

(2002) 04 BOM CK 0113
In the Bombay High Court
Case No : C.R.A. No. 1629 of 2001

Fedroline Anthoney Joseph	Vs	APPELLANT
Vinod Vishanji Dharod and Hazol Rodriques and Others		RESPONDENT

Date of Decision : 09-04-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(2), 9A

Citation : (2002) 5 BomCR 582 : (2002) 3 MhLj 865

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : O.J. Menezes, instructed by R.P. Mudholkar, for the Appellant; A.S. Oka, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—A suit for specific performance of an agreement dated 30th August 1980 has been filed by the first respondent to which the Applicant herein is the first defendant. The suit was instituted in the Court of the learned Civil Judge, Senior Division, Thane, on 16th January 1998 and is pending. In the suit, the Applicant has filed a Written Statement.

2. A preliminary objection was sought to be urged on behalf of the Applicant to the maintainability of the suit, on the ground that it was barred by limitation and the Trial Court was requested to frame a preliminary issue on the question of limitation. A perusal of the application filed before the Trial Court would show that a fairly detailed analysis of facts was sought to be presented in the application on the basis of which it was urged that the suit was barred by limitation. In reply thereto, the first respondent contended that the application was filed merely to delay the trial of the suit and that the application which was presumably under Order 14, Rule 2(2) of the Code of Civil Procedure, 1908, was misconceived. The first respondent submitted that the determination of the question of limitation in this case involves an enquiry into matters of fact which were in dispute, upon which evidence would have to be adduced at the trial of

the suit.

3. By the order dated 27th August 2001, the Trial Court is of the view that the suit is ripe for the framing of issues and that the objection of the Applicant to the effect that the suit is barred by limitation, will be determined on the basis of the evidence adduced at the trial- The learned Trial Judge, therefore, held that there was no necessity to frame a preliminary issue and accordingly, dismissed the application at Exh. 45. The Applicant seeks to impugn the order of the learned Trial Judge.

4. The learned Counsel appearing on behalf of the Applicant has relied on the provisions of Section 9A of the Code of Civil Procedure, 1908 which came to be inserted by the Maharashtra Amendment of 1977. Section 9A provides as follows:

"9-A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue. -- (1) Notwithstanding anything contained in this Code or any other law for the time being in force, if at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit. (2) Notwithstanding anything contained in Sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction."

5. The provisions of Section 9-A have been considered by a judgment of this Court in Meher Singh Vs. Deepak Sawhny and Another, . Chief Justice M.B. Shah (as the learned Judge then was), while delivering the judgment of the Division Bench referred to the Statement of Objects and Reasons accompanying the bill for introducing the proposed amendment by the introduction of Section 9A. The Statement of Objects and reasons took note of the fact that in a judgment of this Court reported in 60 BLR 660 it had been held that the Bombay City Civil Court for the purpose of granting interim relief in a suit need not go into the question of jurisdiction. Declaratory suits were, therefore, filed in the City Civil Court without a valid notice u/s 80 of the Code of Civil Procedure, 1908. It had been the practice in the City Civil Court to adjourn the hearing of a Notice of Motion for the grant of injunction in suits which were filed without a valid notice which in turn gave time to the Plaintiff to serve notice u/s 80. Upon the expiry of the period of the notice, the Plaintiff was allowed to withdraw the suit with liberty to file a fresh one. In the intervening period, ad-interim injunctions were granted by the Court which were continued. In this context, the statement of objects and

reasons was to the following effect:

"This practice of granting injunctions, without going into the question of jurisdiction even though raised, has led to grave abuse. It is therefore proposed to provide that if a question of jurisdiction is raised at the hearing of any application for granting or setting aside an order granting an interim relief, the Court shall determine that question first."

The Division Bench held that Section 9-A has departed from the procedure which is prescribed by Order 14, Rule 2 of the Code of Civil Procedure, 1908. The effect of Section 9-A is that if at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, then there is a mandate to the effect that the Court shall proceed to determine at the hearing of such an application the issue as to jurisdiction as a preliminary issue. Ordinarily, under Order 14, Rule 2, it is prescribed that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of Sub-rule (2), pronounce judgment on all issues. Sub-rule (2) of Rule 2 of Order 14, however, provides as follows :

"(2) 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."

