

M/s M. M. Bilaney and Company v. M/s Jamna Auto Industries (Sodhi, J.)

or to file an affidavit in reply. They are in fact the contesting respondents in this case and in default of their appearance the averments in the petition pertaining to them must be deemed to be true. On that basis the petitioner is clearly being denied the right to be considered and to secure admission to the Medical Colleges on the wholly extraneous ground that he had travelled on a British Passport and was thus ineligible. This view of respondents Nos. 2, and 3, is patently erroneous and no rule or provision of law has been pointed out to us to warrant the same.

(14) We, therefore, allow this petition and restrain the respondents from refusing to admit Malkiat Singh petitioner to the 1st Year Class of the M.B.B.S., Course at Amritsar or Patiala on the ground that the domicile certificate produced by him is not valid or on the ground that he is holding a British Passport. Consequently we further direct that the petitioner be admitted to the present 1st Year Class of the M.B.B.S., in the Medical College at Amritsar if he is not disentitled to be so admitted on the ground of the particular percentage of marks obtained by him in the first year of B.Sc. (T.D.C.).

(15) In the circumstances of the case, however, we make no order as to costs.

R.S. Narula, J.—I agree.

K.S.K.

CIVIL MISCELLANEOUS

Before H. R. Sodhi, J.

M/S M. M. BILANEY & COMPANY,—Petitioners.

versus

M/S JAMNA AUTO INDUSTRIES,—Respondents.

Civil Miscellaneous No. 27-M of 1968.

October 4, 1968.

Civil Procedure Code (Act V of 1908)—Ss. 22 and 23—Application for transfer filed by a defendant—Defendant already having raised objections regarding the jurisdiction of the Court in which the suit pending—Application in such circumstances—Whether lies—Provisions regarding time of filing the application—Whether directory.

Held, that Section 22 of the Code of Civil Procedure is attracted only where a suit could have been instituted in any one of two or more Courts and has been instituted in one of such Courts, but where the plea of the defendants is that the Court in which the suit is pending has no jurisdiction, it cannot be said that such a suit can be instituted in that Court. The Court has yet to decide the question of its jurisdiction raised by the defendant and if it is ultimately held that that Court has no jurisdiction, no question of transferring the case to another Court can possibly arise. It is only when both the suits are triable in either of the Courts that a petition, subject to other conditions being satisfied, can be made under Sections 22 and 23 of the Code. (Para 3)

Held, that an application under Section 22 of the Code has to be made at the earliest possible opportunity and in all cases where issues are settled, at or before such settlement. The section curtails the well recognised right of the plaintiff as an *arbiter litis* to choose his own forum and Courts are generally reluctant to interfere with such a right. When the legislature has laid down certain conditions on the fulfilment of which alone this right of the plaintiff can be curtailed, it will be contrary to all well established canons of interpretation of statutes to hold that such conditions should be considered to be only directory and not mandatory. Any such interpretation will run counter to the intention of the legislature as to be seen in sections 22 and 23 of the Code. Hence the provision regarding the time of filing the application under these sections is mandatory.

(Paras 4 and 5)

Application under Sections 22, 23 and 151 of the Civil Procedure Code praying that the suit No. 319 of 1967 be transferred from the Court of the Sub-Judge, 1st Class, Jagadhri, which is subordinate to this Hon'ble Court, to the High Court of Judicature at Bombay.

J. K. HIRANANDANI, ADVOCATE, DELHI, LALIT MOHAN SURI, ADVOCATE, with him, for the Petitioners.

V. P. GANDHI AND MUNSISHWAR PURI, ADVOCATES, for the Respondents.

JUDGMENT

SODHI, J.—This is a petition preferred by Messrs M. M. Bilaney and Company, a partnership firm, who are defendants in a suit filed at Jagadhri by the respondents Messrs Jamna Auto Industries. It is alleged that the petitioners are consultant engineers carrying on their business at Bombay and the respondents decided to have their services in order to expand their factory at Jagadhri. There was correspondence between the parties, as a result whereof the petitioners claimed that the terms and conditions of their appointment

