

VIDYAWATI GUPTA AND ORS.
v.
BHAKTI HARI NAYAK AND ORS.

FEBRUARY 3, 2006

[B.P. SINGH AND ALTAMAS KABIR, JJ.]

Code of Civil Procedure, 1908 (as amended by Amending Act 46 of 1999)—Sections 26 and 129—Order IV; Rule 1—Order VI; Rule 15(4); Order VII—Calcutta High Court Original Side Rules—Chapter VII; Rule 1—Suit instituted without filing an affidavit as required under the amended provisions of the Code—Omission remedied by filing affidavit subsequently—High Court holding that the suit is deemed to have been properly instituted only with effect from the date of filing of the affidavit and not from the date of initial institution of the suit—Correctness of—Held, amendments in the Code were brought in to eliminate procedural delays—The requirements of the Code are directory in nature and hence any omission to comply will not render the suit non-est under the Code and under the Original Side Rules of the High Court—Rectification of the omission will have effect from the date of original institution of the suit and not from the date of rectification of omission.

Appellants, claiming to be owners of suit premises, filed a civil suit before High Court against respondents in respect of their right, title and interest in it. The appellants also filed an interlocutory application for interim injunction to direct the respondents to restore the condition of a part of the appellant's suit premises as was existing on the date of institution of the suit. A Single Judge of the High Court allowed the application. The High Court also restrained the respondents from interfering in any manner with the appellant's interest in the suit premises, including the properties which were directed to be restored, till the disposal of the suit.

The respondents preferred an appeal before Division Bench of the High Court and raised a preliminary objection contending that the suit was not duly instituted by the appellants within the meaning of the provisions of the Code of Civil Procedure, 1908 as amended by the Amending Act 46 of 1999; and hence the entire proceedings from the filing of the plaint and the entertaining of the interlocutory applications by the Single Judge of the High

A Court was without jurisdiction. The High Court allowed the appeal of the respondents holding that the plaint was filed by the appellants without compliance of the amended provisions of the Code and hence it is *non-est* in the eye of law; and that since it was rectified by the appellants, in the mean time, by filing an affidavit subsequently, the suit is deemed to have been properly instituted by the appellants only with effect from the date of curing of the defect and not from the date of initial presentation of the plaint.

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D In appeal of this Court, the appellants contended that the provisions contained in section 26 and Orders IV, VI and VII of the Code dealing with institution of suits are directory and not mandatory and hence an omission to comply with such provisions would not ender a suit invalid; that the defect therein is a mere irregularity which can be cured by amendment; that the Court can grant an opportunity to the plaintiff to cure the defect and that when the defect is cured, the plaint must be taken to have been presented on the date when it was first presented and not on the date when the defect was cured; that the High Court Original Side Rules have an overriding effect over the provisions of the Code; and that the Original Side Rules do not require the plaintiff to file an affidavit for verification of the contents in the plaint and hence in the absence of such requirement, it could not be insisted to file an affidavit under the amended provisions of the Code.

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G The respondents contended that the amended provisions of the Code relating to presentation of plaints would have to be interpreted in their literal sense, as otherwise the very purpose would be rendered nugatory; that Order VI of the Code referred to in the Original Side Rules must mean a reference of Order VI as it stood at the time when the Original Side Rules were framed and also as it stands after amendment in 2002; that non-compliance of the provisions of sub-rule (4) of Rule 15 of Order VI would render the suit *non-est*; that the plaint must be deemed to have been duly instituted only after filing of an affidavit and not before; and that the object of introduction of the provision of filing of an affidavit in support of the pleadings and the plaint is to quicken the process of disposal of suit by fixing responsibility on the party initiating the suit and such object would be frustrated if a liberal approach was adopted in implementing the amended provisions of the Code.

Allowing the appeals, the Court

H HELD: 1.1. The requirements of Order VI and Order VII of the Code of Civil Procedure, 1908, being procedural in nature, any omission in respect

thereof will not render the plaint invalid and that such defect or omission will not only be curable but will also date back to the presentation of the plaint. The reference to the provisions of the Code in Rule 1 of Chapter VII of the Original Side Rules of the High Court cannot be interpreted to limit the scope of such reference to only the provisions of the Code as were existing on the date of such incorporation. It was clearly the intention of the High Court when it framed the Original Side Rules that the plaint should be in conformity with the provisions of Order VI and Order VII of the Code. By necessary implication, reference will also have to be made to Section 26 and Order IV of the Code which, along with Order VI and Order VII, concerns the institution of suits. The provisions of Sub-rule (3) of Rule 1 of Order IV of the Code will also have to be read and understood in that context. The expression "duly" used in Sub-rule (3) of Rule 1 of Order IV of the Code implies that the plaint must be filed in accordance with law. The rules of procedure are made to further the cause of justice and not to prove a hindrance thereto. [27-D, E, F; G]

1.2. The intention of the legislature in bringing about the various amendments in the Code with effect from 1st July, 2002 were aimed at eliminating the procedural delays in the disposal of civil matters. The amendments effected to Section 26, Order IV and Order VI Rule 15 of the Code are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance thereof would not automatically render the plaint *non-est*. Such a stand would be too pedantic and would be contrary to the accepted principles involving interpretation of statutes. [28-B-C]

1.3. Even though the amended provisions of Order VI of the Code are attracted in the matter of filing of plaints in the Original Side of the High Court on account of the reference made to Order VI and Rule 1 of Chapter VII of the Original Side Rules, non-compliance thereof at the initial stage did not render the suit *non-est*. On account of such finding of the Division Bench of the High Court, not only have the proceedings before the Single Judge been wiped out, but such a decision has the effect of rendering the proceedings taken in the appeal also *non-est*. [28-E-F]