Therefore, where the Court is of the opinion that the case or any part of it can be disposed of only on an issue of law, it may try that issue first if it relates to the jurisdiction of the Court or a bar created to the suit by any law for the time being in force. Section 9-A is a departure from the procedure for deciding a preliminary issue under Order 14, Rule 2 because it is prefaced by a non-obstante clause which gives it effect notwithstanding anything contained to the contrary in the Code or in any law for the time being in force. The judgment of the Division Bench in Meher Singh's case, holds that if the issue of jurisdiction involves a pure question of law, then it may be decided without recording evidence. But, if it involves a mixed question of law and fact, then parties have to be granted the opportunity to lead evidence on the facts of the case. In the circumstances, the Division Bench has held thus:

"In the result we hold that if Section 9A is not added, then at interim stage, the Court is not required to decide the issue of jurisdiction finally and the Court by referring to the averments made in the plaint, would ordinarily determine

whether or not the Court has jurisdiction to try the suit. However, it is apparent that Section 9A is added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. According to the Legislature, the practice of granting injunction, without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication. Adjudication would require giving opportunity to the parties to lead evidence, if required."

6. The Judgment of the Division Bench of this Court, thus deals with a situation where at the hearing of an application for the grant of interim relief or for setting aside an order granting interim relief - whether in the nature of stay, injunction, appointment of a receiver or otherwise - an objection as to the jurisdiction of the Court is raised. In such a case, Section 9-A mandates that a preliminary issue has to be framed. If the issue involved is a mixed question of law and fact, the parties would have to be given an opportunity to adduce evidence on the preliminary issue which has been framed. In a matter which is not, however, covered by Section 9-A, what Order 14, Rule 2 of the CPC mandates is that the Court shall pronounce judgment on all issues. Sub-rule (2) of Rule 2 of Order 14, however, provides that where the Court is of the opinion that the case or a part thereof can be disposed of only on an issue of law, it may try that issue first, if that issue relates to the jurisdiction of the Court or to a bar to the suit created by any law for the time being in force.

7. The judgment of the Division Bench, provides an affirmative interpretation of the course of action which is to be followed by the Court once the conditions which are set out in Section 9-A come to exist. Those conditions are that there must be an objection as to jurisdiction raised; and the objection must be raised at the hearing of any application for granting or setting aside an order granting interim relief whether by way of stay, injunction, appointment of a receiver or otherwise. In the present case, the application which was filed by the Applicant before the learned Trial Judge does not purport to be one u/s 9-A. Neither the application, nor for that matter, the order of the learned Trial Judge would show that an objection as to the jurisdiction of the Court was raised at the hearing of any application for the grant of an injunction or interim order. In fact, as already noted, the reply to the application proceeds on the basis that it was filed under Order 14, Rule 2(2). What has been stated in the reply will of course, not be dispositive of the application, but it would suffice to state at the present stage that a perusal of the application does not reveal that it satisfies the necessary prerequisites contained in Section 9-A.

8. That apart, it would also be necessary to note that the judgment of this Court in Meher Singh's case (*supra*), does not determine what in a particular case can be regarded as an objection to jurisdiction. The objection of a defendant on the

ground that the suit is barred by limitation cannot, in my view, be regarded as an objection as to the jurisdiction of the Court. This point has been decided as far back as in 1964 by a Bench of four learned Judges of the Supreme Court in *Ittavira Mathai Vs. Varkey Varkey and Another*, . The Supreme Court rejected in that case, the contention that a decree could be treated as a nullity and that it was liable to be ignored in subsequent proceedings because the suit in which a decree had been passed was barred by limitation. The Supreme Court held thus :

"If the suit was barred by time and yet, the Court decreed it, the court would be committing an illegality and therefore the aggrieved party would be entitled to have the decree set aside by preferring an appeal against it. But it is well settled that a court having jurisdiction over the subject matter of the suit and over the parties thereto, though bound to decide right may decide wrong; and that even though it decided wrong it would not be doing something which it had no jurisdiction to do. It had the jurisdiction over the subject matter and it had the jurisdiction over the party and, therefore, merely because it made an error in deciding a vital issue in the suit, it cannot be said that it has acted beyond its jurisdiction. As has often been said courts have jurisdiction to decide right or to decide wrong and even though they decide wrong, the decrees rendered by them cannot be treated as nullities."

