

(2001) 04 BOM CK 0051

In the Bombay High Court

Case No : Civil Rev. Application No. 938 of 2000

Ujwalaben Mahindra Shah and Another

APPELLANT

Vs

Kesharchand Gulabchand and Others

RESPONDENT

Date of Decision : 18-04-2001

Acts Referred:

Civil Procedure (Maharashtra Amendment) Act, 1977 — Section 9
Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 14 Rule 2(2)
Partnership Act, 1932 — Section 69

Citation : (2001) 4 ALLMR 458 : (2002) 1 CivCC 572 : (2002) 1 MhLj 378 :
(2002) 2 RCR(Civil) 393 : (2002) 2 RCR(Civil) 609

Hon'ble Judges : R.M.S. Khandeparkar, J

Bench : Single Bench

Advocate : V.S. Bedre, for the Appellant; L.B. Pallod and R.R. Mantri, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned advocates for the parties.
2. Perused the records.
3. Rule. Rule made returnable forthwith by consent.
4. The petitioners challenge the order dated 10th April 2000 passed by the Civil Judge, Senior Division, Ahmednagar in Special Civil Suit No. 477 of 1988. By the impugned order, the trial Court has rejected the application filed by the defendant Nos. 16 and 17, who are the petitioners herein, for treating Issue No. 1 as a preliminary issue and to decide it accordingly.
5. Few facts relevant for the decision are that in the suit filed by the respondent No. 1, a point regarding non maintainability of the suit on the ground that the plaintiff firm is not a registered Partnership firm has been raised by the petitioners "and some defendants. The contention of the petitioners is that the suit is not maintainable at the instance of the plaintiffs firm in view of Section 69

of the Partnership Act in the absence of its registration. Based on those pleadings the trial Court has framed the issue No. 1 as under :

"Does plaintiff prove that it is a registered partnership firm with Registrar of Firms?"

Referring to the said issue, an application was filed in March 2000 by the petitioner that the said issue should be tried as a preliminary issue as it would dispose of the entire controversy between the parties. The trial Court, however, after hearing the parties rejected the said application by the impugned order, Hence, the present petition.

6. While assailing the impugned order it is sought to be contended that in the course of deposition of the plaintiff it was disclosed that there was no firm in the plaintiffs name registered with the Registrar of Firms at the time of the filing of the suit but there was a firm by name "M/s. Kesharchand Gulabchand Munot" and that subsequent to the filing of the suit the plaintiff had approached the Registrar of the Firms for deletion of the name "Munot" from the firm's name. Hence, it was necessary for the trial Court to take note of the same and to try and decide the said issue as the preliminary issue as it would dispose of the entire suit itself. The trial Court, however, without even considering as to whether the issue in question can at all be decided as a preliminary issue or not, has held that it is a matter of discretion to decide an issue as a preliminary or otherwise and has rejected the application in improper exercise of its jurisdiction. Placing reliance upon the decision of the learned Single Judge of this Court in the matter of Shakuntala Balwant Gadgil v. Shubhada Suhas Kulkarni reported in 1985 Mh.LJ. 77 it was submitted that the court always has jurisdiction to treat any issue as a preliminary issue if such an issue would obviate the suit and considering the fact that the decision on the point in question would help the Court to dispose of the-entire suit itself, the trial Court ought to have decide the said issue as the preliminary issue. Reliance is also placed in the decision of the Sudesh w/o Sushilkumar Honda v. Abdul Ajhiz s/o Umarbhai and Anr. reported in 2001 (I) Mh.LJ. 324 wherein it has been held that issue whether suit is barred by limitation is a question which would expressly touch upon the issue of jurisdiction of the Court, for, if the suit is barred by limitation, the Court trying such a suit is precluded to pronounce upon the merits of the contentions. With a view to avoid multiplicity of proceedings it will therefore be essential that the issue of jurisdiction in the context of, if suit being barred by limitation, is framed as a preliminary issue and be decided in the first instance before proceeding to decide the suit on any other issue. Considering the fact that the suit has been instituted in 1988 and nearly 10 seating had taken place for recording the deposition of the plaintiff himself, according to the learned advocate for the petitioners, this is a fit case for trying the issue in question as the preliminary issue as it would help to dispose of the matter expeditiously. The contentions on behalf of the petitioners are supported by the respondents Nos. 7, 8,10 to 13, 16 and 17. On the other hand, it is sought, to be contended on behalf of the respondent No. 1 that, the