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were settled, and they advanced an aggregate claim of Rs. 41,036 with interest against the plaintiff respondents. The plaintiffs on the other hand wanted the return of Rs. 7,500, paid by them to the petitioners denying if there was any completed contract. It is not necessary for the purpose of this petition to go into the details of the pleading of the parties and suffice it to mention that the plaintiffs instituted a suit on 17th May, 1967 for the recovery of the said amount of Rs. 7,500 in the Court of the Subordinate Judge, First Class, Jagadhri. Summons of the suit were served on the defendants petitioners and they filed a written statement. Issues in the suit were settled on 5th February, 1968. The petitioners had also filed a suit for their claim against the respondents in the High Court of Bombay on 23rd August, 1967.

It is conceded by Mr. J. K. Hiranandani, learned counsel for the petitioners, that they have taken an objection to the jurisdiction of the Court at Jagadhri in the written statement filed by them and an issue has also been struck to that effect. After the settlement of issues on 5th February, 1968, the petitioners filed the present Civil Miscellaneous petition No. 27-M of 1968 on 12th June, 1968 purporting to be under sections 22, 23 and 151 of the Code of Civil Procedure. In this petition, it has been prayed that the case at Jagadhri be transferred to the Bombay High Court so that both get consolidated and disposed of together. The plea raised is that there are common questions of fact and law arising in both the suits and that the Bombay suit is a more comprehensive one in which all the disputes raised between the parties can be conveniently settled. An argument of balance of convenience is also raised in favour of both the suits being tried at Bombay. The petitioners served a notice on the respondents as required under section 22 of the Code of Civil Procedure before making this petition.

(3) I have heard Mr. J. K. Hiranandani, learned counsel for the petitioners, and Mr. V. P. Ganidhi, learned counsel for the respondents. A preliminary objection has been raised by Mr. Gandhi that no such petition for transfer, as made in this Court, is competent since sections 22 and 23 of the Code do not apply to the circumstances of the present case. The contention is that the petitioners, who are defendants in the suit at Jagadhri, having raised an objection as to the jurisdiction of the Court there cannot at the same time, without getting a decision on that issue, approach this Court for transfer of the case. The other contention

of Mr. Gandhi is that the petition is belated and not within the contemplation of sections 22 and 23 of the Code inasmuch as such a petition, if at all it could be made, should have been made before the settlement of issues. The provisions of sections 22 and 23 of the Code may here be reproduced with advantage and they are in the following terms:—

- “22. Where a suit may be instituted in any one of two or more Courts and is instituted in one of such Courts, any defendant, after notice to the other parties, may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to have the suit transferred to another Court, and the Court to which such application is made, after considering the objections of the other parties (if any), shall determine in which of the several Courts having jurisdiction the suit shall proceed.
23. (1) Where the several Courts having jurisdiction are subordinate to the same Appellate Court, an application under section 22 shall be made to the Appellate Court.
- (2) Where such Courts are subordinate to different Appellate Courts but to the same High Court, the application shall be made to the said High Court.
- (3) Where such Courts are subordinate to different High Courts, the application shall be made to the High Court within the local limits of whose jurisdiction the Court in which the suit is brought is situate.”

A bare reading of these provisions of law makes it abundantly clear that the present petition is wholly misconceived. Section 22 can be attracted only where a suit could have been instituted in any one of two or more Courts and has been instituted in one of such Court, but where the plea of the defendants is that one Court has no jurisdiction it cannot be said that such a suit could be instituted in that Court. The trial Court at Jagadhri has yet to decide the question of its jurisdiction raised by the petitioners and if it is ultimately held that Court has no jurisdiction, no question of transferring the case to the Court at Bombay can possibly arise. It is only when both the suits are triable in either of the Courts that a petition, subject to other conditions being satisfied, can be made under sections 22 and 23 of the Code. The petitioners cannot take up inconsistent positions and

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blow both hot and cold together. The petition, therefore, merits dismissal on the short ground that the petitioners have taken up the plea of want of jurisdiction of the civil Court at Jagadhri. I am fortified in this view of law by a case reported as the *National Engineering Company, Karachi v. The Rattan Engineering Company, Lahore* (1) where Abdul Qadir, J. observed that where the jurisdiction of one of Courts is denied an application for transfer under sections 22 and 23 cannot lie. The same view has been taken by the Allahabad High Court in a case reported as *Firm Babu Lal Girdhari Lal v. Seth Kotumal* (2).