Salem Advocate Bar Association, Tamil Nadu v. Union of India, [2003] 1 SCC 49; *State of M.P. v. M.B. Narasimhan*, AIR (1975) SC 1835; *Life Insurance Corporation of India v. D.J. Bahadur*, [1981] 1 SCC 315; *Mr. Shaikh Salim Haji Abdul Khavumsab v. Kumar and Ors.*, (2005) 10 JT SC 1; *Kailash v. Nankhu*

A *and Ors.*, [2005] 4 SCC 480; *P.S. Sathappan (Dead) by Lrs. v. Andhra Bank Ltd. and Ors.*, [2004] 11 SCC 672; *Iridium India Telecom Ltd. v. Motorola Inc.*, [2005] 2 SCC 145; *State of Kerala v. M.S. Mani and Ors.*, [2001] 8 SCC 82 and *Delhi Development Authority v. Kochar Construction Work and Anr.*, [1998] 8 SCC 559, referred to.

B *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, [1951] 2 All E.R. 587, referred to.

C *Hirabai Gendalal v. Bhagirath Ramachandra & Co.*, AIR (1946) Bombay 174; *Wali Mohammad Khan v. Ishak Ali Khan and Ors.*, AIR (1931) Allahabad 507; *Ramgopal Ghose v. Dharendra Nath Sen and Ors.*, AIR (1927) Calcutta 376; *Subbiah Pillai alias S.S.M. Subramania Pillai v. Sankarapandiam Pillai and Ors.*, AIR (1948) Madras 369 and *All India Reporter Ltd. Bombay v. Ram Chandra Dhondo Datar*, AIR (1961) Bombay 292, referred to.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3005 of 2005.

D From the Judgment and Order dated 9.6.2004 of the Calcutta High Court in G.A. No. 1423/2004 in A.P.O.T. No. 214/2004.

Anindya Mitra, Jaideep Gupta, Abhrojit Mitra, Prateek Jalan, Aani Kr. Roy, Mohd. Iqbal and Rauf Rahim for the Appellants

E Ranjit Kumar, Pradip Kr. Ghosh, Tapas Ray, K.V. Vishwanathan, Bijan Kumar Ghosh, Satish Vig, Goodwill Indeevar and Dr. Kailash Chand for the Respondents

The Judgment of the Court was delivered by

F **ALTAMAS KABIR, J.** The submissions advanced in this appeal by way of special leave necessitates a brief glance into the historical origin of the Calcutta High Court.

G In August 1861, the British Parliament passed the Indian High Courts Act which empowered the Crown to establish, by Letters Patent, High Courts of Judicature at Calcutta, Madras and Bombay. Consequent to such authority, the Letters Patent dated 14th May, 1862 was issued establishing the High Court of Judicature at Calcutta. By subsequent Letters Patent dated 26th June, 1862, the High Court at Bombay and Madras were also established.

H The Letters Patent empowered the High Court of Calcutta to exercise

Ordinary Original Civil Jurisdiction within the local limits of the Presidency town of Calcutta as might be prescribed by a competent Legislative Authority for India. Within such local limits, the High Court was authorized to try and determine suits of every description, except those falling within the jurisdiction of the Small Causes Court at Calcutta. Apart from its Original Jurisdiction, the Letters Patent vested the High Court with wide powers including appellate powers from the Courts of Original Jurisdiction and in procedural matters, the High Court was given the power to make rules and orders in order to regulate all proceedings, civil and criminal, which were brought before it. A B

In this connection, it may not be out of place to refer to the provisions of Clause 37 of the Letters Patent which provides as under:- C

“37, Regulation of Proceedings, and we do further ordain, that it shall be lawful for the said High Court of Judicature at Fort William in Bengal from time to time to make rules and orders for the purpose of regulating all proceedings in civil cases which may be brought before the said High Court, including proceedings in its Admiralty, Vice-Admiralty, Testamentary, Intestate, and Matrimonial jurisdictions respectively: Provided always that the said High Court shall be guided in making such rules and orders, as far as possible, by the provisions of the Code of Civil Procedure, being an Act passed by the Governor-General in Council, and being Act No. VII of 1859, and the provisions of any law which has been made, amending or altering the same, by competent legislative authority for India.” D E

As will be seen from the above, the aforesaid clause vested in the High Court the power to make rules and orders for the purpose of regulating all proceedings in civil cases, which may be brought before it. It was, however, also provided that in making such rules and orders, the High Court should be guided, as far as possible, by the provisions of the Code of Civil Procedure, (hereinafter referred to as ‘the Code’) which had been enacted for courts in India not established by Royal Charter. F

By virtue of the issuance of the Letters Patent, the High Courts of Calcutta, Bombay and Madras came to be known as the Chartered High Courts empowered to regulate their own procedure, *inter alia* in respect of its Ordinary Original Civil Jurisdiction. G

The Original Side Rules of the Calcutta High Court (for short ‘the Original Side Rules’), which are still in force, came to be framed by the High H

A Court under Clause 37 of the Letters Patent which has to be read along with Section 129 of the Code which also confers on the High Courts powers to make rules as to their own original civil procedure and reads as follows:-

B “129. *Power of High Courts to make rules as to their original civil procedure*--Notwithstanding anything in this Code, any High Court not being the Court of a Judicial Commissioner may make such rules not inconsistent with the Letters Patent or order other law establishing it to regulate its own procedure in the exercise of its original civil jurisdiction as it shall think fit, and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.”

