

Writ Petition (M/ S) No. 2039 of 2011

M/s The Commercial Motors Limited
and Another ... Defendants/ Respondents

Hon'ble Sharad Kumar Sharma, J.

3. The sole issue of debate in this writ petition, is, as to whether the question of limitation, which constitutes as to be an ingredient of issue No. 11, could be simpliciter decided as a 'preliminary issue', based on the pleadings raised in the Suit or it engages consideration of facts, which could be decided by appreciating the pleadings raised in the plaint, which ought to be decided at the stage, when the other issues are decided by the learned trial Court i.e. it is required to be decided with other issues after considering evidence and facts.

4. Upon the suit being instituted, the respondents had filed their written statement and has raised a plea pertaining to the bar of limitation, and accordingly, the defendants/respondents have raised a plea by filing of an application on 13th August 2008 by invoking the provisions contained under Order 7 Rule 11, exclusively confining their plea that the suit, as instituted by the plaintiff/petitioner, would not be sustainable, because a bar of limitation would play against them this had been the only basic ground for filing application under Order 7 Rule 11 of CPC.

5. It is this question, which becomes a controversial issue to be answered by this Court!

6. When the Application under Order 7 Rule 11 was considered, that is, being paper No. 26 (ga), by the learned trial Court, the same was decided by an order dated 20th March 2009, and at the stage when the trial Court has decided the aforesaid application under Order 7 Rule 11, the Court has made the following observations:-

“जहाँ तक प्रतिवादीगण के इस कथन का प्रश्न है कि वादी ने दावा कथित विक्रय पत्र की तिथि से बारह साल के अन्दर प्रस्तुत नहीं किया है। अतः दावा वादी समयावधि से बाधित है। इसका निस्तारण इस प्रारम्भिक आपत्ति के द्वारा नहीं किया जा सकता है क्योंकि यह प्रश्न तथ्य व विधि का समिश्रित है। इस संबंध में माननीय उच्चतम न्यायालय ने 2006 (6) सुप्रीम 44 रमेश भाई देशाई व अन्य बनाम नितिन वाडीलाल मेहता व अन्य” में यह अभिमत प्रकट किया है कि समयावधि का प्रश्न विधि तथ्य का मिश्रित प्रश्न है तथा इसका निस्तारण पक्षकारों के अभिवचनों के आधार पर वाद विरुद्ध निर्मित करने व साक्ष्य आने के उपरान्त ही किया जा सकता है। **अतः इस तथ्य को भी प्रतिवादी गण अपने जबाबदावे में समाहित कर उस पर वाद बिन्दु निर्मित करा सकते हैं। और चूँकि यह तथ्य व विधि का समिश्रित प्रश्न है अतः इसका निस्तारण उभय पक्षों की साक्ष्य आने के उपरान्त ही किया जा सकता है।**”

7. In fact, it's the entire interpretation of both the counsels which is foundationed upon, as to how the aforesaid paragraph, as extracted above, is to be considered for the purposes of answering the question, as

to whether the issue of limitation has to be decided as a preliminary issue under Order 14 Rule 2, or it has to be decided with the other issues, because it engaged consideration of question of facts and law both.

8. The learned counsel for the petitioner contends that, if the said para, as extracted above, is taken into consideration, the learned trial Court, while deciding the Application under Order 7 Rule 11, has quite explicitly taken a view while rejecting the application; that the question of limitation, which is the prime foundation of an application under Order 7 Rule 11, is to be decided only after appreciation of facts and evidence, and the said view, as drawn by the learned trial Court, was based upon the ratio of the judgement of the Hon'ble Apex Court, as reported in 2006 (6) Supreme 44, Ramesh Bhai Desai and others Vs. Nitin Wadilal Mehta and Another which has primarily held that question of bar limitation in any suit would be engaging consideration of facts and evidences, hence should be decided with other issues.

9. The said order, as it was passed by the trial Court, was challenged by the respondents in a Revision before this Court being, Civil Revision No. 16 of 2009, M/ s Commercial Motors Limited and Another Vs. M/ s Commercial Motors. The coordinate bench of this Court had passed the order, in the said Revision to the following effect, which in fact, was based upon the withdrawal of a Revision. The relevant part is extracted hereunder:-

“The Revision Petition is dismissed as withdrawn. It is observed and directed that the Trial Court, while deciding issues in the Civil Suit, shall not in

any manner be influenced by any observation made or finding returned in the impugned order.”

