

(2010) 02 BOM CK 0116

Bombay High Court (Nagpur Bench)

Case No: Civil Revision Application No. 36 of 2008

Maternity Home

APPELLANT

Vs

Kishorkumar Khurana

RESPONDENT

Date of Decision: Feb. 26, 2010

Acts Referred:

- Bombay Public Trusts Act, 1950 - Section 36, 50, 51
- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, 115
- Limitation Act, 1963 - Article 54

Citation: (2010) 3 ALLMR 77 : (2010) 6 BomCR 334

Hon'ble Judges: R.P. Sondur Baldota, J

Bench: Single Bench

Advocate: A.C. Dharmadhikari, for the Appellant; Rohit Sharma, H/f Anand Parchure, for the Respondent

Final Decision: Dismissed

Judgement

R.P. Sondur Baldota, J.

Rule. Rule is made returnable forthwith. Heard learned Counsel for the parties for final disposal of the application.

2. The question that arises for consideration of the Court in this case is whether revision is maintainable against an order of the trial court postponing, decision on the issue of the maintainability of the suit and on the question of bar of limitation, to the trial of the suit.

3. The brief facts of the case, which are relevant for deciding the above question, are that the respondent filed Regular Civil Suit No. 70 of 2006 against the applicant, which is a public trust registered with the Charity Commissioner, for specific performance of an agreement of sale and for a mandatory injunction directing the applicant to obtain necessary permission from the Joint Charity Commissioner,

Nagpur to sell the suit property to the respondent. Immediately on entering its appearance in the suit, the applicant, on 28th February, 2007 filed an application raising the preliminary objection that the suit as filed is not maintainable for want of prior sanction of the Charity Commissioner for sale of the trust property as Section 36 of the Bombay Public Trust Act restricts alienation of the trust property without prior sanction of the Charity Commissioner. That application was disposed of by the trial court by its order dated 11th October, 2007, holding that since for deciding the issue the Court would have to go into the merits of the suit, it would be proper to decide the issue along with other issues on merit at the final hearing of the suit. Within a few months thereafter i.e. on 31st December, 2007, the applicant filed an application at Exh.20 under Order VII Rule 11 C.P.C. once again raising the earlier contention and adding the contention of bar of limitation thereto. According to the applicant, during the course of arguments, it had also challenged maintainability of the suit for want of sanction u/s 50 read with Section 51 of the Bombay Public Trusts Act, which was not considered by the court. The trial court by the impugned order dated 27th March, 2008 rejected the application on the ground that the first contention as regards maintainability of the suit was already considered by the court in its order on Exh.6 and that in the facts and circumstances of the case, the question of bar of limitation is a mixed question of law and facts and hence, required to be postponed to the final hearing of the suit.

4. The applicant contends that the trial court ought to have decided the application under Order VII Rule 11 of the Code of Civil Procedure instead of postponing the decision to the trial of the suit as it was possible to decide the questions on the allegations made in the plaint. According to the applicant, exercise of jurisdiction by the trial court is with illegality and material irregularity. Hence, the order is liable to be quashed and the application below Exh.20 be allowed on consideration of its merits.

5. Mr. Rohit Sharma, the learned Counsel appearing on behalf of Shri Anand Parchure for the respondent submits relying upon two decisions of Allahabad High Court that the revision application is not maintainable since such an order cannot be said to be failure of exercise of jurisdiction by the trial court. In fact, by passing the order, the trial court has exercised the jurisdiction vested in it to postpone the consideration of the issues till after recording of evidence in the matter.

6. The first decision cited is in [Ram Laxman Vs. Dr. J.C. Bass](#), wherein in a suit seeking eviction of tenant, it was contended that the suit was barred u/s 20(1) of the U.P. Act, (12 of 1972) and hence, liable to be rejected under Order VII Rule 11 C.P.C. The trial court passed an order that the question whether U.P. Act (13 of 1972) would be applicable to the facts of the case shall be decided by evidence of the parties. The Allahabad High Court held that the fact as to whether evidence would be needed for determining this question or not is primarily left to be determined by the trial court. Besides, the trial Judge had not chosen to dispose of the matter at

the preliminary stage of the proceedings and had only postponed the decision on the issue to a future date. By doing so, he had not affected the rights of the parties. Therefore, it could not be said that the order was not in accordance with law and hence, it held that the revision application was not maintainable and dismissed the same.

