 situated in village Agrikalan. It is also been pleaded that the Petitioner no. 1 has concealed a fact that Respondent is his real son and this concealment will render family settlement deed *non est* in law, as such deserved to be declared null and void.

- (iv) It has been pleaded, that the Respondent has discharged the duties of son towards his father i.e., Petitioner No. 1 and has been the obedient son and his father never has any complaints with him; also, Respondent has treated the Petitioner no. 2 & 3 as his own brothers and has also treated Respondent no. 4 to 6 as his own sisters, however, on the contrary the Petitioners have executed a family settlement deed which shall disentitle the real son i.e. the Respondent from the property to which he is legally entitled.
- (v) It has been pleaded, that the acts of Petitioners are unfortunate and against the shariat and settled Principles of law; also, it has been pleaded that Petitioner no. 1 has already gifted the property, *supra* to the Respondent and thus the Petitioners have no right to execute a family settlement deed viz-a-viz the land, *supra* as the Respondent is in the exclusive physical possession of the said land.
- (vi) It has been pleaded, that the requisite court fee has also not been paid by the petitioners on execution of the family settlement deed which has been registered on 19-July-2012, as such the

impugned family deed is illegal and also on the count that all the family members which includes the Respondent have not been a party to the impugned family settlement. It has further been pleaded that, a law is settled that if the single member of the family is left out of the family settlement deed then the said family settlement deed is illegal, inoperative, *non-est*, non-existent in the eyes of law.

- (vii) It has been pleaded, that the Petitioner no. 2 might also execute and register fraudulent document viz-a-viz the land measuring 4 Kanals falling under survey no. 1585 along with residential house and the shopping mall situated in town Magam in favour of some his children, which act will be illegal on the part of Petitioner no. 1 as the Respondent would be deprived of his share in the said property.
- (viii) It has been pleaded, that only 18 Marlas of the land from the suit property which have been gifted to the Respondent are in illegal possession of Petitioner no. 4. Further it has been pleaded the Respondent is a businessman and always remains busy with his business at Srinagar, thus taking advantage of his absence the Petitioner No. 4 has forcibly taken possession of 18 Marlas of land, *supra*. Further, it has been pleaded that the respectable persons of the area tried to prevail upon the Petitioner no. 4 to return the possession of 18 Marlas of land to the Respondent but the Petitioner no. 4 categorically refused to do so.
- (ix) It has been pleaded, the cause of action has accrued to the Respondent on the date when he got the knowledge of the

registration of family settlement deed dated i.e., 19th July 2012 and thereafter the Petitioners tried to dispossess the Respondent from the suit property illegally. Further, it has been pleaded that the cause of action is a recurring one. The suit has also been valued at Rupees 300 for the purpose of court fee and jurisdiction in accordance with suit valuation act and the court fee act.

Appointment of Receiver

3. Suit was filed before the Court of Munsiff, Magam (Budgam). On 1st December 2015, the Court of Munsiff, Magam appointed Petitioner as a receiver of the properties, *supra* with the direction to submit the accounts of the said property quarterly before the Court. However, the Respondent, further moved an application under order 40 Rule 4 and 5 of Civil Procedure Code for enforcement of duties of receiver and also sought change of receiver on the grounds that, vide order dated 01-12-2015, petitioner was appointed as receiver of suit property with the direction to submit the accounts of the same quarterly before the court, however, receiver has failed to submit the account and has cut down poplar trees standing on the suit property, as such has caused damage to the suit property. Also, it was averred that the receiver has fenced the suit property which has diminished the market value of the suit property; in these circumstances, the aforesaid application was filed for a direction to the receiver to submit the accounts with the further prayer that the Tehsildar, Pattan be appointed as the receiver of the suit property.

4. The court of Additional/Special Mobile Magistrate (Munsiff), Beerwah dismissed the said application vide order dated 21-11-2017.