C Apart from Section 129, Order XLIX of the Code specifically excludes the application of certain rules and orders of the aforesaid Code to any of the Chartered High Courts. At the same time, Chapter XL of the Original Side Rules indicates that the provisions of Section 2 of the Code and of the D General Clauses Act, 1897 would apply to the Original Side Rules, but where no other provision is made by the Code or by the said Rules, the procedure and practice in existence would continue to remain in force.

E Chapter VII of the Original Side Rules framed by the Calcutta High Court to regulate its own procedure in original civil matters deals with the institution of suits. Inasmuch as, a good deal of submission has been made with regard to the provisions of Rule 1 of Chapter VII which will have a significant bearing with regard to a decision in this case, the same is reproduced hereinbelow:-

F “1. *The plaint to be written or printed : manner of : contents.* The plaint shall be legibly written, or printed, in the English language, on durable foolscap paper or other paper similar to it in size and quality, bookwise, and on both sides of the paper, with not more than 25 or less than 18 lines, of about 10 words in each line in each page, and with an inner margin of about an inch and a quarter wide. It shall be G stitched bookwise in the following order : (1) Warrant to sue, where the plaintiff appears by an Advocate acting on the Original side ; (2) Concise statement, (3) The plaint, (4) List of documents upon which the plaintiff relies, (5) List of documents produced with the plaint, (6) Exhibits or copies of exhibits filed. Dates, sums and numbers occurring H in the plaint shall be expressed in figures as well as in words stated in rupees, annas and pies, and the corresponding English dates being

added, where the dates are not according to the English calendar. The
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 the plaintiff shall comply with O. VI of the Code, and shall contain the
 particulars required by O. VII, rr 1 to 8 of the Code. Every alteration
 in the plaint shall be marked and authenticated by the initials of the
 persons verifying the plaint, or with leave of the Judge or Officer, by
 the Advocate acting on the Original side.”

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 A glance at the aforesaid provisions will indicate that although the
 heading of the aforesaid Chapter is “Institution of Suits”, Rule 1 does not
 really indicate the manner in which a suit is required to be instituted. The
 directions contained in Rule 1 deal mainly with the form in which a plaint
 is required to be prepared with specific instructions regarding the printing of
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 the contents and the paper to be used in the preparation of the plaint and
 provides for the various other documents which are to be filed along with the
 plaint. What it does mention in addition to the above is that the plaint has to
 comply with the provisions of Order VI of the Code and has to contain the
 particulars required by Order VII, Rules 1 to 8 of the said Code.

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 Order VI of the Code deals with pleadings generally and as provided
 in Rule 1 of Order VI “Pleadings” has been indicated to mean ‘plaint’ or
 ‘written statement’. Rule 15 of Order VI provides for verification of pleadings
 and reads as follows:-

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 “15. *Verification of pleadings*—(1) Save as otherwise provided by
 any law for the time being in force, every pleading shall be verified
 at the foot by the party or by one of the parties pleading or by some
 other person proved to the satisfaction of the court to be acquainted
 with the facts of the case.

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 (2) The person verifying shall specify, by reference to the numbered
 paragraphs of the pleading, what he verifies of his own knowledge
 and what he verifies upon information received and believed to be
 true.

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 (3) The verification shall be signed by the person making it and shall
 state the date on which and the place at which it was signed.

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 (4) The person verifying the pleading shall also furnish an affidavit
 in support of his pleadings.”

It is of relevance to these proceedings to point out that Sub-rule (4) of
 Rule 15 reproduced hereinabove was introduced by way of Amending Act 46

A of 1999 with effect from 1st July 2002. Prior to such amendment, there was no general provision regarding verification of pleadings in a plaint also by way of an affidavit, though such a practice had been introduced and followed in some of the High Courts in India.

B Order VII referred to in Rule 1 of Chapter VII of the Original Side Rules deals with plaints and indicates the contents to be included in a plaint. Rules 1 to 8 of Order VII of the Code deals specifically with the contents of the plaint which has to be complied with for the purpose of institution of a suit under Chapter VII of the Original Side Rules.

C Although, we shall have occasion to advert to the provisions of Section 26 of the Code at a later stage of this judgment, together with Order IV Rule 1 of the said Code, since the said provisions are inter-connected with Orders VI and VII of the Code, it would be in the fitness of things to reproduce the same at this stage. Section 26 of the Code which deals with institution of suits provides as follows:-

D “Section 26. Institution of suits.—(1) Every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed.

(2) In every plaint, facts shall be proved by affidavit.”

E Sub-section (2) of Section 26 was also inserted by way of amendment with effect from 1st July, 2002.

Order IV Rule 1 which also deals with the institution of suits provides as follows:-

F “1. *Suit to be commenced* by plaint.—(1) Every suit shall be instituted by presenting a plaint in duplicate to the Court or such officer as it appoints in this behalf.

(2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.

G (3) The plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in sub-rules (1) and (2).”

H As in the case of Sub-section (2) of Section 26, Sub-rule (3) of Rule 1 of Order IV was also introduced by Amending Act 46 of 1999 with effect from 1st July, 2002. We shall have occasion to refer to Sub-rule (3) of Rule

1 of Order IV while dealing with the judgment under appeal since a certain amount of emphasis has been laid on the said provision by the Division Bench of the Calcutta High Court which calls for interpretation in the instant proceedings.

