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**(1983) 06 BOM CK 0025**

**Bombay High Court**

**Case No:** Writ Petition No. 40 of 1982

Usha Sales Ltd.

APPELLANT

Vs

Malcolm Gomes and Others

RESPONDENT

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**Date of Decision:** June 23, 1983

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 14 Rule 2, Order 14 Rule 2(2)

**Citation:** AIR 1984 Bom 60 : (1983) 2 BomCR 612

**Hon'ble Judges:** Jahagirdar, J

**Bench:** Single Bench

**Advocate:** T. Tijoriwalla and H.N. Vakil, Mulla and instructed by Mulla and Cragie Blunt and Caroe, for the Appellant; B.R. Naik and Y.R. Naik, for the Respondent

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### **Judgement**

1-6.     x           x           x           x

7. The question that is to be decided is whether under O. 14, R. 2 of the Civil P. C. it is obligatory upon a Court to decide the issues relating to the jurisdiction the issues relating to the jurisdiction of the Court or bar to the suit created by any law for the time being in force as preliminary issues before the settlement of other issues or trial of the entire case as a whole. The argument has arisen because of the change in the terminology of R. 2 of O. 14 of the Code. According to Mr. Tijoriwalla the amendment not made any difference where the issues relate to the jurisdiction of the Court or to the legal bar to a suit. According to Mr. Tijoriwalla if such issues are raised the Court is obliged to hear and decide those issues despite what he calls the apparently discretionary language of sub-r. (2) of O. 14, R. 2. Before I proceed to examine the contention of Mr. Tijoriwalla it would be appropriate to notice what the position of law was before the amendment of O. 14, R. 2 of the Code. O. 14, R. 2 of the Code as is existed before the amendment in 1976 read as follows:-

"Where issues of both law and of fact arise in the same suit, and the Court is of the 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 issues of fact only after issues of law have been determined."

8. A proper reading of this provision, which can be broken up into two parts, shows that the Court is obliged to decide certain issues of law only and (2) the Court is of the opinion that the case or any part thereof could be disposed of on issues of law only. This provision has been, with great respect, lucidly explained by the judgment of Mody J. in *Watanmal Boolchand v. N. V. Stoomvaart*, 63 Bom LR 702. In that O. 14, R. 2 does not apply unless one or some of the issues in a case are purely issues of law. Thereafter it has been mentioned as follows:-

"What O. XIV. R. 2 of the Code lays down is that the Court has first to judicially determine whether in the case before it the two conditions mentioned in that rule are fulfilled, viz., whether there is any issues or issues which are pure issues of law and whether the case or any part thereof is capable of being disposed of on such issue or issues only. The second condition would be deemed to have been fulfilled if the decision of such issue or issues of law would dispose of the case or any part thereof if such decision is one way but not the other. If the Court reaches a decision that both the conditions have been fulfilled, it is obligatory upon the Court and the Court has no option but to determine such issue or issues of law as preliminary issues."

If either of these conditions is not satisfied then there was no obligation upon the Court to decide any issue as a preliminary issue. However, there was a discretion despite the provision contained in O. 14, R. 2 enabling a Court to decide mixed question of fact and law if in the opinion of the Court it disposes of a case or part of a case. However, the Court was to bear in mind:-

"..... the two well-known but contracting principles, one being that to save waste of time and costs it would be desirable to dispose of the case on a preliminary issue if prima facie there are strong probabilities that such preliminary issue would dispose of the case, and the other being that piecemeal trial of suits should be avoided with the view to obviate remands and thereby avoid litigation from being protracted."

9. That a Court could decide as a preliminary issue an issue of fact or a mixed issue of fact and law was or a mixed issue of fact and law was also pointed out by a Division Bench of this Court in *Sowabai v. Tukourao Holkar* 35 Bom LR 6 : AIR 1932 PC 128 to which a reference has been made by Mody J. in *Watanmal Boolchand's* case. It is thus seen that the law as it stood prior to the amendment of O. 14, R. 2 in the year 1976 by Act 104 of 1976 was that-

(1) the Court was under an obligation to decide some issues as 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 and

(2) the Court had discretion to decide any other issue as a preliminary issue thought that issue was not a pure issue of law.

10. Drastic change has been made by the amendment in the year 1976 as could be seen from the wording of R. 2 of O. 14 of the Civil P. C. :

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

11. From the above it is easily seen that there is an obligation cast 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.

12. 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-r. (2) of P. 2 of O. 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.

13. Mr. Tijoriwalla's contention that the duty which was cast upon the Court prior to 1976 is still there but now it is confined only to the issues relating to the jurisdiction of the Court and to the legal bar to the maintenance of the suit. It is not possible for me. In the face of the language used by the Legislature, to accept the argument of Mr. Tijoriwalla that there is any duty or obligation upon the Court to try issues relating to the jurisdiction of the Court or to the legal bar to the maintenance of the suit as a preliminary issues. It is well-known that in several cases the Courts used to decide some issues without there being necessity to do so as preliminary issues from which either appeals or revisions were preferred and the proceedings in the

suit were stayed. This prolonged rather than abridged the proceedings in a suit and it is obviously to obviate such situations that the Legislature amended O. 14, R. 2. While interpreting any amendment, it must be presumed that the Legislature was aware of the law prevalent before the amendment. If this is so then one must proceed on the further assumption that the Legislature would not make any unnecessary amendment and the amendment made is for preventing the mischief arising out of the law existing at the time of the amendment.

14. Mr. Tijoriwalla invited my attention to several judgments, some of this court and some of other Courts. He was fair enough to mention that none of them was on all fours with this case. On a proper analysis of the provisions contained in O. 14, R. 2 I have come to the conclusion as stated above, which conclusion is not affected by the several decisions on which Mr. Tijoriwalla placed reliance.]

15. In the result, the petition must fail. Rule is accordingly discharged with costs.

16. Petition dismissed.