First Civil Miscellaneous Appeal

5. The Respondent assailed the order dated 21-11-2017 passed by the Learned Additional Special Mobile Magistrate (Munsiff), Beerwah, before the court of Principal District Judge, Budgam by filing a Civil Miscellaneous Appeal under order 43 of Civil Procedure Code.
6. The appellate court has set-aside the order dated 21-11-2017 passed by the Special Mobile Magistrate, (Munsiff), Beerwah and remanded the matter back to the 'Trial Court' i.e., Learned Special Mobile Magistrate, Munisff, Beerwah with a direction to pass order afresh after hearing the parties in accordance with law. However, appellate court directed the trial court to examine the pleadings and determine the petition as well as the question of jurisdiction within a period of 30 days after record is received back. Also, it was directed that if circumstances warrant, the trial court shall proceed in terms of Order 14 Rule 2 (2) of Code of Civil Procedure, 1908.

Transfer of Suit

7. Thereafter, appallingly, without any rhyme and reason, the Court of Principal District Judge, Budgam vide order dated 13-09-2021 has transferred the suit from the court of Learned Special Mobile Magistrate, Munisff, Beerwah to the Court of Sub Judge (CJM) Budgam. **The decision to transfer the case to the court of Sub judge (CJM), Budgam on the face of it looks arbitrary, however, at**

this stage this court shall exercise restraint to adjudicate upon the said issue.

Preliminary Issue and Application for Amendment

8. On transfer of the file, the Court of Sub Judge (CJM), Budgam proceeded with the case. Since, as per the directions of the Court of Principal District judge, Budgam, the Court of Sub Judge had to examine the issue of territorial jurisdiction within a period of 30 days, the court of Sub-judge (CJM), Budgam formulated a preliminary issue in the matter, as follows:

“Whether this Court is held territorial jurisdiction to try this suit? OPP.”

After formulating the issue on territorial jurisdiction, what transpires from the record placed on record by the petitioners is that the parties were directed to advance argument on the issue so formulated on the next date of hearing which was fixed on 08-10-2021. On the said date, Respondent through his counsel submitted at bar that he wants to make amendment in the suit because of which the arguments could not be heard on that day and the matter was posted to 18-11-2021, on which date the Respondent through his counsel again sought time to make application for amendment to suit which was vehemently objected by the petitioners through their counsel who submitted that court lacked inherent jurisdiction in the suit because of the fact that the suit property is not situated within the territorial limits of district Budgam, as such no ancillary application could be heard and disposed off by the Court. Accordingly, the matter was reserved for orders, however, in the meantime, Respondents through their counsel made an application for

amendment of plaint along with amended plaint. **Through this amendment, the *quantum of suit land* has been sought to be enhanced by 4 Kanals falling under survey no. 1585 situated at Estate Malgam, District Budgam, just to bring the suit within the territorial jurisdiction of the Court of Sub Judge (CJM), Budgam.**

Order dated 22.11.2021 passed by Court of Sub Judge, Budgam

9. Now, since the two issues were pending adjudication before the Court of Sub Judge (CJM), Budgam, *firstly*, the issue was to be decided with regard to territorial jurisdiction to try the suit. *Secondly*, to decide the Application for amendment moved by the Respondent. The Learned Court of Sub Judge (CJM), Budgam took a correct view by holding that the issue of territorial jurisdiction has to be decided first and if the issue goes against the Respondent, then the suit is to be returned to the Respondent under Order 7 Rule 10 of CPC along with the Application for Amendment. Court of Sub Judge, Budgam, on deciding the issue of territorial jurisdiction, held that the whole of the suit land falls outside the territorial limits of District Budgam. Further, the Court held that in terms of mandate of Section 16 of CPC, a suit for partition of immovable property or for the determination of any other right to or interest in immovable property shall be instituted in the court within the local limits of whose jurisdiction the property is situated. It was held, that once the court lacks inherent jurisdiction to try the suit, the court cannot entertain and dispose of any other ancillary matter pertaining thereto. The Learned Court of Sub Judge (CJM) Budgam rightly explained the fundamental difference between the powers exercised

