
(1990) 12 BOM CK 0036

In the Bombay High Court

Case No : Civil Revision Application No. 908 of 1990

RT. Rev. Dr. Ignatius D'Cunha and Another

APPELLANT

Vs

Rev. Father Denis Kamath

RESPONDENT

Date of Decision : 12-12-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 4, Order 30 Rule 1, Order 30 Rule 2, Order 39 Rule 1, 115

Citation : (1992) 1 BomCR 647

Hon'ble Judges : N.P. Chapalgaonkar, J

Bench : Single Bench

Advocate : S.C. Bora, for the Appellant; R.R. Jethalia, for the Respondent

Judgement

N.P. Chapalgaonkar, J.—Rev. Father Denis s/o. Chittarajan Kamath, who was working as a Secretary of Saint Francis De-Sales Education Society, Aurangabad was removed from his post by Bishop who alleges to be the President of the Society and this removal was challenged by him in Regular Civil Suit No 814 of 1990 filed in the Court of Civil Judge. Junior Division at Aurangabad. Defendants namely; the alleged President and the person who is appointed in place of the plaintiff, contested the suit and also raised plea that the Civil Court has no jurisdiction to hear this suit because of a bar created by section 80 of the Bombay Public Trusts Act, 1960. Plaintiff had submitted an application for temporary injunction under Order 39, Rule 1 praying that the defendants be restrained from obstructing him from working as a Secretary of the said Trust. Despite raising an objection in the written statement, a separate application was also moved by the defendants on 9-7-1990 that the point for the jurisdiction be decided though the prayer did not say so elaborately but the intention of the defendant in filing this application appear to be that this issue be tried as preliminary issue. This is clear by the fact that in the title of this application, there is a mention that this application, is u/s 9-A of the Code of Civil Procedure. It appears that the learned trial Judge did not pass any order separately on this application and did not frame any preliminary issue. In fact, no issues have been

framed in this suit at all. But he proceeded to dispose of both the applications namely: application for temporary injunction at Exhibit 5 and application for deciding issue of jurisdiction namely; Exhibit 14 together by an elaborate judgment The learned Judge framing points at issue held that Civil Court had the jurisdiction to entertain and try the instant suit and also consider the question of grant of interim relief and reject the application by his order dated 23-7-1990.

2. Aggrieved by this order passed by the 4th Civil Judge, Junior Division, Aurangabad in Regular Civil Sent No. 814 of 1990, plaintiff preferred Misc. Civil Appeal bearing No. 163 of 1990 objecting to the refusal of the temporary injunction In this appeal, an application for the interim relief was moved by the plaintiff appellant and the learned Additional District Judge, Aurangabad was pleased to grant an injunction as prayed by the plaintiff restraining defendants from obstructing plaintiffs function as Secretary of the said Trust. Society by Order dated 29-8-1990 but the Misc. Civil Appeal No. 163 of 1990 is still pending on the file of the District Court, Aurangabad.

3. The main contention raised by Shri S. C. Bora, learned Counsel for the appellant, before me is that not only the trial Court has acted with material irregularity in deciding the question of the interim relief before framing an issue regarding the jurisdiction and deciding it as a preliminary issue required by mandate of section 9-A of the Code of Civil Procedure, 1908 but has also acted without jurisdiction. Shri Bora submits that whenever an objection to the jurisdiction of the Court is raised, the Court has no jurisdiction to pass any order of interim relief unless it decides the question of jurisdiction first and finds that it has jurisdiction and only an exception carved out from this is that during the pendency of the question of jurisdiction and when the decision of the said question is in process, ad interim relief can be granted by the Court. Shri Bora submits, that in the instant case, the relief considered and refused is not ad interim relief but it is temporary having finality only subject to appeal, till disposal of the suit. Shri Bora further submits that since the matter was disposed of in the trial Court, right to appeal arose in plaintiff and he could obtain interim relief in the appeal. Therefore, even interim relief granted in appeal would be without jurisdiction since question of interim relief cannot be said to have been finally disposed of by the trial Court.

4. Shri Jethalia, learned Counsel for the respondent, submits that what is required by section 9-A is that before deciding application for interim relief, question of jurisdiction will have also to be decided by the Court and reason behind this, provision appears to be that unless Court finds that it has jurisdiction, interim relief should not be considered Therefore, there will not be any prejudice to the parties or material irregularity if the question of jurisdiction and question of interim relief are decided simultaneously.

5. Shri Jethalia's submission cannot be accepted for the reason that when procedure as is laid down for deciding two things is one and the same, then decision on both the points simultaneously or one after another will have no

difference. But, in the instant case, it cannot be said that a decision on issue to be framed under Order 14 of the CPC and a decision on the question of application under Order 39 are to be decided by the same procedure. A summary procedure has been prescribed for decision application under order 39 and it is evident from special provision made in respect of taking evidence while considering the interim relief. Order 39, Rule 1 authorises specifically to the Court hearing application for interim relief to pass orders when the facts are proved by affidavits This is an exception to the general rule how the evidence is to be recorded in the trial of a suit as mentioned in Rule 4 of Order 18. Secondly, the nature of the evidence which a party would be required to place before the Court when the Court is considering a question of granting or refusing interim relief under Order 39 would be totally different from the nature of the evidence which it would require to place before the Court when the Court is to consider question of jurisdiction and, thirdly, an issue is required to be framed for the reasons that the parties must be made aware as to what are question to be decided by the Court. Parties are to submit evidence in the light of these issues and the burden of proving them is on either of the parties. Therefore, when the issue is to be decided, it is a conclusion of the trial so far as that aspect of the case is concerned and fourthly, in case the Court finds that it has no jurisdiction, the finding on this issue results into disposal of the suit itself. Therefore, there is material difference between the nature of the hearing in respect of an interim relief and in respect of issue regarding jurisdiction.

