

(2001) 07 BOM CK 0104

In the Bombay High Court

Case No : Writ Petition No's. 631 and 636 of 2000

Amit Ashok Agrawal (Master) and Another

APPELLANT

Vs

Khandesh Urban Co-operative Credit Society Ltd.

RESPONDENT

Date of Decision : 26-07-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2(1)

Citation : (2002) 2 ALLMR 669 : (2002) 2 BomCR 749

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : N.R. Katneshwarkar, for V.J. Dixit, in W.P. Nos. 631 and 636/2000, for the Appellant; S.S. Manale, for V.D. Hon in W.P. Nos. 631 and 636/2000, for the Respondent

Judgement

R.M.S. Khandeparkar, J.—Since common questions of law and facts arise in both the petitions, the same are heard together and are being disposed of by this common judgment.

2. In Writ Petition No. 631/2000, the petitioner instituted a dispute in the Co-operative Court, Jalgaon for recovery of the amount of Rs. 6,42,242/-. The same was allowed by the Award dated 30th August, 1997. The appeal preferred by the respondent against the same before the Co-operative Appellate Court was dismissed on 8th May, 1998. The respondent approached this Court in Writ Petition No. 2211 of 1998 which was allowed to be withdrawn on 11-6-1998 with liberty to the respondent to approach the Co-operative Appellate Court with a review petition. Consequently, the Review Application No. 11/98 of the respondent was partly allowed by the Co-operative Appellate Court on 9-10-1998 to the extent of correcting the date of summons mentioned in the order. Being aggrieved, the respondent preferred another Writ Petition No. 4642/1998 which was allowed by this Court by judgment and order dated 18-1-1998 and the proceedings before both the courts below were quashed and the matter was remanded to the Co-operative Court, Jalgaon in Dispute No. 98/97 to be decided

afresh. When the matter came up for hearing before the Co-operative Court, Jalgaon on 29-1-1999, the respondent filed application raising preliminary objection to the effect that the dispute sought to be filed by the petitioner was not maintainable as the petitioner is neither the member of the society nor falls within the parameters of the provisions of law contained in section 91(1) of the Maharashtra Co-operative Societies Act, 1960. After hearing the parties, the Co-operative Court by its order dated 25-8-1999 held that the issue of jurisdiction will have to be decided along with the other issues in the dispute. Being aggrieved, the respondent preferred Revision Application No. 36/1999 before the Co-operative Revisional Court and the same was allowed by the impugned judgment and order dated 26th November, 1999.

3. In Writ Petition No. 636/2000, the petitioner filed dispute in Co-operative Court, Jalgaon for recovery of Rs. 9,61,5277/- and interest thereon in April, 1997. On account of failure on the part of the respondent to attend the proceedings, the same proceeded ex parte and were allowed accordingly, by award dated 30th August, 1997. The appeal preferred against the same by the respondent before the Co-operative Appellate Court was dismissed on 6th May, 1998. The respondent preferred Writ Petition No. 2213/1998 before this Court which was allowed to be withdrawn on 11th June, 1998 with liberty to file review application before the Co-operative Appellate Court. Accordingly, Review Application No. 10/1998 came to be filed before the Co-operative Appellate Court which was disposed of by way of some modification in the dates mentioned in the order. The order to that effect was passed on 3rd February, 1998. Being aggrieved, the respondent preferred Writ Petition No. 4644/98 before this Court which was allowed by this Court by judgment and order dated 18th January, 1999 and the matter was remanded to the Co-operative Court to decide the dispute afresh. When the matter came up before the co-operative Court, Jalgaon on 29-1-1999, the respondent filed application raising preliminary objection that the dispute has been filed by a person who is not a member of the society and, therefore, not maintainable u/s 91 of the M.C.S. Act. After hearing the parties, the co-operative Court held that the issue of jurisdiction would be decided along with other issues. Being aggrieved, the respondent preferred Revision Application No. 36/1999 which came to be allowed by the Co-operative Revisional Court by its judgment and order dated 26-11-1999. Hence the petition.

4. Upon, hearing the learned Advocate for the parties and on perusal of the records, it is seen that the Co-operative Court while considering the objection raised by the respondent in both the cases, had held that the issue regarding the jurisdiction, based on the objection by the respondent, will have to be considered along with other issues in the matter. The orders to that effect were passed on 25th August, 1999 by the Co-operative Court in both the cases. While setting aside the said order, the Co-operative Revisional Court has held that the issue as to whether the petitioner would be entitled to raise the dispute u/s 91 of the said Act or not, has to be decided on the basis of the pleadings of the petitioner and that the petitioner being not a member of the respondent society and the

transaction being not subject to restrictions or regulations imposable under sections 43, 44 and 45 of the said Act, the matter does not fall for consideration u/s 91 of the said Act. In other words, while interfering with the order of the lower authority, purely on the point as to whether an issue to be tried as preliminary issue or along with other issues, the revisional Court has assumed the jurisdiction of the original authority to decide the matter on the merits itself. Apparently, therefore, the revisional authority has not only exceeded its jurisdiction but, has decided the matter improperly and illegally and the same warrants interference of this Court in writ jurisdiction under Article 227 of the Constitution of India. Once, it was clear to the revisional authority that the Co-operative Court had not addressed itself either to the issue of jurisdiction or to the maintainability of the application by the petitioner u/s 91 of the said Act and it was held that the same to be decided along with other issues, it was not permissible for the revisional authority to decide the matter on merits assuming itself the original jurisdiction of the Co-operative Court.