under Order 7 Rule 10 and under Order 7 Rule 11 of CPC by holding that former relates to the return of plaint in the factual circumstances where the court lacks the jurisdiction to try the suit and the later relates to rejection of the plaint on the grounds mentioned therein. In case of Order 7 Rule 10 of CPC, the court lacks jurisdiction and therefore returns the plaint because the court cannot proceed ahead without jurisdiction. On the contrary under Order 7 Rule 11, the court is having inherent jurisdiction but for the bar created by any law. In view of the same, the learned trial court held that the Court lacks inherent jurisdiction to try the suit, as such cannot entertain and dispose of ancillary matters like amendment of plaint. Axiomatically, the Leaned Court of Sub Judge (CJM), Budgam has rightly held that application to make amendment in the plaint and subsequent presentation of the amendment application will not be of any consequence, since the court lacks the inherent jurisdiction to try this suit, accordingly the plaint was returned to the plaint with all ancillary applications including the amendment application to present the same before the proper court having jurisdiction

Second Miscellaneous Appeal

10. The Respondent invoked the jurisdiction of the appellate Court and challenged the order dated 22-11-2021 passed by the Court of Sub Judge (CJM) Budgam returning his plaint. The court of Principal District Judge, Budgam vide impugned order dated 08-12-2022 has quashed the order dated 22-11-2021 passed by the Court of Sub Judge (CJM), Budgam on the ground *that it is trite in law that the trial court should have decided the application for amendment of plaint after*

hearing the parties in accordance with the law and thereafter, i.e. post such determination should have proceeded to determine the issue of territorial jurisdiction formulated by the said Court. On this count the order dated 22-11-2021 passed by the Court of Sub Judge (CJM) Budgam was set-aside.

11. Heard. Reserved. Respondent is on caveat. Caveat discharged. With the consent of the parties, the matter is taken up for final disposal

Question of Law to be deliberated upon by this Court

12. The moot question which falls for consideration before this Court is that when the court lacks territorial jurisdiction, can it even entertain an application for amendment of the plaint, which amendment would vest territorial jurisdiction in the court. In other words, when issue of territorial jurisdiction arises in the civil suit and simultaneously an application for amendment of suit is filed, then whether trial court has to decide “Issue of Territorial Jurisdiction” in the first instance or whether trial court has to decide “Application for Amendment” in the first instance.

Legal Analysis

13. Having considered the matter, I am of the opinion that the issue of territorial jurisdiction has to be decided first. If the court has no jurisdiction to try the suit, plaint along with application seeking amendment has to be returned. There is a fundamental distinction between an application filed under Order 7 Rule 10 and an application filed under Order 7 Rule 11. An application under Order 7 Rule 11 of the CPC is adjudicated on the ground that plaint does not disclose the

cause of action or plaint suffers from some other technical defect viz of valuation, court fee paid or the claim therein being barred by any law, as such cannot be equated with an application under Order 7 Rule 10 of the CPC which is adjudicated on the ground of the court not having territorial jurisdiction. This becomes important because it is settled preposition of law that when the court lacks territorial jurisdiction, it cannot even entertain an application for amendment of a plaint, which amendment would vest territorial jurisdiction in the court. The court have to examine the plaint *as existing* and come to the conclusion whether it discloses the court to be having territorial jurisdiction or not; if the averments contained in the plaint *as existing* does not disclose the court to be having territorial jurisdiction and amendment is sought to vest territorial jurisdiction in the court , then the only option for the court is to return the plaint and the court will have no jurisdiction to even consider the application for amendment of the plaint and which amendment, if allows, would disclose the plaint as having necessary averments for the court to have jurisdiction to entertain this suit.

14. **Saying so, a plaint is the very foundation of the civil suit, it is bedrock that brings out the necessary facts which forms the basis for the courts to adjudicate upon the dispute.** The suit is said to be instituted on the date of presentation of the plaint and it is solely on the basis of the averments on the plaint as it exists on the day of presentation that primary questions of jurisdiction and maintainability are adjudicated upon. While returning a finding on the issue of jurisdiction, the court has to see whether it has the requisite territorial and pecuniary jurisdiction to entertain the suit if the said question is

answered in the negative, the court exercise its powers under Order 7 Rule 10 of Civil Procedure Court 1908 and returns the plaint for it to be presented to the court having necessary territorial and pecuniary jurisdiction to entertain the suit. It would, therefore, be safe to say that an order under Order 7 Rule 10 of CPC does not put the dispute to an end as it is not adjudication on the merits of the case.

