

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

REVIEW APPLICATION NO.37 OF 2015
IN
WRIT PETITION NO.1724 OF 2015

SMT CHAMPABAI LAXMANDAS RATHOD PETITIONERS
DECEASED, THROUGH HER LR'S AND OTHERS

VERSUS

TAHER ABDUL GAFOOR TAMBATKAR RESPONDENTS
AND OTHERS

Mrs.Anjali Dube (Bajpai), Advocate for the petitioners.
Mrs.S.T.Kazi, Advocate for respondent Nos. 1 to 3.

(CORAM : RAVINDRA V. GHUGE, J.)

DATE : 01/04/2015

PER COURT :

1. The petitioners seek review of the order dated 26/02/2015 passed by this Court in Writ Petition No.1724/2015.

2. The order impugned in the writ petition is dated 06/01/2015 passed below Exh.80 in RCS No.222/2002. The said application was, according to the petitioners, a request made to the Trial Court to decide the aspect of jurisdiction peremptorily by postponing the decision on the rest of the issues in the light of Order 14 Rule 2 (2) of the CPC.

3. The petitioners contend that they had never moved an application under section 9A (Maharashtra Amendment) of the CPC. The petitioners had, therefore, raised a grievance in the writ petition that the order passed by the Trial Court dated 06/01/2015 was under Section 9A and not under Order 14 Rule 2(2) of the CPC, hence not sustainable.

4. The petitioners are grievants in this review petition that the order passed by this Court suffers from an error to the extent of having failed to consider that Order 14 Rule 2(2) of the CPC was the provision, which was attracted by Exhibit 80 and this Court should have therefore set aside the order of the Trial Court dated 06/01/2015 since it was passed by considering Section 9A of the CPC.

5. Application Exh.80 does not even whisper about Order 14 Rule 2(2) of the CPC. The review petitioners had not made any attempt to specifically indicate to the Trial Court as to whether their prayer for deciding 3 issues as preliminary issues was based on Section 9A or Order 14 Rule 2(2) of the CPC. Having considered Exh.80 and the order dated 06/01/2015, it appears that the review petitioners had

canvassed Section 9A while addressing the Trial Court. There is no whisper as regards Order 14 Rule 2(2) of the CPC.

6. The review petitioners have attempted to canvass by this review petition that the Trial Court should have considered Order 14 Rule 2 (2) of the CPC by itself, notwithstanding whether the review petitioners have ever canvassed their submissions based on the said provision.

7. This Court, while passing the order under review, has taken into account the fact that issues were cast on 01/12/2009. Application Exh.80 was filed on 04/08/2014. Issue as regards jurisdiction was framed on 01/12/2009 and inspite of the same, the review petitioners and for the said reason, the original defendant Smt.Champabai, also did not pray for trying 3 issues as preliminary issues.

8. The contention of the review petitioners is that Order 14 Rule 2 (2) virtually makes it mandatory for the Trial Court to decide every issue touching its jurisdiction as a preliminary issue. Order 14 Rule 2 of the CPC reads as under :-

“2. Court to pronounce judgment on all issues.- (1)

Notwithstanding that a case may be disposed of on a 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.”

9. From the phraseology of clause 2 below Rule 2, it is apparent that the discretion is left with the Court. In fact, clause 1 under Rule 2 clearly provides that the Courts shall decide all the issues and pronounce a judgment on all the issues notwithstanding that the case may be disposed of on a preliminary issue.

10. In the instant case, it is the view point of the petitioners that the case can be disposed of on a preliminary issue. However, in the backdrop of the contents of application Exh.80, wherein the

petitioners had not canvassed their submissions on Order 14 Rule 2 (2) of the CPC and in the light of the fact that an application for trying 3 issues as preliminary issues was made after almost 5 years, the Trial Court thought it proper to consider all the issues together.

11. The petitioners submit that though the applicability of Order 14 Rule 2(2) of the CPC may not have been canvassed before the Trial Court or before this Court, it would not be late even at this stage to order the Trial Court to decide issue Nos. 1,2 and 4 as preliminary issues. For the said purpose, learned counsel for the petitioners has placed reliance upon the judgment of this Court in the matter of The Manikgarh Cement, Proprietor, Century Textiles and Industries Ltd., and others Vs. Patel Narayandas Bhagwandas Fertilisers Pvt.Ltd.,2001(2) All MR 497.

12. Paragraph Nos. 2 and the observations below paragraph No.6 of the Manikgarh judgment (supra) read as under :-

“2. The plaintiff had filed an interim relief application and at that time, the defendants had taken the contention that in view of the provisions of Section 9A of the Code of Civil Procedure, the question of jurisdiction of the Court be first decided. However, later on, the application for interim relief was not pressed by the plaintiff and so, no question arose of giving the decision on the

question of jurisdiction as per the provisions of section 9A of the Code of Civil Procedure. However, it appears that on 06/11/1989, the learned Civil Judge had passed an order that the question will be considered at the time of framing issues; and, accordingly, issue No.4 is with respect to the jurisdiction of the Civil Court, Senior Division, Jalgaon.

6. No doubt, a discretion is given to the Court under this sub-rule to treat the issue regarding jurisdiction as preliminary issue or not to treat so. But, while exercising this discretion, the Court has to consider all the circumstances obtaining in the matter. Here, it is already pointed out that issue regarding jurisdiction can be decided independently of other issues. In fact, when there was the issue regarding jurisdiction raised by the defendants in the written statement, the learned Civil Judge, before settling other issues, ought to have settled this issue and ought to have decided it as preliminary issue.”

13. In the light of the above, had the petitioners moved the Trial Court with promptitude and advanced their submissions in the light of Order 14 Rule 2(2) of the CPC, the Trial Court would have been in a position to consider the discretion vested in it by Law and decide whether issue Nos. 1, 2 and 4 could be decided as preliminary issues. A request was made by the review petitioners after 5 years. In my view, no fault could be found with the discretion exercised by

the Trial Court.

14. I have considered the submissions of the petitioners in the light of Order 14 Rule 2. Clause 1 below Rule 2 in fact is a mandate for the Trial Court to decide all the issues together notwithstanding the fact that the case could be decided/disposed of on the preliminary issue. This, therefore, indicates that the Trial Court can exercise its discretion under Clause 2 of Rule 2 of taking up issues for decision peremptorily, of course if the litigants are equally diligent. There is no whisper in application Exh.80 as to what were the circumstances that prevented the petitioners from seeking decision on 3 issues as preliminary issues, peremptorily.

15. The Apex Court in the case of Haridas Das Vs. Usha Rani Banik, (2006) 4 SCC 78 has laid down the law that merely because some aspects of the matter were not canvassed or set out, would not be a ground for entertaining a review petition.

16. In the instant case, the petitioners have been unable to make out a case of an error apparent on the face of the record in the passing of the order dated 26/02/2015 by this Court.

17. As such, this petition is devoid of merit and is therefore dismissed. Needless to state, the time frame, within which RCS No.222/2002 is to be decided in the light of paragraph No.12 of the order dated 26/02/2015 passed by this Court, places the litigating sides under an obligation to co-operate with the Trial Court for an expeditious decision of the said suit within the time frame on its merits.

(RAVINDRA V. GHUGE, J.)