7. The second decision cited is in [Ghaziabad Development Authority Vs. M/s Shyam Lal Mahendra Kumar, Muzaffarnagar](#) . In this case, the defendant had raised question of jurisdiction of the court to entertain the suit and applied for its hearing as a preliminary issue. The trial court rejected the application for hearing the question of jurisdiction as preliminary issue, which order gave rise to the Civil Revision Application. It was argued before Allahabad High Court that the trial court had committed material irregularity in ordering for the decision of the issue regarding jurisdiction along with other issues and that the defendant ought not to have been permitted to be dragged into protracted unwanted litigation. The argument advanced in reply was that there was no illegality committed by the trial court in postponing the decision on the issue along with other issues and that the court had exercised a discretion which was not liable to be interfered as the issue regarding jurisdiction involved questions of law and fact. Further, such an order would not be deemed to be a case decided and the revision was not maintainable. The Allahabad High Court found merit in the submission of the opposite party and held as follows:

10. In deed the revision is not maintainable but looking to the entire aspect of the case and the circumstances surrounding thereto it would have been appropriate for the court below to have decided the issue regarding jurisdiction instead of permitting the parties to a protracted litigation. The trial Court has exercised its discretion. It would not be appropriate to interfere with such a discretion but at the same time it is still open to the trial Court to consider this aspect of the matter when the issue regarding jurisdiction is decided as a preliminary issue. The inherent powers are available to the trial Court and there would be no illegality if it proposes to decide the issue regarding jurisdiction as a preliminary issue. In fact the trial Court ought to have decided the issue regarding jurisdiction but the postponement of the issue regarding jurisdiction to be decided along with other issues is a discretion exercised by the trial Court, which is not a case decided nor can such a discretion be interfered u/s 115 of the Code of Civil Procedure.

8. As against this, Mr. A.C. Dharmadhikari, the learned Counsel for the applicant relies upon the following decisions to submit that an application for rejection of a plaint can be considered by the Court at any stage of the suit, whether before filing of the written statement or after framing of the issues in the suit or at a stage when trial is in progress:

1. [I.T.C. Limited Vs. Debts Recovery Appellate Tribunal and Others](#) .

2. [P.R. Sukeshwala and another Vs. Dr. Devadatta V.S. Kerkar and another](#), .

3. Nelamega Bhattachariar v. T.R. Govindaraghavan and Ors. reported in 2001 A.I.H.C. 2869 (Sr. No. 9)

9. There can be no dispute with the proposition advanced by Mr. Dharmadhikari. Therefore, it is not necessary to dilate upon the decisions cited by him. The question that falls for consideration of this Court is not whether an application under Order VII Rule 11 CPC is maintainable at any particular stage of the suit, but whether the propriety of postponement by the trial court of the questions raised in such applications to the final hearing of the suit can be questioned in Civil Revision Application.

10. The two decisions of the Allahabad High Court cited by Mr. Sharma are of the period prior to the amendment to Section 115 C.P.C. by the Amendment Act 1999 effective from 1st July, 2002. The provision prior to it's amendment and as it stands today after the amendment, reads as follows:

Unamended Section 115:

1) The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears -

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

Provided that the High Court shall not, under this section, vary or reverse any order made, or may order deciding an issue, in the course of a suit or other proceeding, except where -

(a) the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceeding ; or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made ;

(2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

Explanation : In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

Amended Section 115:

Section 115. Revision - 1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears -

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit.

[Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings].

2) The High Court shall not, under this section, vary or reverse any decree or order against which an appeal lies either to the High Court or to any court subordinate thereto.

3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court.

Explanation : In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the course of a suit or other proceeding.

