
(2015) 08 AHC CK 0024

In the Allahabad High Court

Case No : Matters Under Article 227 No. 4414, 4415, 4416 and 4417 of 2015

Yudhishtir Singh and Others

APPELLANT

Vs

Additional District Judge/Special Judge and Others

RESPONDENT

Date of Decision : 27-08-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 7 Rule 11, Order 7 Rule 11(d)

Constitution of India, 1950 — Article 227

Limitation Act, 1963 — Section 10

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 331, 59

Citation : (2015) 5 AWC 5300

Hon'ble Judges : Manoj Kumar Gupta, J

Bench : Single Bench

Advocate : Satish Mandhyan, for the Appellant; Rajesh Gupta, Advocates for the Respondent

Final Decision : Allowed

Judgement

Manoj Kumar Gupta, J—These petitions involve common questions of fact and law and therefore, with consent of learned counsel for the parties, all the petitions were heard together and are being decided by this common judgement. Counsel for the parties agreed for treating petition No. 4416 of 2015 as the leading case and arguments were advanced accordingly.

2. Second respondent in these petitions filed four different suits being Original Suit No. 47, 50, 52 and 53 all of the year 2007 for recovery of arrears of rent, mesne profits and for ejection of the petitioner(s) from open piece of land alleged to be in the tenancy of the petitioner(s). For sake of convenience, the facts in the leading petition No. 4416 of 2015 arising out of Original Suit No. 53 of 2007 are being noted. According to the assertions made in the plaint of the said suit, Late Abhay Singh, grand father of the first petitioner and father of the second petitioner had taken the suit property on monthly rent of Rs. 7/- per month from Shiv Nath Sharma, the grand father of the plaintiff-respondent by

means of a registered lease deed dated 20/7/1947. It is alleged that after the death of Abhay Singh, the petitioners inherited the tenancy rights as joint tenants. It is claimed that rent was due since 1/1/1967, which was not paid despite request. The tenancy of the petitioners was terminated by registered notice dated 18/10/2006, which was duly served, but the petitioners in their reply refused to pay rent and also denied the ownership of the plaintiff-respondents with respect to the suit property. The plaintiffs, it is alleged, have not condoned the aforesaid act of the petitioners and consequently suit for ejectment and for arrears of rent was instituted.

3. The petitioners contested the suit by filing a written statement. It was admitted that the suit property was taken on rent by registered lease deed dated 20/7/1947. However, the petitioners in their written statement pleaded that the suit land is part of khasra No. 4899 measuring 3 bigha whose zamindar was Late Shiv Nath Sharma, the grand father of the plaintiff. He executed a registered lease deed dated 20/7/1947 with regard to 300 sq. yd. of land on annual rent of Rs. 90/- in favour of Abhay Singh. It is further averred that towards east of the suit property, an area measuring 125 sq. yd. was also let out to Late Abhai Singh, by registered lease deed dated 4/9/1948 on payment of annual rent of Rs. 37.50p. These lease were given for the purpose of construction of building. Abhai Singh transferred his interest in part of the demised land in favour of Smt. Raj Kumari by lease deed dated 29/5/1950. Smt. Raj Kumari by registered deed dated 27/5/1959 transferred her rights in favour of Sardar Singh son of Balwant Singh. Abhay Singh had constructed a pucca building over the demised land, soon after obtaining the same on lease. The land being within the urban area of district Meerut came to be governed by the Uttar Pradesh Urban Areas Zamindari Abolition and Land Reforms Act, 1956. Consequently, the proceedings for demarcation were undertaken and by an order dated 30/12/1966, the predecessor in title of the defendants and their assignees were conferred Bhumidhari rights in the land. It is further claimed that since then all the rights, title and interest of Sri Shiv Nath Sharma, the grand father of the plaintiffs came to an end. Consequently, it was denied that there exist any relationship of landlord and tenant between the parties.

4. The plaintiff filed a replica in which it is claimed that he nor his predecessors had any knowledge of order dated 30/12/1966. It is alleged that any proceedings held behind the back of the plaintiff and his ancestors is illegal and void. It is further alleged that the suit land was not agricultural land nor could have been subject matter of proceedings under the Act. It was reiterated that the defendants are the tenants and are liable to be evicted.