The Supreme Court then dealt with the argument that Section 3 of the Limitation Act requires the Court to ascertain for itself whether the suit filed before it was within time. On that basis the submission was that the Court would act without jurisdiction if it fails to do so. Dealing with that argument, the Supreme Court held thus :

"All that the decision relied upon says is that Section 3 of the Limitation Act is peremptory and that it is the duty of the court to take notice of this provision and give effect to it even though the point of limitation is not referred to in the pleadings. The Privy Council has not said that where the court fails to perform its duty, it acts without jurisdiction. If it fails to do its duty, it merely makes an error of law and an error of law can be corrected only in the manner laid down in the Civil Procedure Code."

9. In the subsequent judgment in *Manindra Land and Building Corporation Ltd. Vs. Bhutnath Banerjee and Others*, , where the Subordinate Judge had set aside an abatement and condoned the delay in submitting the application, the Supreme Court held that the decision of the learned Trial Judge, in determining whether sufficient cause has been made out for the condonation of delay, was within jurisdiction and that, therefore, the exercise of the revisional jurisdiction of the High Court u/s 115 of the Code of Civil Procedure, 1908, was not warranted. The Supreme Court has in the context of the exercise of the powers of the High Court u/s 115, while exercising the revisional jurisdiction, made a distinction between where a case the Trial Court decides the question of law pertaining to jurisdiction and a case where the Trial Court decides the question within its jurisdiction. In the former case, by a wrong decision it clutches at

jurisdiction or refuses to exercise jurisdiction, whereas in the latter case, the question as to whether there was sufficient cause is exclusively within the jurisdiction of the Court and the Court could decide it rightly or wrongly. Therefore, while interpreting the power of the High Court u/s 115 of the Code of Civil Procedure, the Supreme Court has made a distinction between a case where the Trial Court has wrongly decided whether a suit was barred by limitation in which case, the powers u/s 115 can be exercised and a case where the Trial Court decides whether to condone the delay u/s 5 of the Limitation Act in which case the Trial Court has acted within its jurisdiction, so that in the latter case the provisions of Section 115 would not be attracted.

10. The judgment of the Supreme Court in *Ittyavira Mathai's case* (supra) has been followed in a recent judgment of the Supreme Court in *Budhia Swain and Others Vs. Gopinath Deb and Others*, . Mr. Justice R. C. Lahoti delivering the judgment of a Bench of two learned Judges held that

"A suit or proceeding entertained and decided in spite of being barred by limitation is not without jurisdiction, at worst it can be a case of illegality."

11. In the circumstances of this case, the provisions of Section 9-A were not attracted either in terms of the stage at which the application could be filed or in terms of the subject matter which can permissibly form a part of the challenge to the jurisdiction of the Court. The learned Trial Judge was of the view that the issue involved in the present case was not an issue of law alone, but requires evidence to be adduced. In holding thus, the learned Trial Judge has obviously based his reasoning on the provisions contained in Order 14, Rule 2(2) of the Code of Civil Procedure. Since the issue of limitation in the present case was not a pure question of law as the contents of the application filed by the Applicant herein would itself show, the learned Trial Judge was justified in the view which he has taken.

12. Finally, it would be necessary to refer to the judgment of a learned Single Judge of this Court in *Sudesh v. Abdul Ajiz*, 2001(1) Mh.L.J. 324 where in a suit for specific performance, an objection was sought to be raised on the ground that the suit was barred by limitation. The learned Single Judge was of the view that this objection had u/s 9-A to be decided as a preliminary issue in regard to the jurisdiction of the Court. From the recital of the facts contained in the judgment, it is not clear as to whether the objection was raised at the stage of the hearing of an application for granting or for setting aside an order granting interim relief. But, that must have been so in order to attract the provisions of Section 9-A. The learned Single Judge was of the view that the judgment of the Division Bench in *Meher Singh Vs. Deepak Sawhny and Another*, mandated that the question of limitation be determined as a preliminary issue u/s 9-A. With a view to avoid a multiplicity of the proceedings, the learned Single Judge was of the view that it was desirable that the issue of jurisdiction be framed and decided in the first instance for if the issue was answered against the Plaintiff, it would be wholly unnecessary for the Trial Court to undertake the exercise of recording evidence

with regard to the rival stands of the parties on the merits of the case.

13. In the facts and circumstances of the present case, I am of the view that the provisions of Section 9-A are not attracted and that the learned Trial Judge was justified in rejecting the application under the provisions of Order 14, Rule 2(2) of the Code of Civil Procedure, 1908. There is, in the circumstances, no merit in the Civil Revision Application which is accordingly rejected.