

(1995) 01 CAL CK 0007
In the Calcutta High Court
Case No : C.O. 2681 and 2682 of 1991

Madhabilata Dutta and Others	Vs	APPELLANT
Rameswar Prasad Gupta and Others		RESPONDENT

Date of Decision : 24-01-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(2), 115

Citation : 99 CWN 1010

Hon'ble Judges : N.K. Batabyal, J

Bench : Single Bench

Advocate : Nihar Ranjan Chatterjee, Kasinath De and P.K. Basu, for the Appellant; R.P. Bagchi and Rabindra Narayan Das, for the Respondent

Final Decision : Dismissed

Judgement

N.K. Batabyal, J.—This Civil Order arises out of an application u/s 115 of the C.P.C. and is directed against the Order No. 211 dated 5.6.91 passed by the Learned Judge, 2nd Bench. City Civil Court, Calcutta in Title Suit No. 1573 of 1977. One Baidehi Gupta, since deceased, filed T. S. No. 1573/77 in the City Civil Court at Calcutta against the revision petitioners and the opposite party no. 8 for specific performance of an agreement dated 29.5.77 for sale of premises No. 11A. Ram Kumar Rakshit Lane, P. S. Burrabazar. Calcutta-7. The defendant nos. 1 to 7 who are the petitioners in the revisional application disclosed in their written objection against the petition for temporary injunction filed by the plaintiffs that the subject matter of the Suit had already been transferred to one Kisen Lal Agarwal. The then plaintiff, Baidehi Gupta filed a petition for adding Kisen Lal Agarwal and one S.C. Palit as defendant nos. 9 and 10 respectively and that prayer was allowed. The plaintiffs also made a prayer for a new declaration that the particular Deed of Sale made by the defendant nos. 1 to 8 in the Suit in favour of the defendant no. 9 be cancelled. The petition for amendment of the prayer portion was made about 7/8 years after the addition of the petitioner nos. 9 and 10 as parties to the Suit. The order allowing the amendment of the prayer

portion by the Learned Trial Court was challenged in this Court and this Court was pleased to confirm the order in revision. Thereafter additional written statement was filed by the defendants raising the question whether the reliefs claimed in the amended plaint were barred by the limitation. Additional issue being issue No. 1 I was raised on that point. Thereafter the revision-petitioners filed an application for hearing the said additional issue as the preliminary issue under Order 14 Rule 2 C.P.C. The plaintiffs/opposite parties filed written objection against the said application. The opposite party no. 9 supported the contention of the revisionists. The Learned Court below has been pleased by the impugned order to reject the contention of the revisionists. Being aggrieved by and dissatisfied with the said order the revisionists have come before this Court.

2. Their main contention is that the learned Trial Judge acted illegally and with material irregularity and failed to exercise jurisdiction vested in him in passing the impugned order.

3. The revisional application is hotly contested.

4. The only point for consideration is whether the impugned order is liable to be quashed.

5. The disputed point is whether the Learned Court below failed to exercise the jurisdiction vested in it under Order 14 Rule 2(2) C.P.C. while refusing to entertain the prayer of the revisionists for hearing the issue of jurisdiction of the court as a preliminary issue. It has been argued by the Learned Advocate for the revisionists as also the Learned Advocate for respondent no. 9 that the point of limitation is a question of jurisdiction and if the issue was decided against the plaintiffs-opposite parties then so far as the respondent no. 9 was concerned the suit would have to come to an end and consequently the entire suit would have failed. In support of his contention the Learned Advocate for the revisionists as also the Learned Advocate for the respondent no. 9 have placed reliance upon the principles laid down in *Mahant Narayangiri Guru Mahant Someshwarigiri Vs. The State of Maharashtra and Another*, In that case the plaintiffs suit was a suit for declaration of his title to the property in dispute. In order to succeed in that suit, the plaintiffs sought to establish not only that the property in dispute was the private property of the deceased Mahant but also that he was a duly appointed Chella of the deceased Mahant and that finding was no longer open to challenge, the question of going into the other aspect as to whether the plaintiff-appellant was or was not the duly appointed Chella of the deceased Mahant would not survive for decision.

6. The learned Advocate for the revisionists petitioners has also submitted that in view of the, clear observation of the Learned Court below in the body of the impugned order to the following effect that "admittedly, such prayer for cancellation of Deed should be made within 3 years from the date of knowledge of transfer and evidently that has not been done" it was no longer open to the court below to refuse the prayer of the revisionists for treating the point of

limitation as a preliminary issue under Order 14 Rule 2 C.P.C. The Learned Advocate for the respondent no. 9 has also supported the contention of the Learned Lawyer for the revisionists.