5. On the basis of the pleadings of the parties, the trial court framed as many as ten issues. The petitioners filed an application for deciding issues No. 2, 7 and 9 as preliminary issues. The trial court by order dated 5.11.2011 rejected the application for deciding these issues as preliminary issues being of the opinion that adjudication of these issues require consideration of the evidence of the

parties and being mixed questions of law and facts, cannot be decided as preliminary issues. The order of the trial court has been affirmed with the dismissal of the revision by order dated 1/8/2015. Aggrieved thereby, the petitioners have assailed these orders by way of the instant petition.

6. Sri B.D. Mandhyan, learned Senior Advocate appearing on behalf of the petitioners submitted that the issues in question goes to the root of the matter and relates to the jurisdiction of the court to entertain the suit and thus it was incumbent upon the trial court to have decided these issues as preliminary issues. In his submission, the courts below have erred in refusing to decide these issues as preliminary issues. It is submitted that the order dated 30/12/1966 passed in the proceedings under the Act has attained finality. It is urged that in such view of the matter, the trial court should at least have decided the plea relating to Order 7, Rule 11 CPC as a preliminary issue, which itself would have entailed rejection of the plaint. It is further submitted that the revisional court while deciding the revision had erred in making observations touching upon the merits of the contentions of the parties, as the dispute before it was confined to testing the validity of the order of the trial court, by which it had declined to decide certain issues as preliminary issues.

7. On the other hand, learned counsel for the plaintiff-respondents submitted that the issues in question, though legal issues, are dependant on determination of questions of fact and therefore could not have been decided as preliminary issues. It is further submitted that the revisional court has not made any observation on the merits of the matter and the apprehension expressed by the petitioners in this regard is unfounded.

8. The main question which call for consideration is whether the issues in question are required to be decided as preliminary issues or not. Issues No. 2, 7 and 9 in respect of which prayer has been made for deciding them as preliminary issues are as under :--

Order 14 Rule 2 CPC which deals with the power of the trial court to decide an issue as a preliminary issue was amended in the year 1976, and it now reads as under :--

"2. Court to pronounce judgment on all issues- (1) Notwithstanding that a case may be disposed of on preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(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."

The unamended provision of Order 14, Rule 2, was considered by the Supreme Court in *Major S.S. Khanna Vs. Brig. F.J. Dillon*, AIR 1964 SC 497 : AIR 1963 SC 497 : (1964) 66 PLR 115 : (1964) 4 SCR 409 and it was held as under :--

"Under Order 14 Rule 2, of the Code of Civil Procedure, 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 as 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 depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

(emphasis supplied)

9. The Supreme Court in *Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others*, AIR 2006 SC 3672 : (2006) 132 CompCas 479 : (2006) 5 CompLJ 203 : (2006) 6 JT 253 : (2006) 7 SCALE 62 : (2006) 5 SCC 638 : (2006) 69 SCL 211 : (2006) 3 SCR 414 Supp : (2006) AIRSCW 3768 : (2006) 6 Supreme 44 was considering the question whether an issue of law has to be decided in all eventuality as a preliminary issue or not. In that case, question of law for consideration before the Supreme Court was whether the company petition filed before the Gujarat High Court, was barred by limitation. The Supreme Court quoted with approval the proposition laid down in *Major S.S. Khanna v. Brig. F.L. Dillon* (supra) and held that "though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

10. In a recent judgement in *Satti Paradesi Samadhi Vs. M. Sankuntala*, (2014) AIRSCW 5532 : (2014) 8 JT 455 : (2014) 3 RCR(Civil) 938 : (2014) 8 SCALE 469 , their Lordships of the Supreme Court again cited with the approval the decision in *Major S.S. Khanna v. Brig. F.L. Dillon* (supra) as well as in *Ramesh B. Desai v. Bipin Vadilal Mehta* (supra) and held that the court below had erred in deciding the issue of limitation as a preliminary issue as it was found to be a mixed question of law and fact. It has been held as under :--

"15. In the case at hand, we find that unless there is determination of the fact

which would not protect the plaintiff under Section 10 of the Limitation Act the suit cannot be dismissed on the ground of limitation. It is not a case which will come within the ambit and sweep of Order 14 Rule 2 which would enable the court to frame a preliminary issue to adjudicate thereof. The learned single Judge, as it appears, has remained totally oblivious of the said facet and adjudicated the issue as if it falls under Order 14 Rule 2."