trial Court in its discretion has held that the issue in question cannot be tried as a preliminary issue and that such discretion having been exercised judiciously, there is no error of jurisdiction which warrants interference in revisional jurisdiction. Placing reliance upon the decision of the learned single Judge in the matter of Usha Sales Ltd. Vs. Malcolm Gomes and Others, it has been submitted that in view of the amendment to CPC which has been brought about in 1976, there is an obligation cast upon the Court to decide the entire controversy in the suit by pronouncing the judgment and not to dispose of the matter merely on a preliminary issue unless such issue relates to the jurisdiction of the Court to try the suit or to the legal bar to the suit and that too in the discretion of the Court and when the court is of the opinion that it is expedient to dispose of the suit on such preliminary issue. Further referring to the decision of the learned single Judge in the matter of Maharashtra State Warehousing Corporation Ltd. Vs. Bhujang Krishnaji Kohale, it has been submitted that the issues which are mixed questions of facts and law cannot be tried as preliminary issues and they are to be tried along with all other issues in the suit.

7. The learned Single judge of this Court in Shakuntala Balwant Gadgil's case while dealing with the suit for possession of premises on termination of tenancy of the defendant, wherein the issue regarding non maintainability of the suit on account of applicability of the provisions of the Bombay Rent Act to the premises was raised, has observed that the Court always has jurisdiction to treat any particular issue as a preliminary issue if the Court is satisfied that the trial of the suit itself would be obviated in case the finding on the issue goes to the root of the Courts decision to grant any relief to the plaintiff. If the finding on an issue is bound to decide the fate of the suit in one way or the other and thereby can result in quick disposal of the suit, then such an issue is necessarily to be decided as the preliminary issue. It has also been observed that if the evidence is required to be led, parties could be permitted to lead evidence in support of the preliminary issue.

8. In Sudesh w/o Sushilkumar Hondo's case, the learned single Judge referring to the decision of the Division Bench of this court in the matter of Meher Singh v. Deepak Sawhny reported in 1995 (3) Mh.LJ. 940 has held that the view taken by the Division Bench is that when the question of jurisdiction is raised, it is the duty of the court to frame preliminary issue in that behalf and try and decide the same at the earliest opportunity before proceeding with the merits of the contentions raised in the suit and that the view that the question of jurisdiction being a mixed question of law and facts, it cannot be decided at early stage, would be an erroneous view of the said decision of the Division Bench. It has been further observed that the issue as to whether the suit is barred by limitation is a question which would expressly touch upon the issue of jurisdiction of the Court, and therefore, essential that issue of jurisdiction in the context of suit being barred by limitation, is framed and decided in the first instance before proceeding to decide the suit on any other issue.

9. In fact in Meher Singh's (supra) case, the point for determination was whether while deciding the preliminary issue of jurisdiction as contemplated u/s 9A the parties are required to be given opportunity to lead evidence or not. Answering the said question, the Division Bench has held 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 specified 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 injunctions, 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 of opportunity to the parties to lead evidence, if required."