The facts of the case resulting in the judgment under appeal may now be stated in brief for proper understanding of the various provisions of the Letters Patent, the Original Side Rules and the Code.

The appellants in the instant appeal claiming to be the owners of the entire floor, the 1st floor and a portion of the basement of Premises No.33-A, Jawaharlal Nehru Road, Calcutta, filed a Civil Suit No.352/2002 in the Calcutta High Court on or about 26th July, 2002 against the respondents herein *inter alia* for certain orders of injunction against the said respondents in respect of their right, title and interest in the said portions of the premises in question. Thereafter, leave was granted by the learned Single Judge taking up interlocutory matters under Order I, Rule 8 of the Code on 30th July, 2002 and writ of summons was issued immediately thereafter and served upon the defendants. An application for interim injunction was also filed in the suit on behalf of the appellants and as will appear from the materials on record an application under Section 8 of the Arbitration and Conciliation Act, 1996, was also filed on behalf of the respondents. The said application for interim injunction was allowed by an Order dated 2nd April, 2004 passed by the learned Single Judge whereby the respondents were directed to restore the condition of the plaintiffs' roof-top cooling towers and the western side ground floor of the suit premises, as was existing on the date of the institution of the suit, within a period of three weeks from the date of the order. The defendants (respondents herein) were also restrained from interfering, in any manner, with the plaintiffs' interest in the suit properties, including the properties which were directed to be restored in terms of the injunction order. The learned Single Judge directed that the interim order would remain in force till the disposal of the suit.

Aggrieved by the said order of the learned Single Judge, the respondents herein preferred an appeal, being APOT No. 214/2004, before the Division Bench of the Calcutta High Court and the same appears to have been taken up for hearing firstly on 27.4.2004 and thereafter on subsequent dates.

As will appear from the order of the Division Bench of the High Court, before the matter was taken up for consideration on merits, a preliminary

A objection was raised on behalf of the appellants, who are the respondents herein, regarding the valid institution of the suit itself in view of the amended provisions of the Code. The Division Bench decided to adjudicate on the said objection first since it felt that the said question went to the very root of the matter concerning the jurisdiction of the learned Single Judge to entertain the suit and the interlocutory applications filed therein.

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Before the Division Bench, it was submitted on behalf of the appellants that prior to 1st July, 2002, Section 26 of the Code merely indicated that every suit shall be instituted by the presentation of a plaint or in such other manner as may be prescribed. The manner in which such plaint was to be prepared and presented has been provided for in detail in Orders VI and VII of the Code. It was submitted on behalf of the appellants that with effect from 1st July, 2002, certain amendments were effected to the aforesaid provisions of the Code by Act 46 of 1999 which made it mandatory that in every plaint, facts would have to be proved by an affidavit. It was submitted that sub-section (2) was added to Section 26 by way of amendment

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incorporating the said provision. Correspondingly, amendments were also introduced in Order VI Rule 15 relating to verification of pleadings and Sub-rule (4) was inserted mandating that the person verifying the pleading was also required to furnish an affidavit in support of its pleadings. In addition to the above, Order IV of the Code, which deals with the institution of suits,

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was also amended and Sub-rule (3) was added to Rule 1 and it was specifically stipulated that the plaint to be filed in compliance with the provisions of Orders VI and VII would not be deemed to have been duly instituted unless it complied with the requirements specified in Sub-rules (1) and (2). It was the further case of the appellants that having regard to the provisions of Chapter VII Rule 1 of the Original Side Rules, the reference made in Sub-

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rule (3) of Rule 1 of Order IV of the Code would also include the amendments brought about in the said Orders with effect from 1st July, 2002. Consequently, it was urged that since the amended requirements of Sub-rule (4) of Rule 15 of Order VI had come into operation with effect from 1st July, 2002 and since the suit had been instituted thereafter on 26th July, 2002, the same could not be said to have been duly instituted within the meaning of Sub-rule

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(3) of Rule 1 of Order IV of the Code. It was urged that the entire proceedings from the filing of the plaint and the entertaining of the interlocutory applications by the learned Single Judge was without jurisdiction and was liable to be declared as such.

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On behalf of the respondents, who are the appellants before us, it was

submitted that the provisions of the Code being subject to the rules framed by the Chartered High Courts, of which the Calcutta High Court was one, the Rules as framed by the High Court would have an overriding effect over the provisions of the Code. It was contended that the Original Side Rules relating to the institution of suits had been framed under the Letters Patent and would prevail over the provisions of the Code. It was further submitted that Rule 1 of Chapter VII of the Original Side Rules, while setting out the specifications relating to the filing of the plaint, has merely indicated that the plaint should comply with the provisions of Order VI of the Code and shall contain the particulars required by Rules 1 to 8 of Order VII of the Code. It was contended that there was no stipulation in the said Rule which required the plaintiff to file an affidavit for the purpose of verification of the contents of the plaint and in the absence of such requirement, it could not be insisted that having regard to the amendments of the Code, verification in a plaint presented in the Original Side of the Calcutta High Court was also required to be supported by an affidavit.

