

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

Reserved on: 17.02.2023
Pronounced on: 21.02.2023

RFA No.50/2022

DR. JAHANGIR IQBAL TANTRAY ... APPELLANT(S)

Through: - Mr. Shuja-ul-Haq, Advocate.

Vs.

FARMEEDA AKHTAR ...RESPONDENT(S)

Through: - None.

CORAM: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

1) As Benjamin Franklin once remarked – “great haste makes great waste”, the courts while endeavouring to deliver speedy justice, must never deny justice in overzealousness to dispose cases.

2) Challenge in this Civil Miscellaneous Appeal in terms of Order XLIII of Code of Civil Procedure, 1908 ('Code' for short) has been thrown to order dated 10.09.2022 propounded by the Court of learned Principal Judge Family Court, Srinagar (hereinafter referred to as 'trial court') in case No.2782/2022 titled 'Jahangir Iqbal Tantray vs. Farmeeda Akhtar', vide

which learned trial court has returned the suit filed by the appellant for presentation before the court of competent jurisdiction.

3) Shorn of verbosity, factual matrix of the case set out by the appellant in the trial court is that appellant preferred a suit for declaration and permanent injunction for a decree of declaration that the divorce pronounced by him upon the respondent on 22.04.2022 had attained finality after the expiry of three months period, a decree of declaration declaring that the respondent/defendant has no right or claim in the landed property measuring 21 marlas bearing Survey No.10 (Old 3) Khewat No.162/157 situate at Mouza Habak Khushki, Srinagar, Kashmir, purchased by him in 2013 after raising loan from the State Bank of India, Srinagar, a decree of declaration declaring that respondent/defendant has no right, claim or interest upon the house situate at Loren Mandi, Poonch, Jammu, constructed by him after raising loan from the J&K Bank, Srinagar, and a decree of permanent prohibitory Injunction restraining the respondent/defendant from interfering or causing interference into his peaceful and smooth life.

4) The appellant has questioned the impugned order, primarily, on the ground that since parties to the suit are living at Hazratbal Srinagar, the marital dispute between them arose at Srinagar, divorce was also pronounced/communicated upon the respondent/defendant and the property in question also falls within the territorial jurisdiction of the learned trial court, therefore, the impugned order is *per se* illegal, arbitrary, perverse and perfunctory. It is also case of the appellant in the trial court that it has been pleaded and agitated by the respondent/defendant in the application filed by her under Section 12 of the Protection of Women From Domestic Violence Act that divorce has taken place in Srinagar, therefore, suit filed by the appellant could not be returned for want of jurisdiction.

5) The respondent despite service did not choose to appear and, accordingly, is set *ex parte*.

6) It is trite position of law that in dealing with the subject, whether a civil court's jurisdiction to analyze a suit is barred or not, it is necessary to bear in mind that every opinion should be made in support of the jurisdiction of a civil court. The refusal of jurisdiction, rejection of plaint or return thereof by a civil court to

entertain civil causes should not be easily inferred unless the appropriate law contains express terms to that effect or points to a significant and inevitable implication of nature.

7) In order to appreciate the contours of controversy in the right perspective, we need to analyse some indispensable provisions of the Code. Section 9 of the Code makes it clear that Courts, subject to other provisions of the Code, shall have jurisdiction to try all suits of a civil nature except those whose cognizance is either expressly or impliedly barred. Sub-section (1) of Section 26 stipulates that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. Section 27 deals with the issuance of summons to the defendants and it provides that where a suit has been 'duly instituted', a summons may be issued to the defendant to appear and answer the claim and may be served in the manner prescribed etc. Section 33 of the Code postulates that the Court, after the case has been heard, shall pronounce judgment and on such judgment, a decree shall follow.

8) Order V Rule 1(1) reflects the substantive provision contained in Section 27 of the Code and it lays down

that when a suit has been 'duly instituted', a summons may be issued to the defendant to appear and answer the claim and to file the written statement of his defence etc.

9) It is axiomatic upon examination of the provisions of Section 27 read with Order V Rule 1(1) of the Code, that when a suit is 'duly instituted' a summons may be issued to the defendant. The use of expression 'duly instituted' has to be seen in the context of the provisions of Orders VI and VII of the Code.

