



## ERGO

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### SUPREME COURT REITERATES SUIT TO COMMENCE DE NOVO AFTER RETURN OF PLAINT UNDER ORDER VII RULE 10 AND 10A OF THE CODE OF CIVIL PROCEDURE, 1908

31 August 2020

#### INTRODUCTION

By decision dated 5 August 2020 in M/s EXL Careers & Anr. vs. Frankfinn Aviation Services (P) Ltd. (CA No. 2904 of 2020), a three judge bench of the Hon'ble Supreme Court resolved conflicting views in two of its earlier division bench judgments - *ONGC vs. Modern Construction & Company*(2014)1SCC648 ('ONGC') and *Joginder Tuli vs. S. L. Bhatia* (1997) 1 SCC 502 ('Joginder Tuli'). It approved ONGC and held that a suit filed in a court having jurisdiction after the return of plaint under Order VII Rule 10, Civil Procedure Code, 1908 ('CPC') is to be treated as a fresh filing and *Oriental Insurance Company Ltd. vs. Tejparas Associates and Exports Pvt. Ltd.* (2019) 9 SCC 435 ('Oriental Insurance') was overruled.

#### RELEVANT FACTS

- Plaintiff (Frankfinn Aviation Services (P) Ltd.) filed a suit for recovery of money arising out of a Franchise Agreement ('Agreement') before the Civil Judge (Senior Division) at Gurgaon. The defendant filed an application for return of plaint under Order VII Rule 10 of the CPC, contending that the cause of action arose in Meerut and that the defendant did not reside in Gurgaon. The application was rejected and a preliminary issue on jurisdiction was also decided in favour of the plaintiff.
- Defendant filed a revision petition before the High Court against this order. The High Court held Clause 16B of the agreement conferred exclusive territorial jurisdiction to courts at Delhi, therefore the Gurgaon court was directed to return the file. Meanwhile, defendant's evidence was concluded before the Gurgaon Court.
- Defendant filed another revision petition after the Gurgaon Court allowed the plaintiffs application for return of entire file, however, the same was dismissed. Thereafter Defendant filed a special leave petition which was referred to a larger bench in view of the conflict between ONGC and Joginder Tuli.

### CONTENTIONS OF PARTIES

- Defendant (Petitioner in the Supreme Court) argued that there is no conflict between the ONGC and Joginder Tuli as the latter decision was passed specifically in the facts of the case. The defendant relied on various judgments to establish that a suit must necessarily proceed *de novo* after return of plaint, irrespective of the stage which the suit was previously at (before the court lacking jurisdiction). Unlike Section 24, CPC, which confers discretion to transferee courts to either retry the matter or start afresh, Order VII Rule 10A does not envisage such discretion.
- Plaintiff argued that the High Court ordered return of the entire file as the Gurgaon court had overlapping jurisdiction to hear the matter which was ready for final hearing and it would be unjust to hear the matter afresh.
- Plaintiff cited *Oriental Insurance*, where Joginder Tuli was relied upon, to distinguish *Amar Chand Inani vs. The Union of India* (1973) 1 SCC 115 (a three judge bench decision) by arguing that Rule 10A was subsequently inserted by an amendment in 1977 and it cannot be said that in all circumstances the return of plaint for presentation before appropriate court must be treated as fresh filing.

### CONSIDERATIONS BY THE COURT

- It was held that ONGC lays down the correct position of law i.e., when a plaint is returned, proceedings before a court which inherently lacks jurisdiction must be set at naught, and upon presentation of plaint to a court of competent jurisdiction, proceedings must start *de novo*. The time spent before the first court can be excluded while computing limitation period as per Section 14 of the Limitation Act, 1963.
- It was noted that order of 'return of the file' could only mean return of plaint and could not enlarge the scope of Order VII Rule 10 and 10A, CPC.
- It was held that Joginder Tuli does not lay down the law on this subject and discretionary jurisdiction was exercised in the facts of that case.
- It was held that transfer of a suit under Section 24, CPC was entirely different from return of plaint. In transfer, both the transferor and the transferee court have jurisdiction to hear the matter. Hence, the transferee court has the discretion to either continue proceedings or retry the matter. However, Order VII Rule 10 and 10A of the CPC does not give the court such discretion.
- Accordingly, *Oriental Insurance* was overruled as: (i) insertion of Rule 10A in 1977 could not be construed to imply that the suit could continue from the stage at which plaint was returned; and (ii) reliance placed on Joginder Tuli was misplaced as it did not lay down the law.
- Having approved ONGC, in the instant case, the Supreme Court exercised its discretion in the interest of justice and held that the suit would continue from the stage the plaint was returned since: (i) the defendant's objection of exclusionary clause in the agreement was an afterthought; and (ii) that the suit was ready for final hearing.

## COMMENTS

- To our mind, there was really no conflict between ONGC and Joginder Tuli. In fact, it was Oriental Insurance where the settled legal position in ONGC was not given due consideration. By overruling Oriental Insurance and specifically holding that ONGC holds the field, the Supreme Court has put to rest much ambiguity.
- Having said as above, we cannot reconcile with the discretion exercised by the Supreme Court. Having unambiguously held that proceedings must begin *de novo* on one hand, it appears contradictory that proceedings before a court that inherently lacked jurisdiction were not set at naught. It leaves an impression that some allowance may be made if the suit is in its final stages.
- *Vivek Jhunjunwala (Partner), Sachin Shukla (Principal Associate) and Debdatta Ray Chaudhury (Associate)*

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