
(2016) 02 DEL CK 0247

In the Delhi High Court

Case No : FAO(OS) 457/2014 and C.M. 18008, 11281/2015

Shakun Jaiswal and Others

APPELLANT

Vs

Anand Pershad Jaiswal and Others

RESPONDENT

Date of Decision : 03-02-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 13 Rule 1, Order 14 Rule 5, Order 7 Rule 11(a), Order 7 Rule 11(d), Order 7 Rule 14
Specific Relief Act, 1963 — Section 34

Citation : (2016) 3 ADDelhi 65

Hon'ble Judges : Badar Durrez Ahmed and Sanjeev Sachdeva, JJ.

Bench : Division Bench

Advocate : A.S. Chandhiok, Sr. Advocate, Malini Sood, Harleen Singh, Vaishnavi Rao and Nimisha Jain, Advocates, for the Appellant; Arvind K. Nigam, Sr. Advocate, Akshay Makhija, Saurabh Seth and Amisha Bejroi, for the Respondent

Final Decision : Dismissed

Judgement

Sanjeev Sachdeva, J.—1. Both these appeals impugn the common order dated 22.09.2014 in CS (OS) 2064/2009. FAO (OS) 457/2014 is filed by the defendant No. 1 in the suit and FAO (OS) 459/2014 is filed by the defendant No. 2 in the suit. Respondent No. 1 in both the appeals is the plaintiff in the subject suit. The plaintiff filed the suit for declaration and mandatory injunction for declaring the transfer of funds amounting to ? Sterling 86,41.735.81, US \$ 2.54.589.83 and ? 10,000 from the accounts belonging to late Shri L.P. Jaiswal in favour of defendant No. 1 to be fraudulent transactions and therefore null and void and for reversing the said transactions.

2. The two applications decided by the impugned order are applications filed by the respondent No. 1 (plaintiff in the suit) being IA No. 19226/2013 under Order 7 Rule 14 read with Order 13 Rule 1 Code of Civil Procedure (hereinafter referred to as CPC) seeking to place additional documents on record and IA No. 5416/2014 under Order 14 Rule 5 seeking to strike out issue No. (v) and to vary

the direction treating issues (i) and (ii) as preliminary issues.

3. Originally the plaint by order dated 28.02.2011 was rejected under Order 7 Rule 11(d) of the CPC on an application filed by the appellants herein. The order rejecting the plaint was challenged by the respondent No. 1, which challenge was accepted and the order dated 28.02.2011 was set aside and the suit was restored. The said decision was impugned by the appellant herein before the Supreme Court. The Supreme Court while dismissing the petitions clarified that it was open to the appellants herein to raise all available pleas in the written statement including the pleas relating to limitation, court fees and maintainability of the suit. It was directed that the trial be concluded as expeditiously as possible and preferably within two years from the date of the passing of the said order.

4. Thereafter, the written statement and replication were filed and the following issues were settled on 14.02.2014:-

i) Whether the suit as framed by the plaintiff is properly valued for the purpose of court fees?

ii) Whether the suit is liable to be rejected under Order 7 Rule 11(a) and (d) CPC?

iii) Whether the suit is barred by limitation? OPD.

iv) Whether the plaintiff has the locus to maintain the present suit? OPD.

v) Whether the suit as framed is maintainable in view of the proviso to Section 34 of the Specific Relief Act, 1963? OPD.

vi) If the answer to issue Nos. (i) to (v) or any of them is in the negative, whether the plaintiff is entitled to a declaration, as prayed for?

vii) Whether the plaintiff is entitled to a decree of mandatory injunction, as prayed for?

viii) Whether the suit is barred by principles analogous to res judicata? OPD-1.

ix) Whether the plaintiff is estopped from filing the present suit for declaration in view of the undertaking given by the plaintiff before the Company Law Board? OPD-1.

Issues No. (i) and (ii) were treated as preliminary issues.

5. By the impugned order, IA No. 19226/2013 under Order 7 Rule 14 read with Order 13 Rule 1 CPC seeking to place additional documents on record has been allowed and IA No. 5416/2014 under Order 14 Rule 5 seeking to strike out issue No. (v) and to vary the direction treating issues (i) and (ii) as preliminary issues has been partly allowed. While the prayer seeking deletion of issue (v) has been dismissed, the direction treating issues (i) and (ii) as preliminary issues has been recalled.

6. By IA No. 19226/2013, the plaintiff sought to place on record documents filed vide three sets of index dated 10.09.2013, 23.09.2013 and 30.10.2013. The documents filed along with the first index dated 10.09.2013 are stated to be certified copies of testimonies of various witnesses recorded in testamentary cases, which testimonies were recorded after the filing of the subject suits. The second set of documents filed with the list of index dated 23.09.2013 are stated to be medical history and record of late Shri L.P. Jaiswal and the third set of documents are certified copies of the documents stated to be already on record and the same were re-filed for the convenience of the court. The learned Single Judge has allowed the said application permitting the said documents to be taken on record. We may also note that the documents were filed prior to the framing of issues. The learned Single Judge has left the question of the relevance and validity of the said documents to be considered at the stage of trial in accordance with law.

7. We find no reason to interfere with the discretion exercised by the learned Single Judge in permitting to take on record the said documents. Though the documents were filed belatedly, however, they were filed well before the framing of issues. The documents are stated to be relevant for the purposes of disposal of the suits. The evidence of the parties is yet to commence. No prejudice is likely to be caused in case the plaintiff is permitted to place the said documents on record. The relevance and validity of the documents would in any case be considered at an appropriate stage i.e., at trial.