In addition to the above, it was also urged on behalf of the respondents that mere procedural omissions which were curable could not affect the validity of a plaint as filed. Various decisions of the different High Courts relating to failure in complying with the provisions of Order VI of the Code were cited on behalf of the respondents and it was pointed out that in all the said cases it was consistently held that the court has a discretion to remove the illegality to be cured if the plaintiff has acted in good faith and without any gross negligence and after the defect is cured the suit will be deemed to have been filed when it was first instituted. In particular the decision of the Bombay High Court in *Hirabai Gendal v. Bhagirath Ramchandra & Co.*, reported in AIR 1946 Bombay 174, that of the Special Bench of the Allahabad High Court in the case of *Wali Mohammad Khan v. Ishak Ali Khan & Ors.*, reported in AIR (1931) Allahabad 507 and the decision of the Calcutta High Court in the case of *Ramgopal Ghose v. Dharendra Nath Sen & Ors.*, reported in AIR 1927 Calcutta 376 were relied upon. In addition, the respondents also relied on a recent decision of this Court in the case of *Salem Advocate Bar Association, Tamil Nadu v. Union of India*, reported in [2003] 1 SCC 49, wherein while considering the effect of the amendments introduced in the Code by the Amending Acts 46 of 1999 and 22 of 2002, it was observed in paragraph 16 that the attention of the Court had been drawn to Order VII Rule 11 to which clauses (e) and (f) had been added which enabled the Court to reject the plaint where it is not filed in duplicate or where the plaintiff failed to comply with the provisions of Rule 9 of Order VII. This Court was

A of the view that the said clauses being procedural would not require the automatic rejection of the plaint at the first instance. If there was any defect as contemplated by Rule 11(e) or non-compliance as referred to in Rule 11(f), the Court should ordinarily give an opportunity for rectifying the defects and in the event of the same not being done, the Court will have the liberty or the right to reject the plaint.

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C On the basis of the aforesaid submissions, it was contended on behalf of the respondents that the non-filing of an affidavit in support of the pleadings in the plaint at the time of presentation thereof was a mere procedural error which was capable of being cured and had actually been cured pursuant to leave granted by the Appeal Court and that an affidavit in support of the plaint was affirmed and filed before the Division Bench on 28th April, 2004. It was submitted that having regard to the various decisions referred to above, the plaint must be deemed to have been presented in the Computer Department of the Calcutta High Court on 26th July, 2002 and the preliminary objection taken regarding the validity of the plaint was required to be rejected.

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E After considering the various provisions of the Code along with the relevant amendments introduced in the Code with effect from 1st July, 2002 and the relevant provisions of the Letters Patent and after considering various decisions cited at the Bar, in particular the decision of this Court in the case of *State of M.P. v. M.B. Narasimhan*, reported in AIR, (1975) SC 1835, the Appeal Court came to the conclusion that the instant case stood on a different footing from the various decisions cited in view of the express provisions of Order IV Rule 3 of the Code, as amended. Relying on the interpretation of the expression "duly" used in Order IV Rule 3 in a decision of this Court in the case of *Life Insurance Corporation of India v. D.J. Bahadur*, [1981] 1 SCC 315 and the decision of the House of Lords in the case of *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, reported in [1951] 2 All E.R. 587, the Division Bench was of the view that unless the plaint complied with the requirements of the amended provisions, there would be no due institution of the plaint. The Division Bench held that if a plaint is filed without compliance with the requirement of the amended provisions, in the eye of law no plaint can be said to have been filed and the same is *non-est*.
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G However, having regard to the various decisions cited, including the decision of this Court in *Salem Advocate Bar Association* (supra) it was also held by the Division Bench that from the moment the error is rectified, the plaint will be deemed to have been properly instituted but the rectification could not
H relate back to a period when in view of the deeming clause there was no due

institution of the plaint. On the aforesaid reasoning, the Division Bench held that the suit could not be dismissed nor could the plaint be rejected because of non-compliance with the amended provisions since the omission had been remedied by the filing of an affidavit by the respondent-plaintiff. It was held that after the defect was removed the suit must be deemed to have been duly instituted with effect from 28th July, 2004 and not before that date and consequently the interlocutory order that had been passed by the learned single Judge at a point of time when the suit had not been duly instituted could not survive.

The Division Bench accordingly set aside the order passed by the learned Single Judge on 2nd April, 2004 but made it clear that the same had been set aside not on merits but for the reasons discussed in the judgment and the plaintiff, if so advised, would not be prevented from approaching the learned Single Judge with another prayer for injunction and if such a prayer was made the said application may be dealt with in accordance with law.

It is against the aforesaid order of the Appeal Court that the instant civil appeal is directed.

Appearing in support of the appeal, Mr. Anindya Mitra, learned senior advocate, repeated and reiterated the submissions made before the Division Bench of the Calcutta High Court. In particular, Mr. Mitra, upon a reference to Section 26, Orders IV, VI and VII of the Code, contended that the provisions contained therein had been held to be directory and not mandatory in nature. In other words, Mr. Mitra submitted that omission to comply with any of the provisions contained therein would not render a suit invalid but that an opportunity was required to be given by the Court to the plaintiff to cure the defect by supplying the omission. In this regard, a reference was made to the decision of this Court in *Mr. Shaikh Salim Haji Abdul Khayumsab v. Mr. Kumar & Ors.*, JT (2005) 10 SC 1, wherein the provisions of Order VIII Rule 1, after amendment, were held to be directory on the reasoning that rules of procedure are handmaids of justice and while the language employed by the draftsman of processual law may be liberal or stringent, the fact remains that the object of prescribing procedure is to advance the cause of justice. Reference was also made to the decision of this Court in *Kailash v. Nankhu & Ors.*, [2005] 4 SCC 480, wherein also while considering the amended provisions of Order VIII Rule 1 of the Code this court held that unless compelled by express and specific language of the statute the provisions of the Code or any other procedural enactment ought not to be construed in a manner which

A would leave the Court helpless to meet extraordinary situations in the ends of justice. This Court went on to hold that merely because the provision of law is couched in negative language, implying a mandatory character, the same is not without exceptions and that the directions contained regarding the period for filing written statement in Order VIII Rule 1 of the Code was directory and not mandatory being procedural law.