10. The expression, which becomes relevant for consideration for the issue, as debated in this writ petition, would be the expression given by the revisional Court, by observing “while deciding issues in civil suit”. The implications of the revisional Court’s order once again where the revision was sought to be withdrawn, the impact of which would be, that the defendant has acceded to the order of 20th March 2009, which had been passed by the learned trial Court and furthermore, when the revisional Court has used a specific expression ‘while deciding the issues in civil suit’, will have to be read in the context of all the issues and not isolatedly for the issue, for which the application under Order 7 Rule 11 was preferred. And this logic, which has been derived by this Court is apparent from the aforesaid expression of the revisional Court, which is yet supported by a fact, that when the trial Court has decided the application under Order 7 Rule 11 on 20th March 2009 in the light of the observations made, that the question of limitation is a mixed question of fact and law and the said expression made in the extract, as already drawn above, will be deemed to have been affirmed by the Revisional Court, because the defendants/respondents herein, had never called upon the revisional Court to a challenge to answer the application under Order 7 Rule 11 based upon the observation, which was made therein, meaning thereby, that the observations made by the learned trial Court, that the issue of limitation would be a mix-question of fact and law, would stand final *qua* the defendants themselves, consequent to decision taken on an application under Order 7 Rule 11 of CPC.

11. There could be an argument, which has been extended to be delivered by the learned senior counsel for the respondents, that a logical interpretation has to be given to the judgment of the learned trial Court, as it was rendered in the context of an application which was filed under Order 7 Rule 11, as decided on 20th March 2009, and the exception, which has been attempted to be carved out by him is, that when the Court states that the question of limitation is a question of fact and law, the reference of facts, as given therein, has to be construed in the context of the issue, which was the basis of the application under Order 7 Rule 11, and not otherwise in relation to the other issues. Meaning thereby, it was to be exclusively read only for the purposes of Order 7 Rule 11 of CPC.

12. What he intends to convey to the Court is, that the observations made in the order dated 20th March 2009, observing therein that the question of limitation is a question of fact and law, has had to be interpreted that here the facts would have reference to the facts which are exclusively related to the limitation and not in relation to the merit of the case.

13. In elaboration to it, the arguments of the learned senior counsel for the respondents had drawn the attention of this Court, contending that the suit was barred by limitation, could itself be culled out by this Court by reading para 8 and 11 in conjunction to the relief clause of the suit itself, for which according to him no additional facts are required to be considered, and thus, he contends that the observations made by the learned trial Court for deciding

the issue No. 11 as a preliminary issue does not suffer from any apparent error.

14. In fact, the argument, as extended by the learned senior counsel for the respondents, as soon as when he attempts to address the Court on para 8, which is exclusively a narration of facts which is being sought to be read in consonance with para 11, which is yet again a narration of fact for the purposes of determining that, no other fact is required to be considered by the Court while deciding the question of limitation as it engages consideration for the purposes of deciding issue No. 11.

15. This Court is of the view, that at a stage when an applicant under Order 7 Rule 11 has concurrently failed before both the Forums i.e. before the trial Court, as well as at the revisional stage, the same would create an impediment for the defendants to argue that Order 7 Rule 11, would exclusively fall to be considered as a preliminary issue, because according to his interpretation, no facts are required to be considered. But this Court is in respectful disagreement with his argument, for the reason being, that in order to analyze the issue of limitation when the learned senior counsel for the respondents takes the shelter of interpretation of the contents of para 8 and para 11 which are conversion of facts and are to be read in conjunction with the relief sought, that itself will attract an appreciation of facts, as to whether, under the given set of circumstances, the fact would become a predominant factor, to be considered prior to decide issue No. 11 pertaining to limitation.

16. In continuation thereto, when as soon as the reference is made to Section 23 of the Registration Act, for the purposes of deciding the cut-off limitation prescribed therein, which is giving an upper period of limitation, without there being any scope of its extension, that interpretation of Section 23 of the Act, yet again would have to be legally fitted in, in accordance with the pleading of the facts of the suit and where all these aspects have to be collaborated together for deciding issue No. 11 pertaining to limitation it will engage a consideration of facts, as to whether the suit falls to be barred by limitation or not. The justification to it, is that wherever an interpretation of a pleading by a party to the proceedings is required, it would not be his exclusive view or his impression based upon the interpretation given to the pleadings, but then the interpretation given by the counsel, for substantiating his arguments that cannot be left to be unopposed by the adversary, to be answered at the stage, when the said aspect is required to be dealt with, when issue No. 11 was to be decided. As soon as the opposite parties arguments are required to be considered, for answering the arguments of defendant, it will definitely engage considering facts first to apply law under a given case.