15. Further, Order 6 Rule 17 CPC allows a party, at any stage of the proceedings, to make such amendments which are necessary for adjudication of the disputes. The Courts initially grappled with the question whether the benefit of amendment of pleadings can be allowed even when an application under Order 7 Rule 10 CPC was pending or Order 7 Rule 11 CPC was pending before it.

16. While the courts have been forthcoming and generous in allowing application seeking amendment of pleadings in the face of an application pending under Order 7 Rule 11 of CPC, however, same is not case in allowing application seeking amendment of pleadings before deciding an application under Order 7 Rule 10 of CPC.

17. **The Delhi High Court in a case titled *HSIL V/s Imperial Ceramic* 2018 (73) PTC 556 (Del) dismissed an Application moved by the Plaintiff (therein) under Order 6 Rule 17 of CPC to bring forth certain additional facts in support of the earlier pleaded cause of action and simultaneously allowed the Application under Order 7 Rule 10 of CPC.** Rightly, if the amended application, if allowed, would have the effect of rendering the preliminary issue related to territorial jurisdiction or the application seeking return of plaintiff infructuous, the Hon'ble Court proceeded to disallow the said amendment application

stating *inter alia* that once the plaint failed to disclose the terrestrial jurisdiction in his favour, the court cannot assume jurisdiction to entertain/allow an application under Order 6 Rule 17 of CPC and has to mandatorily return the plaint. The relevant portion of the judgment is reproduced here under:

“21. Thus, if the plaint in these suits as it exists, does not disclose this court to be having territorial jurisdiction then the only option for this Court is to return/reject the plaint and this court would not have jurisdiction to even consider the application of the plaintiff for amendment of the plaint and which amendment, if allowed, would disclose the plaint as having necessary averments for his Court to give jurisdiction to entertain the suit.

22. The Counsel for the plaintiff has contended that the plaintiff, even after return/rejection of the plaint, would be entitled to sue the defendants afresh in this Court only by making the averments in the fresh plaint to be filed, averments which are sought to be made by way of amendments in these pending suits. It is argued that once it is so, this Court should not, on account of technicality, compel the plaintiff to follow the said procedure.

23. Though undoubtedly so but once the law is found to be aforesaid, I cannot, in the name of “technicalities being not allowed to come in the way of justice” violate the law or decide contrary to law.....

18. Also, the Rajasthan High Court in a case titled *Kundan Mall & Ors V/s Thikana Siryari & Ors*, AIR 1959 RAJ 146 has held that if the suit as framed was beyond the jurisdiction of the ‘lower court’ than they

would have had no jurisdiction to make any amendment. The relevant portion of the Judgment is reproduced is here in below:

“It is true that if the suit as framed were beyond the jurisdiction of the lower courts, they would have not jurisdiction to make any amendments. However, from the plaint as it stands, it cannot be said that the lower court had no jurisdiction in the suit when it was filed. The Civil Courts would have been, therefore, perfectly, justified in exercising their powers of amendments, even though the consequences of the amendments would be that the suit might become beyond the jurisdiction of the Civil Courts. If as a result of amendments, the suit becomes one not cognizable by Civil Courts, they would have to return the plaint for presentation to proper court.”

19. The High Court of Kerala in its case titled **“T.K. Sreedharan V/s P.S. Job, AIR 1969 KER 75** followed the decision of the Rajasthan High Court in Kundan Mall’s Case, *supra* and held that if the plaint in its original does not disclose the territorial jurisdiction of the courts then the court would have no jurisdiction to make any amendment. The relevant portion of the judgment is reproduced here under:

“In Kundan Mal V/s ThikanaSiryari, AIR 1959 Raj 146, a Single Judge of the Rajasthan High Court disagreed with the decision in AIR 1928 Mad 400 and observed:

“It is true that if the suit as framed were beyond jurisdiction of the lower courts, they would have no jurisdiction to make any amendment. However, from the plaint as it stands, it cannot be said that the lower court had no jurisdiction in the suit when it was filed. The Civil Courts would have been, therefore, perfectly justified in exercising their powers of amendment, even though the consequences of the amendment

would be that the suit might become beyond the jurisdiction of the Civil Courts. If as a result of amendment, the suit becomes one not cognisable by Civil Court they would have to return the plaint for presentation to proper Court.”