11. The power conferred on the High Court u/s 115 of C.P.C. is to keep subordinate courts within the bounds of their jurisdiction. It is distinguished from the power of appeal to correct errors of fact and law. Therefore, the power can be exercised only when the case of the applicant falls within the four corners of Section 115 CPC. The main Section 115 consists of two parts ending with the proviso as circumference of limitation. The first part prescribes the conditions in which the jurisdiction of the High Court arises and the second part sets out the conditions in which the High Court exercises the jurisdiction. The essentials of the first part are -

(i) impugned order amounts to a case decided ;

(ii) impugned order must have been passed by a court subordinate to the High Court ;

(iii) impugned order must not be appealable one.

The essentials of the second part are there must be allegations of jurisdictional error amounting to -

(i) excessive exercise of jurisdiction ; or

(ii) failure to exercise jurisdiction ; or

(iii) defective exercise of jurisdiction i.e. exercise of jurisdiction with illegality or material irregularity.

The limitations imposed upon the power u/s 115 vide the proviso prior to amendment were that the power could be exercised only where the order of the subordinate court, if it had been made in favour of the applicant, would have finally disposed off the suit or proceedings or where the order if allowed to stand would occasion a failure of justice or cause irreparable injury to the applicant. By the Amending Act of 1999, the second part of the proviso, enabling the High Court to vary or reverse the order of the sub-ordinate court in case of failure of justice or causing irreparable harm if allowed to stand has been deleted, thereby further restricting the power of revision. In view of the amendment now revision would lie only against such interlocutory orders, which would finally dispose of the suit or the proceedings and no other.

12. By the impugned order, the learned trial Judge has postponed consideration of the preliminary objections till recording of evidence in the matter for the reasons stated in the order. Such order cannot be regarded as an order deciding a case or proceedings. An order which decides a case or proceedings must be one which determines some legal right or obligation of one of the parties to the suit or proceedings. Needless to say that taking a view that evidence is required to be recorded for deciding the rights or obligations of the parties is merely postponement of the decision. Therefore, one essential from the first part is missing. Next the learned Judge has exercised the discretion vested in him by taking the view. There could be another view of the matter. However, that does not make the exercise of jurisdiction either illegal or materially irregular. Thus, the essential from the second part is also missing. Lastly, such order does not fit even in the restriction under the proviso. The reverse of the order postponing the decision to trial would be to consider the preliminary objections on merit. That by itself would not necessarily dispose off the suit finally. There is an uncertainty about the result. The order might or might not dispose off the suit finally depending upon the decision on merits. In the circumstances, in my considered opinion, revision is not maintainable against an order of the trial court postponing decision on the preliminary objection or on the application for rejection of plaint under Order VII Rule 11 C.P.C. to the trial of the suit.

13. Even if the challenge to the impugned order is to be considered on its merits, I find no substance in the challenge. The answer of the respondent to the question of maintainability of the suit for want of prior sanction for sale of trust property by the Charity Commissioner is that he has sought a mandatory injunction to direct the applicant to apply for the permission to the Charity Commissioner. In that circumstance, consideration of question would involve conduct of the applicant as regards making of an application for the purpose to the Joint Charity Commissioner. This would definitely require evidence of the parties. Therefore, it cannot be said

that postponement of this question to the trial is erroneous. Similar is the case as regards the question of bar of limitation. The trial court has held that the bar of limitation in the instant case is a mixed question of law and facts and hence, cannot be considered on the basis of the pleadings alone. The trial court has considered Article 54 of the Limitation Act, which provides for limitation of 3 years for filing the suit for specific performance from the date fixed for the performance or if no such date is fixed, when the plaintiff has noticed that the performance is refused. It is the claim of the respondent in the suit that it is only on 25th September, 2006 that he got knowledge that applicant was deliberately avoiding execution of the sale deed. In these circumstances, the trial court held that the question of limitation is a mixed question of facts and law and hence, it cannot be decided by merely perusing the plaint. In my opinion, no fault can be found with this order of the trial court, hence, the Civil Revision Application is dismissed. No order as to costs.