

(2014) 08 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition No. 2398 of 2014

Chandansingh

APPELLANT

Vs

Kokila

RESPONDENT

Date of Decision : 13-08-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 10, Order 7 Rule 11

Citation : (2014) 6 BomCR 559

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : M.P. Khajanchi, Advocate for the Appellant; M.P. Kariya and A.R. Taiwade, AGP, Advocate for the Respondent

Final Decision : Allowed

Judgement

A.P. Bhangale, J.—Upon hearing learned counsel appearing for both the parties, the petition is taken up for final hearing.

2. Rule. Rule is made returnable forthwith.

3. By this petition, the petitioner questions order passed by learned Joint Civil Judge Senior Division, Chandrapur, in Regular Civil Suit No. 46 of 2006, whereby it appears that application under Order VII Rule 11 of the CPC at Exh. 26 was filed with a prayer for rejection of the plaint. According to defendant No. 1 who filed the application for rejection of the plaint, the trial Court had no jurisdiction to entertain and try the suit. Thus, in stead of rejecting the plaint, the trial Court by passing order on 23.4.2014, below Exh. 1, dealt with a preliminary issue as to jurisdiction of the Court to try the suit.

4. The grievance of the petitioner is that, though the trial Court framed a preliminary issue as to whether it has jurisdiction to try the suit, no opportunity of hearing was granted and no evidence whatsoever was recorded while deciding the issue as to jurisdiction of the Court to entertain and try the suit. Though the trial Court went on to consider the number of rulings on the point of preliminary

issue as to jurisdiction of the Court to entertain and try the suit, it had failed to record the evidence of any of the parties before deciding a preliminary issue and passing order below Exh. 1.

5. It is surprising that, though application was under Order VII Rule 11 of the Code of Civil Procedure, learned trial Judge appears to have treated it u/s 9-A of the CPC and furthermore, learned trial Judge went on to return the plaint under Order VII Rule 10 of the CPC after holding that Court has no jurisdiction to try the suit. This order was under challenge in Misc. Civil Appeal No. 18 of 2013 before learned District Judge, Chandrapur, whereby the appeal filed by the petitioner was dismissed on 2.5.2014. Hence, both orders are impugned in this writ petition.

6. Shri M.P. Khajanchi, learned counsel for the petitioner, has invited my attention to order passed by this Court on 13.6.2013, in Writ Petition No. 2704 of 2013, whereby this Court while disposing of the writ petition by consent of learned counsel appearing for the parties directed the appellate Court to decide application Exh. 5 in Misc. Civil Appeal No. 18 of 2013, within a period of one month from the date of first appearance of the parties before it and till then, status quo was granted till the decision of application Exh. 5 only. However, it is further surprising that learned appellate Judge in stead of following order passed by this Court, went on to dismiss the appeal itself in respect of which the petitioner has grievance that order passed by this Court was not followed by learned appellate Judge in its letter and spirit.

7. It is to be noted that when application was filed under Order VII Rule 11 of the Code of Civil Procedure, prima facie on the ground that the plaint is liable to be rejected, if it does not disclose a cause of action or when the relief is under-valued, and the plaintiff, fails to correct the valuation within time fixed by the Court, or when relief though properly valued, the plaint is written on the paper insufficiently stamped, and the plaintiff fails to comply with the objection as to requirement of requisite stamp papers within time fixed by the Court or when the suit appears from the statement in the plaint as barred by law. The trial Court considering such applications for rejection of the plaint is required to examine averments/pleading in the plaint and if according to it, if the suit is barred by any law or ground is made out, the Court may exercise its power to reject the plaint under Order VII Rule 11 of the Code of Civil Procedure.

8. In other words, when the application was filed with prayer for rejection of the plaint, learned trial Judge ought not have returned the plaint under Order VII Rule 10 of the Code of Civil Procedure. Furthermore, there are requirements, when the plaint is returned it is obligatory upon learned Judge returning the plaint giving reasons for returning it, as such the Court can also fix the date of appearance in the Court where the plaint is required to be instituted after its return. In other words, there appears non-application of mind on the part of learned trial Judge who was considering application under Order VII Rule 11 of the CPC to unnecessarily frame preliminary issue when it was not required by

any party. Framing a preliminary issue is contemplated u/s 9-A of the CPC when an objection is taken as to jurisdiction of the Court to entertain and try the suit. u/s 9-A of the CPC as applicable in State of Maharashtra, the Court is required to consider an objection to the jurisdiction of the Court, frame preliminary issue and then to decide it after giving opportunity to the parties to lead evidence upon it.

9. Here, in the case in hand, it appears that preliminary issue was framed and disposed of without giving an opportunity of hearing to the parties. It must be borne in mind that decision upon the preliminary issue as such would entail consequences of final dismissal or disposal of the suit. It is expected that such preliminary issue which would have effect of disposal of the suit itself would be heard after giving full opportunity to the parties to lead evidence about it. Unfortunately, relevant provisions were not considered in their proper perspectives as admittedly, the application was for rejection of the plaint under Order VII Rule 11 of the CPC and not under Order VII Rule 10, the appellate Court which was directed by this Court to dispose of Exh. 5 only, under these circumstances stated, learned appellate Judge committed an error to dispose of the appeal itself.

10. According to learned Counsel for respondent No. 1, the parties had consented for disposal of the appeal. Be that as it may, learned appellate Judge did not consider the implications of Section 9-A of the CPC as applicable in the State of Maharashtra. Learned trial Judge appears to have erred to follow the procedure to frame preliminary issue and learned appellate Judge committed an error to decide the appeal without giving an opportunity of hearing to the parties concerned. In my opinion, when the Court is required to decide the preliminary issue u/s 9-A of the CPC and when such issue is framed, it would be unjust and improper to decide the same without giving opportunity to the parties to lead evidence about it.

11. In view of above, it is necessary to quash and set aside the impugned orders passed by the Courts below and direct the parties to appear before the trial Court, which has framed a preliminary issue as to jurisdiction of the Court to entertain and try the suit, to hear the parties afresh upon preliminary issue as to jurisdiction of the Court to entertain and try the suit and then to decide a preliminary issue on merits. If according to learned Advocate for the defendant he had filed application merely under Order VII Rule 11 of the Code of Civil Procedure, such application may be decided upon averments made in the plaint alone. As under Order VII Rule 11, plaint can be rejected when averments made in the plaint themselves prima facie make out the ground stated without framing any issue as for rejection of the plaint the trial Judge is not required to frame any issue. Section 9-A of the CPC contemplates adversarial decision as in the trial. The distinction must be noted and understood.

12. In the result, the writ petition is allowed. The impugned orders are quashed and set aside. The proceeding is, therefore, remanded back to the trial Court to consider the application before it according to law then to decide the same after

giving an opportunity of hearing to the parties concerned. The parties shall appear before the trial Court on 25.8.2014 and the trial Court would consider the application pending before it expeditiously and preferably within a period of six weeks from the date of receipt of writ in accordance with law. The undertaking which was furnished to the trial Court shall continue till decision of the application pending before the trial Court.