10) Adverting to the present case, a perusal of copy of the plaint annexed with the present appeal indicates that it is specific case of the appellant in the trial court that the respondent/defendant approached Chief Proctor, Kashmir University, for intervention into the marital dispute of the parties and the respondent asked for divorce. It is further case of the appellant/plaintiff that he pronounced single Talaq upon the respondent on 20.04.2022 in Srinagar and consequently a deed of declaration of divorce was prepared by the appellant/plaintiff on 30.07.2022 and Fatwa given by Mufti Nasir-ul-Islam was pronounced in Srinagar after the expiry of three month's period from the date of

pronouncement of Talaq on 20.04.2022. It is also specific case of the appellant/plaintiff in the trial court that the respondent/defendant has been residing in the quarter allotted to him by the University at Mirzabagh, Kashmir University, after she was posted as a Lecturer in HSS Boys, Ganderbal, after 24.04.2021. It is also pertinent to mention that the appellant/plaintiff also seeks a decree of declaration with respect to the landed property situate at Mouza Habak Khushki, Srinagar, though the house, with respect to which the appellant also seeks declaration, is situated at Loren Mandi, Poonch, Jammu. Therefore, it is evident from the title of the suit as also from the recitals of the plaint that marital dispute between the parties arise at Srinagar, one of the landed properties situate at Srinagar, the divorce was pronounced at Srinagar and above all wife of the appellant resides in the quarter at Kashmir University, Srinagar, i.e. within the territorial jurisdiction of the trial court. Therefore, it is neither a case of return of plaint envisaged under Order VII Rule 10 nor a case of rejection of plaint within the meaning of Order VII Rule 11 of the Code.

11) It needs a specific mention that first proviso to Order V Rule 1(1) of the Code itself provides a situation

where summons must not be issued and that happens when a defendant appears at the presentation of a plaint and admits the plaintiff's claim. In all other cases, when a suit has been duly instituted and is not hit by either Order VII Rule 10 or Order VII Rule 11 of the Code, summons have to be issued to the defendant. Therefore, it was incumbent upon learned trial court to have issued summons to the defendant, particularly because the respondent/ defendant had not appeared at the time of presentation of the plaint and did not admit the claim of the appellant/plaintiff.

12) At the stage of admission of a suit, it is only to be seen as to whether it has been duly instituted or not. The recitals/statements contained in the plaint are to be taken by way of demurer and they can only be proved or disproved through evidence based on issues that may be struck.

13) The obligation to dismiss a suit at the threshold or return a plaint for want of jurisdiction arises only when it is a pure issue of law. The issue of jurisdiction, depending on question of fact or mixed question of law and fact, must be decided on merits. If the court finds, on trial, that the case is not cognizable by the court for

want of territorial or pecuniary jurisdiction, the plaint will be ordered to be returned for presentation to the proper court and if the court finds that, having regard to the nature of the suit, it is not cognizable by the class of courts to which it belongs, the plaintiff's suit will have to be dismissed in its entirety. However, if the question of jurisdiction is a question of fact or a mixed question of fact and law, the suit cannot be thrown overboard lock, stock and barrel without affording an opportunity to the plaintiff to establish the case

14) As discussed earlier, it is a specific case of the appellant/plaintiff that not only the parties to the suit reside but the cause of action with respect to the matrimonial dispute arose as also the part of the landed property situate within the territorial jurisdiction of the trial court and since the respondent/defendant, a female is stated to be residing within the territorial jurisdiction of the trial court, it shall also be convenient for her to appear and prosecute case in the trial court. We should not endeavour to hand out hasty decisions, “the hurrier I go, the behinder I get” – as remarked by Lewis Carroll, Alice in Wonderland.

15) Having regard to what has been observed and discussed above, the appeal is allowed and the impugned order being devoid of merit is set aside. Learned trial court is directed to entertain the suit and proceed with the trial of the case in accordance with law.

16) A copy of this order be sent to learned trial court for information and compliance.

**(RAJESH SEKHRI)
JUDGE**

**Srinagar,
21.02.2023
"Bhat Altaf, PS"**

Whether the order is speaking: Yes

Whether the order is reportable: Yes