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C As an extension of the aforesaid submission, Mr. Mitra urged that it had been consistently held by the different High Courts from as far back as in the case of *Ramgopal Ghose v. Dhirendra Nath Sen & Ors.*, AIR (1927) Calcutta 376, that when a pleading does not conform with the provisions of Order VI Rule 15, the defect therein is a mere irregularity that can be cured by amendment and consequently when the verification in the plaint is amended being originally defective, the plaint must be taken to have been presented not on the date of the amendment but on the date when it was first presented.

D Reliance was also placed on the decision of the Madras High Court in *Subbiah Pillai alias S.S.M. Subramania Pillai v. Sankarapandiam Pillai & Ors.*, AIR (1948) Madras 369 and on a decision of the Bombay High Court in the case of *All India Reporter Ltd., Bombay v. Ram Chandra Dhondo Datar*, AIR (1961) Bombay 292, where similar views were expressed.

E Mr. Mitra contended that an analogy similar to the decision in the aforesaid cases could and should also be drawn in the facts of the instant case where the omission complained of was also procedural in nature and did not affect either the territorial or the pecuniary jurisdiction of the Court to entertain the suit. Mr. Mitra urged that having held that the defect and omission were curable, the Division Bench of the Calcutta High Court had thereafter erred in holding that having regard to the provisions of Sub-rule (3) of Rule 1 of Order IV of the Code, the suit will be deemed to have been instituted from the date on which the defects stood cured and not from the date of initial presentation of the plaint. Mr. Mitra urged that the said error had caused the Division Bench to set aside the order impugned in the appeal on the said technical ground without going into the merits of the matter.

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H Mr. Mitra submitted that after the decision rendered by the Division Bench on 9th June, 2004 this Court had occasion to consider the provisions of the Letters Patent of the Madras High Court and the Bombay High Court in the case of *P.S. Sathappan (Dead) By Lrs. v. Andhra Bank Ltd. & Ors.*, [2004] 11 SCC 672 and in the case of *Iridium India Telecom Ltd. v. Motorola Inc.*, [2005] 2 SCC 145. In the first of the said two cases, to which one of

us (B.P. Singh, J.) was a party, while considering the effect of the amended provisions of Section 100A and Section 104 of the Code in relation to appeals provided for under Clause 15 of the Letters Patent of the Bombay High Court, the majority view of the Constitution Bench was that a Letters Patent is a special law of the High Court concerned while the Code is a general law applicable to all courts. It was observed that it was well settled law that in the event of a conflict between a special law and a general law, the special law must always prevail and though there was no apparent conflict between the Letters Patent and Section 104, if there was any conflict between the Letters Patent and the C.P.C., then the provisions of the Letters Patent would always prevail, unless there was a specific exclusion, which position would also be clear from Section 4 of the Code which provides that nothing in the Code would limit or affect any special law.

In the latter case, this Court had occasion to consider in detail the relevant amendments in the Code referred to above also in the context of the Bombay High Court Original Side Rules and the Bombay High Court Letters Patent and after a detailed analysis of the various provisions, and in particular the provisions of Clause 37 of the Letters Patent and Section 129 of the Code, this Court in no uncertain terms, upon a reference to the decision in *P.S. Sathappan's* case (supra), concluded that far from doing away with the Letters Patent, the Amending Act of 2002 has left unscathed the provisions of Section 129 of the Code and what follows therefrom and upheld the contention of the Division Bench of the Bombay High Court that suits on the Original Side of the High Court were to be governed by the Original Side Rules and not by the amended provisions of Order VIII Rule 1 of the Code.

Mr. Mitra submitted that since the matter had been set at rest by the two aforesaid decisions, the finding of the Division Bench of the Calcutta High Court that the Original Side Rules and the Code were supplementary to each other, was liable to be set aside and not only was the suit liable to be held to have been duly instituted on 26th July, 2002, but the interim order of injunction passed therein was also liable to be restored.

Appearing on behalf of the respondents, who were the defendants in the suit, Mr. Ranjit Kumar, learned senior advocate, tried to convince us with his usual eloquence that the amended provisions of the Code relating to presentation of plaints would have to be interpreted in their literal sense, as otherwise the very purpose for which the amendments had been introduced would be rendered nugatory. He laid special emphasis on the provisions of

A Sub-rule (3) of Rule 1 of Order IV of the Code which provides that the plaint shall not be deemed to be duly instituted unless it complies with the requirements specified in Sub-rules (1) and (2) which in their turn provide that every plaint shall comply with the Rules contained in Orders VI and VII of the Code.