(4) The petition suffers from another infirmity as well inasmuch as it is very belated. It is clearly stated in section 22 that such a petition must be made at the earliest possible opportunity and in all cases where issues are settled at or before such settlement. It will be noticed that the issues in the present case, as already stated, were framed on 5th February, 1968 and the petition for transfer was made almost after four months on 12th June, 1968, when 20th June, 1968 was the date fixed for evidence. It was rather to prevent the evidence being recorded that such a petition seems to have been made.

(5) Mr. Hiranandani contends that the conditions for making a petition, as given in sections 22 and 23 of the Code, are only directory and not mandatory. It is a startling proposition submitted by the learned counsel, and he could not support it by any decided authority. Any such interpretation as suggested by the learned counsel will completely negative the object and scheme of these provisions of law. The legislature has laid down some conditions pre-requisite to the making of such a petition for transfer in most unequivocal terms and they are that—

- (1) the suit sought to be transferred is cognizable by either of the two Courts;
- (2) there must be a notice given to the other party before a petition for transfer is moved; and
- (3) the petition for transfer must be made at the earliest possible opportunity and in all cases at or before the settlement of issues.

Section 22 of the Code curtails the well recognised right of the plaintiff as an *arbiter litis* to choose his own forum and Courts are generally reluctant to interfere with such a right. When the legislature has

(1) A.I.R. 1923 Lahore 288 (2).

(2) A.I.R. 1941 All. 27.

laid down certain conditions on the fulfilment of which alone this right of the plaintiff can be curtailed, it will be contrary to all well established canons of interpretation of statutes to hold that such conditions should be considered to be only directory and not mandatory. Any such interpretation will run counter to the intention of the legislature as to be seen in sections 22 and 23 of the Code. In a case reported as (*Pandit Shiv Datt and others v. Pandit Motiram and another*) (3) Zafar Ali, J. dismissed an application for transfer made under section 22 of the code on the ground that such application had not been presented at the earliest opportunity or before the settlement of issues. While rejecting the application, the learned Judge held that the language of section 22 of the Code was mandatory.

(6) Mr. V. P. Gandhi also relied on *Dr. Rajnath v. L. Vidya Ram and others* (4) where an application made six months after the settlement of issues was dismissed it being held that the conditions given in section 22 were not complied with. In *Firm Behari Lal Kanhaya Lal v. Official Receiver, Insolvent Estates, Lahore* (5) where a similar matter came up for consideration, Broadway, J. held that the provisions of section 22 were mandatory and that application under this section must be made at the earliest opportunity and in a case where issues are settled at or before such settlement, is made.

(7) It is also not possible to accept the contention of Mr. Hiranandani that a liberal construction should be given and that the use of the word 'at' suggests that the petition for transfer can be made 'at any time after the issues have been settled'. I do not understand how the word 'at' can mean 'at any time after the settlement of issues'. This interpretation is contrary to the ordinary and grammatical meaning of the word 'at'.

(8) No other point was urged by the learned counsel for the petitioners. The preliminary objections raised by Mr. Gandhi are full of force and must be accepted. The petition consequently fails and is dismissed with costs which I assess at Rs. 200.

(9) It may, however, be made clear that in this judgement I am giving no finding on the merits of the petition including the question of balance or convenience of the parties.

R.N.M.

(3) A.I.R. 1925 Lahore 322 (1).

(4) A.I.R. 1953 All. 772.

(5) A.I.R. 1925 Lah. 175.