10. The learned Single Judge of this Court in Usha Sales Limited's case, after taking into consideration the comparison between the provisions of law contained in Order XIV prior to and after the Act 104 of 1976, the Act by which various provisions in the CPC were amended, has observed that prior to the enforcement of the said amendment, the Court was under obligation to decide some issues as the preliminary issues if those issues were issues of law only and if the decision on them would dispose of a case or a part thereof. Secondly the court had discretion to decide any other issue as a preliminary issue though that issue was not a pure issue of law. However, drastic changes have been made by the amendment in the year 1976 as could be seen from the wording of Rule 2 of Order 14 of the Civil Procedure Code. It has been further held therein:

"..... there is an obligation cast upon the Court that even though a case upon the Court that even though a case may be disposed of on a preliminary issue the Courts, shall subject to the provision of Sub-rule (2) pronounce judgment on all issues. In other words, the obligation to decide a question of law as a preliminary issue if that decision disposes of the case or part of the case is no longer there. Similarly, the discretion to decide any other issue as a preliminary issue has been taken away totally from the Court. On the other hand, a duty is cast upon the court that it must proceed to hear all the issues and pronounce judgment on the same.

There is, however, a small exception carved out to the above provision. The Court may try an issue relating to the jurisdiction of the court or to the legal bar to the suit as a preliminary issue but this is more in the nature of a discretion rather than a duty and the Court is not bound to try any issue despite the provision contained in Sub-rule (2) of Rule 2 of Order 14 of the Code. The words "it may try" are clearly indicative of the fact that discretion is given to the Court

and no duty is cast upon the Court to decide any issue as a preliminary issue."

11. In Maharashtra State Warehousing Corporation Limited Pune's case the learned single Judge of this Court has held that whether to try the issues as preliminary issues is a discretion vested in the Court. Issues which are mixed questions of fact and law cannot be tried as preliminary issues.

12. It was sought to be contended that since the decisions in Shakuntala Balwant Gadgil's case as well as in Usha Sales Limited's case were delivered by single Judges and the former being delivered latter in time, the same to be held as a good law and to be binding unless it is set aside by a larger Bench. In any case it is also submitted that in view of the contrary views taken in the said two decisions by the learned Single Judges of this Court, this case may be referred to the larger Bench. Before considering this contention, it would be appropriate to refer to three more decisions, one of the learned single Judge, the other of Division Bench of this Court and the third one of the Apex Court.

13. The learned Single Judge of this Court in Kranti Mohan Guruprasad Mehra and Anr. v. Fatehchand Vasuram Behal reported in 1983 Mh.LJ. 141 has held thus:

"Section 9-A which came to be inserted by the CPC (Maharashtra Amendment) Act 65 of 1977 envisages that if at the hearing of an application for granting or setting aside an order granting any interim relief including injunction and appointment of a receiver made in a suit, an objection to the jurisdiction of the Court to entertain the suit is taken by any of the parties, then the Court shall proceed to determine at the hearing of such an application, the issue about the jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief. The determination of such an issue has to be on consideration of all aspects, in which the said issue is enveloped. It will have to be decided after giving the parties full opportunity to lead all the necessary evidence as they would have done when the issue was framed at the trial and the determination of such an issue even at that stage would get a label of finality insofar as that proceeding and the suit is concerned. It is not as if that the same issue need be reheard in the second round when the other issues are heard at the trial and it is equally not as if that the first round being, only a prima facie, superficial view on a tentative objection while the second round, being a full fledged, final decision or adjudication on all aspects of the merits transforming the said objection into a regular issue. Section 9A of the CPC as amended therefore opens an umbrella under which exists a self-contained scheme with a definite object.

14. The Division Bench of this Court in Shiv Bhagwan Moti Ram Saraoji Vs. Onkarmal Ishar Dass and Others, , has while holding that the issue of jurisdiction which is a mixed question of law and facts can be tried as preliminary issue as well as an issue along with other issues, observed that:

"This would depend upon whether the evidence with regard to jurisdiction could

be separated from the evidence on other issues. Therefore it would not be correct to say that in all cases an issue as to jurisdiction, is necessarily an issue of law."