B Mr. Ranjit Kumar pointed out that even Rule (1) of Chapter VII of the Original Side Rules is similar to Sub-rule (2) of Rule 1 of Order IV and provides that the plaint shall comply with Order VI of the Code and shall contain the particulars required by Order VII Rules 1 to 8 of the Code. Mr. Ranjit Kumar submitted that the reference made to Order VI of the Code in
C Clause 1 of Chapter VII must mean a reference to Order VI as it stood at the time when the Original Side Rules were framed and also as it stands today since the provisions of Order VI had been incorporated in Rule 1 of Chapter VII by reference which could not be taken to be partial but had to be considered as a whole. According to Mr. Ranjit Kumar, the provisions of Sub-rule (4)
D of Rule 15 of Order VI were equally attracted to the facts of the instant case and non-compliance thereof had been very rightly held by the Division Bench to have rendered the suit *non-est* when it was instituted on 26.7.2002 without being accompanied by an affidavit. Mr. Ranjit Kumar, however, accepted the position as explained by this Court in the *Salem Advocate Bar Asscn.* case (supra), paragraph 16 whereof was relied upon by the Division Bench of the
E Calcutta High Court and wherein it was observed that on non-compliance of the provisions of Order VII and clauses (e) and (f) of Rule 11 and Rule 9 there should not be any automatic rejection of the plaint at the first instance but that the Court should ordinarily give an opportunity for rectifying the defect. Mr. Ranjit Kumar submitted that pursuant to the above, the Division Bench of the Calcutta High Court had granted leave to the appellants herein
F to file an affidavit in support of the pleadings in the plaint and that such an affidavit had been filed pursuant to the leave granted on 28th April, 2004 and the plaint must be deemed to have been duly instituted only thereafter as had been held by the Division Bench of the Calcutta High Court.

G Although, various decisions were cited by Mr. Ranjit Kumar on the question of legislation by reference, we are not really required to dwell on such submission since it is the common case of the parties that the provisions of Order VI and select portions of Order VII would have application to plaints filed on the Original Side of the Calcutta High Court and it is also the settled position that the Rules of the Original Side as framed under the Letters
H Patent, unless excluded and/or modified, would continue to have primacy

over the Code and matters not provided for. What we are really required to consider is the effect of the amended provisions of the Code in relation to Chapter VII Rule 1 of the Original Side Rules. We need not, therefore, advert to the various decisions cited by Mr. Ranjit Kumar on this aspect of the matter. A

In support of his submission that failure to comply with Order VII Rule 15 would render the suit *non-est*, Mr. Ranjit Kumar submitted that the omission to comply with the requirements of the amended provisions of the Code relating to filing of complaints could not be condoned but require rectification. Mr. Ranjit Kumar referred to and relied on a decision of this Court in *State of Kerala v. M.S. Mani & Ors.*, [2001] 8 SCC 82, which arose out of an application under the Contempt of Courts Act, 1971, Section 15 whereof requires a person to obtain the prior consent in writing of the Advocate General for making a motion under the said Act and it was held that such a provision being mandatory, the failure to obtain such prior consent would render the motion not maintainable. In fact, it was also held in the said case that obtaining consent subsequently would not cure the initial defect. B C D

Relying heavily on the said decision, Mr. Ranjit Kumar pointed out that in the Statement of Objects and Reasons for the amendments to the Code, it had been indicated that the decision to introduce the provisions for the filing of an affidavit in support of the pleadings and the plaint had been taken to quicken the process of disposal of suits by fixing responsibility on the party initiating the suit and such object would be frustrated if a liberal approach was adopted in implementing the amended provisions. E

Reference was also made to two decisions of this Court in the case of *Life Insurance Corporation of India v. D.J. Bahadur & Ors.*, [1981] 1 SCC 315 and *Delhi Development Authority v. Kochhar Construction Work & Anr.*, [1998] 8 SCC 559, where similar views have been expressed in the context of the Industrial Disputes Act, Life Insurance Corporation Act and Arbitration Act, 1940. Certain other decisions were also referred to in the context of Section 69 of the Partnership Act, which do not need any elucidation. F

Mr. Ranjit Kumar submitted that the reasoning and the judgment of the Division Bench of the Calcutta High Court did not call for any interference and the matter had been rightly remanded to the First court for a *denovo* decision if a fresh application for injunction was filed on behalf of the plaintiffs/appellants. G H

A Mr. Pradip Kumar Ghosh, learned senior advocate, appearing for one of the respondents, while adopting the submissions made by Mr. Ranjit Kumar, drew our attention to Section 4 of the Code which provides that in the absence of any provision to the contrary nothing in the Code shall be deemed to limit or otherwise affect any special local law now in force or any special jurisdiction or power conferred, or any special form of procedure prescribed, by or any other law for the time being in force. Mr. Ghosh contended that when there was specific provision available the provisions of the Code must be deemed to have primacy over other special or local laws, especially in the context of Section 26 and Orders IV, VI and VII of the Code dealing with the institution of suits.

C Referring to the Constitution Bench decision of this Court in the case of *P.S. Sathappan* (supra), Mr. Ghosh pointed out that in paragraph 32 of the judgment, while discussing the special nature of the Letters Patent, it was also observed with reference to Section 4 of the Code that only a specific provision to the contrary, such as Section 100A of the Code, could exclude the special law. Mr. Ghosh submitted that since specific provision had been made in Section 26, Order IV as also Order VII Rule 15 for the filing of an affidavit along with the verification in support of the plaint, such a provision being special in nature and not being provided for in Rule 1 of Chapter VII of the Original Side Rules, would prevail and its requirement would acquire a mandatory form even in respect of plaints filed under the Original Side Rules of the Calcutta High Court.

F Mr. Ghosh also referred to Section 116 contained in Part IX of the Code and submitted that the same made the said Part applicable to High Courts not being the Court of a Judicial Commissioner and that save as provided in the said Part or in Part X or under the Rules, the provisions of the Code would apply to such High Courts. Mr. Ghosh submitted that Section 120 of the Code made specific provision as to which sections of the Code, namely, Sections 16, 17 & 20, would not apply to the High Court in the exercise of its ordinary original civil jurisdiction.