7. It has been argued by the Learned Advocate for the plaintiffs-opposite parties that the language of Order 14 Rule 2 C.P.C. is very clear. Sub-rule (2) of Rule 2 of Order 14 C.P.C. runs as follows:

"(2) Where issues both of law and of fact arise in the said 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 or the time being in force and for that purpose made, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined and made deal with the suit in accordance with the decision of that issue.

8. It is clear from above that issues of law only either touching upon the question of jurisdiction of the court or the question of any bar to the suit created by any law can be taken up as a preliminary issue. A question of limitation has been raised in the case at hand as the prayer for setting aside the Sale Deed was inserted after the expiry of three years from the date of the knowledge. Even if that issue was taken up as a preliminary issue, could the decision on that issue have disposed of the entire suit or in part thereof. In a contract for sale of immovable property the parties are bound by the terms of the contract. If any third party deals with the property covered by the contract of sale with notice thereof he is also bound by the contract. The main issue in the suit here is whether the plaintiff-opposite parties are entitled to get a decree for specific performance of a contract. Apparently, the question of purchase of property by the respondent nos. 9 and 10 with notice is a question of fact and this question cannot be decided without due evidence. Therefore, the entire suit cannot fail nor can be disposed of on the decision of the additional issue no. 1 I which was urged to be taken up as a preliminary issue. Under that amended Code, a duty is cast upon the Court that it must proceed to hear all the issues and pronounce judgement on the same. But a court may try an issue relating to the jurisdiction of the court or to the legal bar in the suit as a preliminary issue but this is merely in the nature of a discretion rather than a duty and the court is not bound to try any issue despite the provisions contained in sub rule (2) of Rule 2 of Order 14. The words "it may try" are clearly indicative of the fact that the discretion is given to the court and no duty is cast upon the court to decide an issue as a preliminary issue. *Usha Sales Ltd. Vs. Malcolm Gomes and Others*, In another case reported in *Sunni Central Waqf Board and others Vs. Gopal Singh Vishrad and others*, it has been held that the Court is not bound to take up any issue as preliminary issue. All judicial discretions have to be exercised reasonably. Even if some of the issues fall within the ambit of Clauses (a) and (b) of Rule 2(2) of

Order 14 of the C.P.C. the Court can on a reasonable exercise of discretion refuse to take the same as preliminary issues.

9. From the position of law as discussed above it is clear that the Court is not bound to take up any issue as a preliminary issue even if the same comes within the ambit of Order 14 Rule 2(2) Clause (a) or (b) of C.P.C. but the court has to exercise the discretion in a reasonable manner. In the case at hand, the Learned Judge has given a reason for exercising his discretion in a particular way. This Court may or may not agree with the learned Court below in the matter of the exercising of the discretion, this way or that way. But this court sitting as a Court of Revision u/s 115 of the C.P.C. cannot interfere with the exercise of discretion of the Learned Court below if that discretion has been exercised within the jurisdiction of the court. Simply because that discretion was exercised in a wrongful manner, it cannot be said that this court has jurisdiction to interfere with the exercise of that discretion sitting in a revisional capacity.

10. So far as the case cited by the learned Advocate for the revisionists concerned, it appears that the main point considered in that judgment the Apex Court was decision on what point" is necessary. It has got nothing to do with the jurisdiction of the Court to decide an issue as a preliminary issue. It may in this connection be mentioned that in a case of this High Court reported in M.R. Ghose v. M. M. Karmakar, 84 C.W.N. 426, it was held by a Learned Single Judge of this Court that under Order 14 Rule 2 of the C.P.C. 1908, as amended in 1976, an issue of law may be tried as a preliminary issue only if the conditions indicated in Sub rule (2) of Rule 2 are fulfilled. In that decision also it was not held that the Court is bound to take up a point of issue as a preliminary issue if the conditions of Order 14 Rule 2(2) are fulfilled, as the element of discretion on the part of the Court is there.

11. In view of the discussions made above. I hold that this is not a fit case where a revisional court will interfere with the impugned order. In this view of the matter, the revisional application fails and is dismissed. This order will also govern CO. No. 2682 of 1991 as these two cases have been heard analogously.