15. In Major S.S. Khanna Vs. Brig. F.J. Dillon, , the Apex Court has ruled thus ;

"Under Order 14, Rule 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 the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until, after the issues of law have been determined, the jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact a preliminary issues. Normally all the issues in a suit should be tried by the Court not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

15-A. In fact, the learned Single Judge of this Court in M. S. Warehousing Corporations case by referring the said decision of the Apex Court has further observed that the said decision was given even prior to the amendment of 1976 to the Code of Civil Procedure. According to the said decision of the Apex Court, therefore, the jurisdiction to try issues of law apart from the issues of fact can be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone. At the same time the Apex Court in no uncertain words has expressed that the Code confers no jurisdiction upon the Court to try a suit on mixed questions of law and fact as preliminary issues.

16. There is no doubt that when there are two contradictory decisions of two learned Single Judges of the same High Court, normally the decision latter in point of time is to be held as binding precedent. Perusal of the decision of the learned Single Judge in M. S. Warehousing Corporation's case it shows that me same was delivered after considering the decision of the learned single Judge in Usha Sales Ltd. 's case as well as that of the Apex Court in S. S. Khanna's case (supra). The decision in Usha Sales Limited's case takes into consideration the law as it existed prior to 1976 and subsequent thereto. Considering the law relating to the binding nature of precedent of law laid down by this High Court, the decision in Usha Sales Limited's case clearly lay down the ratio to the effect that the Court may try an issue relating to the jurisdiction of the Court or to legal bar of the suit as a preliminary issue, but it is a matter in the nature of discretion rather than the 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 of the Code and that it is an obligation cast upon the Court that even though a case may be disposed of on a preliminary issue, the court shall subject to the provision of Sub-rule (2) pronounce judgment on all issues. Neither the learned Single Judge in Shakuntala Balwant Gadgil's case nor in Sudesh Sushilkumar Handa's case has laid down any ratio contrary to the said ratio of the decision in Usha Sales

Limited's case. Apparently the decision in Shakuntala Balwant's case was based on the facts of that particular case wherein the decision on the preliminary issue would have obviated the trial of the suit. In Sudesh's case, the learned single Judge was of the view that once the issue of limitation related to the issue of jurisdiction and as the decision on the said issue would have disposed of the suit, it was not necessary to address to other issues of the suit. The decision of Meher Singh's case and Kranti Mohan's case are in respect of Section 9A of CPC which deals with the situation where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken. Considering all these decisions, therefore and read with the decision of the learned Single Judge in M. S. Warehousing Corporation Limited Pune's case, it is now well established that once it is not in dispute that an issue is a mixed question of law and facts, then there is no obligation cast upon the Court to try the same as the preliminary issue, much to the contrary, the same may be tried along with other issues in the suit as the Court is bound to pronounce judgment on all issues involved in the suit. In fact the decision of the Apex Court in S. S. Khanna in that regard is very clear.

17. Reverting to the facts of the case, the controversy in the matter is to the effect that whether the plaintiff - firm is a registered partnership firm with the Registrar of Firms or not. Undisputedly it cannot be a pure question of law. The same is a mixed question of law and facts. Whether a firm is registered or not is to be established by adducing necessary evidence in that regard. Besides, it is not a question of jurisdiction but maintainability of the suit. The jurisdiction to entertain the suit is different from the point of maintainability of the suit. The Court may have jurisdiction to entertain a suit in relation to the grievance made by the plaintiff yet, the suit as filed may not be maintainable for various reasons. Similarly a suit may be otherwise maintainable yet, the Court in which the suit is instituted may not have jurisdiction to entertain the same or for different reasons.

18. The trial court in the impugned order is also justified in observing that whether any issue is to be framed as a preliminary issue or not is a matter of discretion. No doubt there is no elaborate discussion as to why the issue in question is a preliminary issue or not; nevertheless the fact remains that the issue is not a pure issue of law but a mixed question of law and fact. Considering the decisions referred to above and the law laid down by the Apex Court as well as by this Court, I do not find any illegality committed by the trial Court while rejecting the application. There is no jurisdictional error, and hence there is no justification for interference in the impugned order.

19. The revision application is dismissed. Rule is discharged with no order as to costs. Certified copy expedited.

20. Revision application dismissed.