G Mr. Ghosh also urged that no interference was called for with the order passed by the Division Bench of the Calcutta High Court and the appeal was liable to be dismissed.

H Mr. Tapash Ray, learned senior advocate appearing for the Corporation of Calcutta, submitted that although the Corporation of Calcutta was an interested party, it had no role to play in the instant proceedings.

While we have noted and considered the views expressed by this Court in the case of *Iridium India Telecom Ltd.* (supra) and *P.S. Sathappan's* case (supra), with which we respectfully agree, regarding the primacy of the Original Side Rules framed under the Letters Patent over the provisions of the Code in case of conflict, in the instant case, no such conflict has surfaced which necessitates a reference thereto. Although, Mr. Mitra did urge that matters relating to the Ordinary Original Civil Jurisdiction of the Calcutta High Court would be governed by the Original Side Rules, which would prevail over the provisions of the Code, he also accepted the position that a plaint which is presented in the Original Side will have to comply with the requirements of Orders VI and VII as incorporated by way of reference in Rule 1 of Chapter VII of the Original Side Rules. What is in controversy is whether a person presenting such plaint after 1st July 2002, would also be required to comply with the amended provisions of Order VI Rule 15 of the Code.

In this regard we are inclined to agree with the consistent view of the three Chartered High Courts in the different decisions cited by Mr. Mitra that the requirements of Order VI and Order VII of the Code, being procedural in nature, any omission in respect thereof will not render the plaint invalid and that such defect or omission will not only be curable but will also date back to the presentation of the plaint. We are also of the view that the reference to the provisions of the Code in Rule 1 of Chapter VII of the Original Side Rules cannot be interpreted to limit the scope of such reference to only the provisions of the Code as were existing on the date of such incorporation. It was clearly the intention of the High Court when it framed the Original Side Rules that the plaint should be in conformity of the provisions of Order VI and Order VII of the Code. By necessary implication reference will also have to be made to Section 26 and Order IV of the Code which, along with Order VI and Order VII, concerns the institution of suits. We are ad idem with Mr. Pradip Ghosh on this score. The provisions of Sub-rule (3) of Rule 1 of Order IV of the Code, upon which the Division Bench of the Calcutta High Court had placed strong reliance, will also have to be read and understood in that context. The expression "duly" used in Sub-rule (3) of Rule 1 of Order IV of the Code implies that the plaint must be filed in accordance with law. In our view, as has been repeatedly expressed by this Court in various decisions, rules of procedure are made to further the cause of justice and not to prove a hindrance thereto. Both in the case of *Khayumsab* (supra) and *Kailash* (supra), although dealing with the amended provisions of Order VIII Rule 1 of the Code, this Court gave expression to the salubrious principle that procedural enactments ought not to be construed in a manner

A which would prevent the Court from meeting the ends of justice in different situations.

B The intention of the legislature in bringing about the various amendments in the Code with effect from 1st July, 2002 were aimed at eliminating the procedural delays in the disposal of civil matters. The amendments effected to Section 26, Order IV and Order VI Rule 15, are also geared to achieve such object, but being procedural in nature, they are directory in nature and non-compliance thereof would not automatically render the plaint *non-est*, as has been held by the Division Bench of the Calcutta High Court.

C In our view, such a stand would be too pedantic and would be contrary to the accepted principles involving interpretation of statutes. Except for the objection taken that the plaint had not been accompanied by an affidavit in support of the pleadings, it is nobody's case that the plaint had not been otherwise verified in keeping with the unamended provisions of the Code and Rule 1 of Chapter VII of the Original Side Rules. In fact, as has been submitted D at the Bar, the plaint was accepted, after due scrutiny and duly registered and only during the hearing of the appeal was such an objection raised.

E Considering the aforesaid contention, even though the amended provisions of Order VI are attracted in the matter of filing of plaints in the Original Side of the Calcutta High Court on account of the reference made to Order VI and Rule 1 of Chapter VII of the Original Side Rules, non-compliance thereof at the initial stage did not render the suit *non-est*. On account of such finding of the Division Bench of the Calcutta High Court, not only have the proceedings before the learned Single Judge been wiped out, but such a decision has the effect of rendering the proceedings taken in F the appeal also *non-est*.

G The decision in *M.S. Mani's* case (supra) relied upon by Mr. Ranjit Kumar and Mr. P.K. Ghosh, cannot be equated with the views expressed in *Khayumsab's* and *Kailash's* case, *inasmuch* as, in the former case, the provision requiring the prior consent in writing of the Advocate General was an intrinsic part of the application touching upon the maintainability of the motion itself and not procedural as in the facts of the instant case. The said decision, therefore, cannot come to the aid of the respondents.

H We have, therefore, no hesitation in holding that the Division Bench of the Calcutta High Court took a view which is neither supported by the provisions of the Original Side Rules or the Code nor by the various decisions

of this Court on the subject. The views expressed by the Calcutta High Court, being contrary to the established legal position, must give way and is hereby set aside. A

The appeal is accordingly allowed and the impugned order under challenge is set aside. Consequent upon the views expressed by us, the plaint as filed on behalf of the appellants herein must be deemed to have been presented on 26th July, 2002 and not on 28th April, 2004 and the interim order passed by the learned Single Judge on 2nd April, 2004, stands revived. The Division Bench of the Calcutta High Court is directed to re-consider and hear the appeal filed by the respondents herein on merits as expeditiously as possible. B C

Having regard to the peculiar facts of the case, the parties will bear their own costs.

B.S.

Appeal allowed. D