17. As soon as, for the purposes of driving the question of limitation, a pleading is required to be gone into by the Court. It immediately entails a consideration of facts first, and in that eventuality, when the facts are required to be read in consonance with Section 23 of the Registration Act, it will require a consideration of facts in totality before applying law, as it engages consideration of the plaint and,

thus, the view taken by the trial Court while deciding the application under Order 7 Rule 11, that the issue pertaining to limitation, would be a question of fact and law both, cannot be exceptionally read in the manner it has been expressed by the learned senior counsel for the respondents, that the fact, referred to therein, would be exclusively in relation to the question of facts relating to limitation, because, according to his own argument, as soon as he ventures and calls upon the Court, to read para 8 and 11, and further in elaboration to his argument to answer it as to whether the decision on issue No. 11 was at all required to be taken at the later stage, when all the issues are being decided together itself, is an answer against him, because when facts of the suit are required to be considered, it will be the facts in its entirety which has to be considered, and when it is required to be read in the context of Section 23 of the Registration Act it will definitely be a mixed question of facts and law based on evidence and pleadings.

18. Furthermore, and more importantly, when the solitary foundation of application which was filed by the defendants under Order 7 Rule 11, has been concurrently decided against him! and his Revision has been dismissed as withdrawn where the coordinate Bench of this Court, while dismissing the Revision, has observed that while deciding the issues! it is not in an exclusion of issue No. 11, and once it is with an inclusion of issue No. 11, which is rather a judgement solicited by the defendants themselves in a Revision preferred by him against the rejection of an application under Order 7 Rule 11, it goes without saying, that it will be deemed that the issue No. 11, has to be

decided along with all the issues and particularly, in the light of the argument as extended by the learned senior counsel for the respondents, when he attracts para 8, 11 and relief clause of the suit to be read and that too in consonance with the provisions contained under Section 23 of the Registration Act.

19. The learned counsel for the petitioner has referred to a judgment, as reported in 2022 (11) SCC 572, *Mongia Realty and Buildwell Private Limited Vs. Manik Sethi*, wherein the Hon'ble Apex Court, while drawing its interpretation from the provisions contained under Order 14 Rule 2, has provided that the preliminary issue of limitation can be determined, subject to the condition that it does not require an appreciation of facts. If the surrounding facts are inevitably necessary to interpret the question of limitation and which are disputed, that could only be done when the issues of limitation is to be decided along with other issues, as directed by the revisional Court. Para 15 of the aforesaid judgment is extracted hereunder:-

“15. Before this Court in *Nusli Neville Wadia v. Ivory Properties* [*Nusli Neville Wadia v. Ivory Properties*, (2020) 6 SCC 557 : (2020) 3 SCC (Civ) 671], the issue was whether the issue of limitation can be determined as a preliminary issue under Order 14 Rule 2. The three-Judge Bench of this Court observed that if the issue of limitation is based on an admitted fact, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). However, if the facts surrounding the issue of limitation are disputed, it cannot be decided as a preliminary issue. This Court observed as follows : (SCC pp. 596-97, paras 51-52)

“51. ... As per Order 14 Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order 14 Rule 2. In Order 14 Rule 2(1), the

court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order 14 Rule 2(2) makes a departure and the court may decide the question of law as to jurisdiction of the court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

52. In a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.”

20. This Court is of the view, that when the determination of question of limitation under issue No. 11 in the present case is not purely a question of law, but rather for the purposes of arriving at a question of law, a pre consideration of question of facts becomes an essential ingredient in order to reach at law, to decide the question of limitation while deciding issue No. 11, and where access to law, first requires an access to the facts. In that eventuality, the issue is to be decided along with other issues and not as a preliminary issue, and more particularly, when that access of law is preceded by a prior access of fact which has been attempted to be ventured by scrutinisation of pleadings, in that situation, the facts play a predominant role, in deciding the question of law, because law exclusively, in itself, has got no existence until and unless the law is made applicable to be fitted in accordance with the facts of the case which is existing in the instant case. Thus, the view drawn by the learned trial Court by the

impugned order of deciding issue No. 11 as a preliminary issue may not be sustainable in the light of the judgment of *Mongia Reality (supra)*, as well as in the light of the argument extended by the learned senior counsel, when he makes reference to paras 8 and 11 and Section 23 of the Registration Act for substantiating his debate.

21. Thus, the writ petition is allowed. The impugned orders under challenge are hereby quashed. The issue No. 11 is to be decided along with the other issues by the learned trial Court.

(Sharad Kumar Sharma, J.)
20.09.2023

Mahinder/