8. The learned Single Judge while exercising the discretion has burdened the plaintiff with costs of Rs. 50,000/- to be paid equally to the defendants No. 1 and 5 i.e., appellants herein. We see no reason to interfere with the discretion exercised by the learned Single Judge. The appeal in so far as it relates to IA No. 19226/2013 is dismissed.

9. With regard to IA No. 5416/2014 (striking out issue No. (v) and to vary the direction treating issues (i) and (ii) as preliminary issues), the learned Single Judge has modified the order dated 14.02.2014 to the extent that issues No. (i) and (ii) would not be treated as preliminary issues and would be decided along with other issues. The primary reason stated in the impugned order was that the order passed by the Supreme Court had to be given effect to. The contention of the respondent No. 1 that since the Supreme Court had directed the trial to be conducted and expedited the same implied that the suit had to proceed for trial under all circumstances was accepted by the learned Single Judge.

10. The learned senior counsel for the appellant contended that the said application was, in fact, an application seeking review of the order whereby the court while framing issues had directed that the issues No. (i) and (ii) be treated as preliminary issues. In this circumstances, it is contended that the issues involved in the appeal is as to the jurisdiction of the learned Single Judge in passing the impugned order and reviewing the order dated 14.02.2014 and not placing the application before the same learned Judge who had passed the order.

11. The learned counsel for the respondent No. 1 has raised preliminary objection as to maintainability of the appeal on the ground that the said order is not a judgment and is not an appealable order in terms of the ratio as laid down by the Supreme Court in *Shah Babulal Khimji Vs. Jayaben D. Kania* : , 1981 APEXSOFT (S.C.) 134 : (1981) 4 SCC 8.

12. We are of the view that the learned Single Judge has erred in allowing the said application and varying the direction of treating the issues (i) and (ii) as preliminary issues. Perusal of the order dated 14.02.2014 whereby issues were framed clearly shows that the court had applied its mind and considered the contention of the parties that no evidence was required to be led on issues (i) and (ii) and thus issues (i) and (ii) were treated as preliminary issues. The fact that the Supreme Court by order dated 23.03.2013 permitted the defendants to raise all issues in the written statement and directed that the trial be expedited, does not imply that the court has to necessarily undertake the process of the trial if the suit can be disposed of on a preliminary issue. The direction of the Supreme Court that trial be concluded expeditiously does not imply that the trial has to be conducted irrespective of the fact that trial may not be necessary in the facts and circumstances of the case. In case the suit can be disposed on a preliminary issue, the court is not to necessarily set down the suit for trial merely because the trial in the suit has to be expedited. The direction that trial is expedited would come into force in case there is a requirement of trial and the suit is set down for it. If there is no necessity of a trial the direction of the Supreme Court would not be applicable.

13. In view of the above, the impugned order to the said extent is set aside. Issues (i) and (ii) are treated as preliminary issues as originally directed by order dated 14.02.2014. The pendency of the consideration of the said issues before the court does not entail that the proceedings of trial that have been set in motion are to be stalled. The trial shall proceed irrespective of the pendency of the decisions on Issues (i) and (ii). In the event, the court decides Issues (i) and (ii) in favour of the defendants, there would be no necessity of continuing with trial any further and the suit can be disposed of based on the decision of issues (i) and (ii).

14. The plea of the respondent, that the appeal is not maintainable, as the impugned order does not satisfy the test as laid down in *Shah Babulal Khimji* (Supra), is not sustainable. On the contrary, the Supreme Court in the said judgment has laid down ".....Another shape which a preliminary judgment may take is that where the Trial Judge passes an order after hearing the preliminary objections raised by the defendant relating to maintainability of the suit, e.g., bar of jurisdiction, *res Judicata*, a manifest defect in the suit, absence of notice under section 80 and the like, and these objections are decided by the Trial Judge against the defendant, the suit is not terminated but continues and has to be tried on merits but the order of the Trial Judge rejecting the objections doubtless adversely affects a valuable right of the defendant who, if his objections are

valid, is entitled to get the suit dismissed on preliminary grounds. Thus, such an order even though it keeps the suit alive, undoubtedly decides an important aspect of the trial which affects a vital right of the defendant and must, therefore, be construed to be a judgment so as to be appealable to larger Bench."

15. By order dated 14.02.2014, issues (i) and (ii) were treated as preliminary issues and if the said issues are decided in favour of the appellant, the suit can be disposed of and the proceedings terminated. By the impugned order, the learned single judge has varied the order treating the said issues as preliminary issues, which implies that the right of the appellant to have the suit dismissed on the preliminary issues is adversely affected. The impugned order satisfies the test as laid down in *Shah Babulal Khimji (Supra)* and the appeals are thus held to be maintainable. In view of the above, the appeals, in so far as they relate to IA No. 19226/2013 (under Order 7 Rule 14 read with Order 13 Rule 1 CPC, seeking to place additional documents on record) are dismissed and the appeals, in so far as they relate to IA No. 5416/2014 (under Order 14 Rule 5 CPC, seeking to vary the direction treating issues (i) and (ii) as preliminary issues) are allowed. IA No. 5416/2014 in CS(OS) 2064/2009 is dismissed. The parties shall bear their own costs.