20. In view of the above factual and legal position, that while adjudicating upon the issue of maintainability, if an application under Order 7 Rule 11 of CPC is filed and subsequently application seeking amendment is moved then said application can be moved in the face of an earlier pending application seeking rejection of the plaint. It is important to construe the interplay of Order 7 Rule 11 of CPC and Order 6 Rule 17 of CPC to achieve the object with which the provision for amendment of pleading is provided for in the CPC i.e., to avoid multiplicity of proceedings, to save precious judicial time and avoid expenses for the litigants. Having said so, I am of the opinion:

A. The application for amendment of plaint, even if filed to defeat the pending application under Order 7 Rule 11 of the CPC, has to be heard first, as it will not extend to a case where averments contained in the plaint as existing does not disclose the court to be having territorial jurisdiction and the amendment is sought to incorporate averments to disclose the court to be having territorial jurisdiction.

B. However, I am of the opinion that if the application for amendment of plaint is filed to defeat the preliminary issue framed by the court to decide the territorial jurisdiction or to defeat the application filed under Order 7 Rule 10 of the CPC, then the preliminary issue with regard to the territorial

jurisdiction or the application under Order 7 Rule 10 has to be decided first.

C. If the court reaches to a conclusion that the plaint in the suit as it exists, does not disclose the court to be having territorial jurisdiction, then the only option for that court is to return the plaint and the court would not have jurisdiction to even consider the application for amendment of the plaint and which amendment, if allowed, would disclose the plaint as having the necessary averments for the court to have jurisdiction to entertain the suit. Correspondingly, the court will have to return the suit under Order 7 Rule 10 along with the Application for Amendment to be presented before the proper court having jurisdiction in the case.

Conclusion

21. Applying the aforesaid Principals of law in the facts of the present case, the learned court of Sub Judge (CJM) Budgam has rightly held that when confronted with the situation of having to decide the issue related to territorial jurisdiction, in the first instance or to decide application for amendment which would vest territorial jurisdiction in the court, *first of all*, the court has to decide the issue of the territorial jurisdiction. Accordingly, the Learned Court of Sub Judge (CJM), Budgam came to the conclusion that from the perusal of the plaint as it exists, the court lacked inherent jurisdiction to try the suit, as such cannot also entertain and dispose off ancillary matters like amendment of plaint. Accordingly, plaint was returned to the plaintiff along with the ancillary applications to present the same before the proper court.

On appeal, the Court of Principal District Judge, Budgam has taken a view which cannot be sustained in the eyes of law, wherein, it has been held that the benefit of amendment of plaint can be allowed even when an application under Order 7 Rule 10 of CPC was pending before the trial court. In view of the above the impugned order dated 08-12-2022 passed by Principal District Judge, Budgam does not pass the test of law, and the same is set aside. The matter is remanded back to the Court of Principal District Judge, Budgam to decide the Civil Miscellaneous Appeal on merits as to whether the trial court was having territorial jurisdiction to try the suit or not by relying on the plaint as it existed on the date of presentation before the trial court within a period of one month, *preferably*.

22. Parties shall cause their appearance before the Appellate Court i.e. the Court of Principal District Judge, Budgam on 22.05.2022.

23. Petition is disposed of. No order as to costs.

24. Registry to forward copy of this order to the Court of Principal District Judge, Budgam.

(WASIM SADIQ NARGAL)
JUDGE

Srinagar
12.05.2023
Gh. Nabi / Secy

Whether the order is speaking. : Yes
Whether approved for reporting : Yes