11. Thus, it is now well ingrained that the decision even on issue of law, dependent upon the decision of questions of fact, cannot be tried as a preliminary issue. In other words, only pure issues of law, which do not require consideration of any evidence or any enquiry into facts, can be tried and decided as preliminary issues.

12. The petitioners have challenged the jurisdiction of the trial court to decide the suit on the ground that there does not exist any relationship of landlord and tenant between the parties and thus, the suit for eviction based on such plea, is beyond the jurisdiction of the trial court. It is further claimed that since under the provisions of the Act, the suit land was demarcated as agricultural area and it had vested in the predecessor in interest of the petitioners and thus, the suit before the civil court is barred by the provisions of section 59 of the Act and section 331 of the U.P. Zamindari Abolition and Land Reforms Act, 1950. It is further claimed that since the plaintiff was not left with any right, title and interest in the suit land and thus has no cause of action to maintain the suit. The plaint was liable to be rejected under Order 7 Rule 11 CPC.

13. Issue No. 2 which relates to the jurisdiction of the trial court and issue No. 7 relating to the bar on the jurisdiction of the civil court in view of the provisions of section 331 of the U.P. Zamindari Abolition and Land Reforms Act, 1950 and section 59 of the Act, are all based on the contention of the petitioners that the suit land was demarcated as agricultural area under the provisions of the Act and had vested in their ancestors and thus, the right of the predecessor in title of the plaintiff over the demised land, had come to an end. In the opinion of the Court, for adjudication of the said question, the evidence led by the petitioners by way of the proceedings held under the provisions of the Act and there import on the present proceedings are to be taken into consideration. The nature of the lease and whether it would be covered by provisions of the Act as well as the effect of the order of the authorities under the Act dated 30/12/1966, on which reliance is being placed by the petitioners, is to be determined. These questions though raise legal issues, but their determination is dependent upon the consideration of evidence of the parties and various factual aspects of the matter. Accordingly, this Court does not find any illegality in the view taken by the courts below to the effect that issue No. 2 and 7 cannot be decided as preliminary issues.

14. Further, the question whether to decide an issue as a preliminary issue or not, is a matter of discretion of the trial court. The words "it (court) may try that issue" clearly suggests that since after the amendment of Order 14, Rule 2, by Act 104 of 1976, it is no more obligatory on the court to decide issues of law as

preliminary issues. Thus, a court postponing decision on an issue of law, even if erroneously, does not commit any jurisdictional error. In *Waryam Singh and Another Vs. Amarnath and Another*, AIR 1954 SC 215 : (1954) 1 SCR 565 a constitution bench of the Supreme Court has held that the supervisory jurisdiction under Article 227 of the Constitution is to be exercised sparingly and only in order to keep the subordinate courts within the bounds of their authority and it is not meant to correct errors of fact or even of law. Same view was taken in a subsequent constitution bench judgement in *State of Gujarat etc. Vs. Vakhtsinghji Sursinghji Vaghela and Others etc.*, AIR 1968 SC 1481 : (1968) 3 SCR 692 .

In view of the above, even otherwise, this Court refuses to interfere with the impugned order.

15. Issue No. 9 which relates to the plea under Order 7 Rule 11 CPC, however, deserves to be considered as a preliminary issue. This is for the reason that a plea relating to rejection of the plaint under Order 7 Rule 11 CPC involves consideration of the statements made in the plaint or the document annexed thereto. In deciding such plea, the trial court is not empowered to look into the plea raised in the written statement or any evidence filed alongwith the written statement.