5. This Court in the matter of Haridas Mafatlal Gagalbhai Vs. Vijayalakshmi Navinchandra Mafatlal Gagalbhai and Others, while considering the scope of the Order 14, Rule 2 of the Code of Civil Procedure, as it was prior to the amendment in the year, 1976, has held that :-

"Order 14 gives no power to the Court to frame a preliminary issue of fact, but where, however, the Judge has framed all issues which properly arise in a case, he may select one or more of those issues to be tried first and independently, where the evidence on such issue or issues can be conveniently separated from the rest of the evidence and the finding on that issue or those issues may render the trial of other issues unnecessary."

Pursuant to the amendment of 1976. Rule 2(1) specifically requires pronouncement of judgment on all issues notwithstanding the case may be disposed of on preliminary issue, subject however, to the provisions contained in sub-rule (2). Sub-rule (2) provides that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to- (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force and, for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue. While dealing with effect of 1976 amendment to the CPC and particularly framing of the issues, the learned Single Judge in the matter of Usha Sales Ltd. Vs. Malcolm Gomes and Others, , has observed that after the amendment in 1976 there is an obligation cast upon the Court that even though a case may be disposed of on a preliminary issue the courts shall subject to the provision of sub-rule (2) pronounce judgment on all issues. In other words, the obligation to decide a question of law as a preliminary issue if that decision disposes of the case or part of the case is no longer there. Similarly, the

discretion to decide any other issue as a preliminary issue has been taken away totally from the Court. On the other hand, a duty is cast upon the Court that it must proceed to hear all the issues and pronounce judgment on the same. There is, however, a small exception carved out to the above provision. The Court may try an issue relating to the jurisdiction of the Court or to the legal bar to the suit as a preliminary issue but this is more in the nature of a discretion rather than a duty and the Court is not bound to try any issue despite the provision contained in Order 14, Rule 2(2). The words "it may try" are clearly indicative of the fact that discretion is given to the Court and no duty is cast upon the Court to decide any issue as a preliminary issue. Though the provisions of C.P.C. are not strictly applicable to the proceedings before the Co-operative Court, the principles behind the same are required to be followed. Bearing in mind that the matter relates to the jurisdiction of the authority to consider the matter, and certainly there being a discretion given to the authority to decide the same as preliminary issue, the revisional authority was justified in considering that said issue is required to be decided first, and before proceeding to deal with the matter on merits. As is observed by this Court in Haridas Mafatlal's case, such an exercise would be also permissible where the evidence on such issue can be conveniently separated from the rest of the evidence and finding on that issue may render trial of other issues unnecessary.

6. Reverting to the facts of the case in hand, it is the contention of the respondent that the petitioner is neither the member of the respondent society nor is other person who is entitled to raise dispute u/s 91(1)(c) of the said Act. In that regard, the learned Advocate for the respondent placed reliance on the decision of the Apex Court in the matter of Goa Central Cooperative Consumers Vs. Bhagwant Narayan Tendulkar and Others, . The Apex Court therein, has held that the High Court has rightly held in the facts of the case, that the hire purchase agreement between the respondents and the co-operative society was not made in the course of the usual business of the society and that apart, even if it is assumed that such business transaction by way of hire purchase had taken place between the society and a non member of the society, in order to bring the dispute u/s 91 of the said Act, the transaction in question must come within the purview of sections 43, 44 or section 45 of the said Act. It cannot be disputed that whether the transaction comes within the purview of sections 43, 44 or 45 of the said Act, cannot be decided without ascertaining the nature of the transaction and in that regard, necessary evidence is required to be brought on record. It is not a pure question of law but, a question of law and facts. Undoubtedly, the petitioners are not a members of the society but, the contention of the petitioners is that they are entitled to raise the dispute by resorting to the provisions of section 91(1)(c) of the said Act and, that, therefore, the Co-operative Court has jurisdiction to entertain the dispute and certainly, the evidence in that regard can be segregated from the evidence on merits of the case. Being so, the learned Advocate for the respondent is justified in contending that the issue in that regard can be decided as preliminary issue

permitting the parties to lead evidence in support of the said issue.

7. As already observed above, since the revisional Court under wrong assumption of the jurisdiction of the original Court, had proceeded to decide the issue of jurisdiction on merits, without affording proper opportunity to the parties to lead necessary evidence in support of their contention, the impugned order cannot be sustained and is liable to be quashed and set aside and the matter to be remanded for necessary decision on the point of jurisdiction and maintainability of the application by the co-operative Court. At the same time, the decision of the Co-operative Court that the point of jurisdiction is to be decided along with other issues, cannot be sustained.

8. In the result, therefore, the orders of both the lower authorities, are liable to set aside and the matter to be remanded to the Co-operative Court to decide the issue of maintainability of the application and the jurisdiction of the Co-operative Court to decide the dispute considering the provisions u/s 91 of the said Act afresh, by affording proper opportunity to the parties to lead evidence in support of their rival contentions and only in case the Co-operative Court comes to the conclusion about the maintainability of the application and existence of jurisdiction to the Co-operative Court to entertain the dispute u/s 91 of the said Act, thereafter to proceed with the matter on merits. Therefore, the petition partly succeeds. The impugned orders are hereby quashed and set aside and the matter is remanded to the Co-operative Court as stated above. Considering the fact that the dispute relates to the year, 1997, the Co-operative Court should expedite the hearing of the matter and shall dispose of the same on or before 31st March, 2002.

Rule is made absolute accordingly with no order as to costs.