6. Shri Jethalia further submitted that Since decision of temporary injunction and decision about an issue if answered in affirmative holding that Court has a jurisdiction can be challenged by way of Civil Revision Application before this Court, no material prejudice would be there to the parties. But even on this count, the argument of the learned Counsel cannot be accepted. Though both the revision applications shall be u/s 115 of the CPC but this Court may take different approach while interfering in revision in respect of interim relief and in revision which raises question of jurisdiction of the Court.

7. In the instant case, Since the issue has not been framed at all, a mere consideration of the question of jurisdiction by asking Counsel to address the Court on the point will not be a decision on the issue as is required by the mandate of section 9-A of the Code of Civil Procedure. Therefore, there is no compliance of the provisions of section 9-A.

8. The question of jurisdiction and of interim relief can be heard together was also considered by Kotwal, J., in *Kranti Mohan Guruprasad Mebra and Another Vs. Fatehchand Vasuram Behal*, . Kotwal J., observed thus---

"It is true that it may be permissible for the Court to adopt a composite hearing of the said preliminary issue and the interim relief and even to determine the preliminary issue at such hearing and it may even be conceivable in certain circumstances to make such determination on both counts by a composite order, however the governing clause remaining intact would enunciate that the

adjudication of the Preliminary issue would precede the decision of the interim application."

Relying on this observation, Shri Jethalia submitted that the composite decision of both the issues is held to be permissible. Even the hypothetical possibility which was considered by Kotval, J., points out that the issue will have to be framed and determined along with question of the temporary injunction. Kotval, J., has further pointed out the difference between the nature of the bearing on both the matters as follows-

"Thus, it cannot be over-looked that the scheme of the said provision unmistakably indicates that the Court is expected to determine the objection to jurisdiction as an issue in the suit which should be treated as a preliminary issue and having arising regard to the concept of the pleading, the issues arising therefrom and the, determination of such issues on evidence and on the anvil of procedure as prescribed under the Code, it would be clear that the determination of such an issue even at that stage would be on the consideration of all aspects in which the said issue is enveloped, secondly, it would be after giving the parties a full opportunity to lead all the necessary material and the evidence as they would have done when the issue was framed at the trial and lastly the determination of such an issue even at that stage would get a label of finality in so far as that proceeding and the suit is concerned. It is this depth that is in contract with the thinner one of the interim applicator for an interim relief which is to be decided essentially on the prima facie view without probing deeper in the finer shades and aspects. One tends to touch the roof whereas the other remains on the surface. This difference would equally by alive even if both the matters are heard at one and the same time".

Though Kotval, J., has pointed out the possibility of both the questions to be decided together, but looking to the difference of the nature of the inquiry as was pointed out by him, it would always be desirable that both the things are not heard together.

9. Provisions of section 9-A require determination of the question of jurisdiction first before an order of interim relief is to be passed and was considered to be an imperative and mandatory by the Division Bench of this Court in Sadguna Chimanlal Shah and another v. New Sagar Darshan Co-Op Housing Society, Bombay and others, 1980 Mh.L.J. 203.

10. In the case at hand, since the issue itself was not framed, the parties were not given to understand that they have to lead evidence on the point, learned Judge appears to have heard learned Counsel on the question of jurisdiction on assumption that parties do not want to lead evidence on the point. No such concession was made by the parties in this case and, therefore, determination of the interim relief by the learned trial Judge itself stands vitiated. Civil Revision Application is, therefore, allowed. Order dated 23-7-1990 passed by the 4th Jt. Civil Judge, Junior Division, Aurangabad rejecting application at Exhibit 14 filed

by defendant and also in rejecting the application at Exhibit 5 filed by the plaintiff is hereby quashed. The learned trial Judge is directed to frame the issue regarding the jurisdiction as it arises out of the pleadings in his opinion and then proceed to decide application Exhibit 5 afresh. Shri Jethalia submits that Since the order dated 23-7-1990 is being quashed and the matter is being sent to the trial Court, the appeal filed by his client in the Court of District Judge, Aurangabad becomes infructuous and he would withdraw the same for that reason. However, it appears that an interim relief has been granted in Misc. Appeal by the appellate Court on 29-8-1990 and that interim relief still continues. This interim relief is directed to be continued and to be taken as interim relief granted under sub- section (2) of section 9-A only during the pendency of the decision on the question of jurisdiction. Preliminary issue to be framed by learned trial Judge, if any, u/s 9-A within a period of two months from today. The writ to go forthwith Since the learned trial Judge has taken a view about the interim relief in his order, it would be desirable if the matter is assigned to some other Judge This liberty is there with Principal Judge of Civil Court, Aurangabad Parties are directed to appear before the Court of Civil Judge, Senior Division, Aurangabad on 26-12-1990.