16. In *Kamala and Others Vs. K.T. Eshwara Sa and Others*, AIR 2008 SC 3174 : (2009) 1 CLR 743 : (2008) 7 SCALE 436 : (2008) 12 SCC 661 : (2009) AIRSCW 373 : (2008) AIRSCW 5364 : (2008) 4 Supreme 204 : (2008) 7 Supreme 125 the Supreme Court explained the difference between Order 7 Rule 11 and Order 14 Rule 2 by holding that under Order 14 Rule 2, the mixed question of law and fact cannot be decided as a preliminary issue but since the plea relating to rejection of the plaint under Order 7 Rule 11 has to be decided on the basis of averment made in the plaint and thus, such plea can be decided at any stage. It was observed thus :--

"21. Order 7, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order 7, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order 7, Rule 11 of the Code is one, Order XIV, Rule 2 is another. "

The Supreme Court thereafter concluded by holding that plea relating to bar of *res judicata* was not a plea on basis of which plaint could be rejected as it is a "mixed question of law and fact which may require not only the examination of

the plaint but also other evidence and the order passed in earlier suit."

17. In *Om Aggarwal Vs. Haryana Financial Corporation and Others*(2015) 3 AD 164 : AIR 2015 SC 1288 : (2015) 2 RCR(Civil) 913 : (2015) 2 SCALE 627 : (2015) 4 SCC 371 : (2015) 3 SCJ 733 , the Supreme Court has reiterated that while deciding a plea under Order 7 Rule 11 CPC, only the plaint assertions can be seen. It has been observed thus:--

"16. An application for rejection of the plaint can be filed, if the allegations made in the plaint taken to be correct as a whole on its face value show the suit to be barred by any law. The question as to whether a suit is barred by any law or not would always depend upon the facts and circumstances of each case. However, for deciding this question, only the averments made in the plaint are relevant. Since the question of jurisdiction of the civil court to entertain and try the civil suit goes to the very root of the case and hence it can be raised at any time by the defendant by taking recourse to the provisions of Order 7 Rule 11 of the Code. Indeed, this principle of law is well settled."

18. In *The Church of Christ Charitable Trust and Educational Charitable Society, represented by its Chairman Vs. Ponniamman Educational Trust represented by its Chairperson/Managing Trustee*, AIR 2013 SC 3912 : (2013) 115 CLT 220 : (2012) 4 CTC 308 : (2012) 6 JT 149 : (2012) 168 PLR 627 : (2012) 3 RCR(Civil) 811 : (2012) 8 SCC 706 the trial court held that the plea under Order 7 Rule 11 CPC can be considered at any stage, i.e., either before registering the plaint or after the issuance of summons to the defendant or at any time before conclusion of the trial. It has been held thus :--

"It is clear from the above that where the plaint does not disclose a cause of action, the relief claimed is undervalued and not corrected within the time allowed by the Court, insufficiently stamped and not rectified within the time fixed by the Court, barred by any law, failed to enclose the required copies and the plaintiff fail to comply with the provisions of Rule 9, the Court has no other option except to reject the same. A reading of the above provision also makes it clear that power under Order VII Rule 11 of the Code can be exercised at any stage of the suit either before registering the plaint or after the issuance of summons to the defendants or at any time before the conclusion of the trial."

19. Thus, it is now well settled that the plea under Order 7 Rule 11 has to be decided on the basis of assertions made in the plaint and such plea can be raised at any stage. Thus, in my opinion, issue No. 9 which relates to the plea under Order 7, Rule 11, should be decided forthwith. The view taken by the courts below, to this extent is not sustainable in law.

20. The last submission made by learned counsel for the petitioners is that the revisional court while deciding the revision has made certain observations on merits, which was not permissible. Learned counsel for the plaintiff-respondents has very fairly stated that the observations made by the revisional court are only tentative in nature and for finding out whether the issues in question should be

decided as preliminary issues or not. Even in the opinion of the Court, the revisional court has not made any adjudication on merits. Thus, all that need to be observed is that the trial court while deciding the issues on merit, shall not be influenced by any of the observations made by the revisional court in the impugned order.

21. As a result of the above discussion, all the petitions are allowed in part and the trial court is directed to decide issue No. 9 relating to the plea under Order 7 Rule 11 CPC as a preliminary issue, before proceeding any further with the trial of the suits. However, in all other respect, the order of the courts below are maintained.

22. There shall be no order as to costs.

1The Act