

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3528 OF 2016

D. Abraham & Sons Pvt. Limited	..Petitioners
<i>Versus</i>	
Indian Fumigation Company and another	..Respondents

....
Mr.Shishir Joshi i/b. Mr. K.N. Shriyan for the Petitioners.
Mr.Ashish Dubey for the Respondents.
....

CORAM : R. G. KETKAR, J.

DATE : 06th SEPTEMBER, 2016

P.C.

1. Heard Mr. Shishir Joshi, learned Counsel for the petitioners and Mr. Ashish Dubey, learned Counsel for respondents, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the plaintiffs, have challenged the judgment and order dated 14.1.2015 passed by the learned Judge, presiding over Court Room No.6 of the Court of Small Causes at Bombay below Exhibit-14 in R.A.D. Suit No.156/2013 as also the judgment and order dated 3.7.2015 passed by the Appellate Bench of the Small Causes Court at Mumbai in Revision Application No.67/2015. By these orders, the Courts below allowed the application Exhibit-14 filed by defendant No.2

and framed issues of limitation and jurisdiction as preliminary issues.

3. The plaintiffs have instituted the suit for declaration of their tenancy right in respect of Godown No.10 admeasuring 4,000 sq. ft. on the ground floor of building No.10, Nanavati Building, Grain Depot, Opp. Sewree Police Station, Darukhana, Mazgaon, Mumbai – 400 010 (for short, 'suit premises) and for perpetual injunction. In paragraph-11, the plaintiffs have asserted that defendant No.2 has abruptly stopped accepting rent from the plaintiffs since January, 2007. In paragraph-13, the plaintiffs have narrated the instances by which the defendants have attempted to dispossess the plaintiffs from the suit premises. The plaintiffs have sought restraining the defendants from interfering with and disturbing the plaintiffs exclusive peaceful use, occupation and possession of the suit premises. In said paragraph-13 (a) to (h) the plaintiffs have referred to several instances of 2013. The suit is instituted for declaration and perpetual injunction sometime in January, 2013.

4. During pendency of the suit, the plaintiffs took out application for interim relief. Defendant No.2 filed application Exhibit-14 *inter alia* contending that the suit is barred by law of limitation as also the suit premises is a public premises within the meaning of Public Premises

(Eviction of Unauthorized Occupants) Act, 1971 since the Bombay Port Trust is the owner and head landlord of the suit premises. The plaintiffs have filed reply resisting the application. By the impugned order, the learned trial Judge framed issues. Aggrieved by that decision, the plaintiffs preferred Revision Application before the Appellate Bench of the Small Causes Court which was also dismissed. It is against these orders, the plaintiffs have instituted the present Writ Petition.

5. Mr. Joshi has taken me through paragraphs-11 and 13 of the plaint. He submitted that in paragraph-11, the plaintiffs have asserted that since January, 2007 defendant No.2 has abruptly stopped accepting rent from them. In paragraph-13 various instances of 2013 are pleaded. He, therefore, submitted that it cannot be said that the suit is not barred by limitation. He relied upon the decision of Apex Court in the case of **Gunwantbhai Mulchand Shah & Ors vs Anton Elis Farel & Ors, AIR 2006 SC 1556** and in particular paragraph-13 thereof as also order dated 20.8.2013 passed by this Court (Coram: Ravi K. Deshpande, J.) in Writ Petition No.6769/2011 (**Shri Govinda Goga Donda and another vs. Shri Mayur Ramesh Bora and others**) by which the learned Single Judge has referred following question to the Larger Bench.

“Whether in exercise of the powers under section 9-A of the Code of Civil

Procedure, the trial Court is competent to frame an issue, disposing of the Suit in part or the cause of action in part ?”

6. Mr. Joshi also invited my attention to the order dated 13.10.2014 passed by this Court (Coram:R.M. Savant,J.) in Writ Petition No.8902/2014. By said order, this Court has deferred the hearing of that petition for eight weeks with liberty to the parties to apply in the event the reference is answered by the Division Bench in the interregnum. He, therefore, prayed that the hearing of the case may be deferred.

7. On the other hand, Mr.Dubey supported the impugned orders. He submitted that the learned trial Judge has framed the preliminary issues and has not decided said issues. It will be open to the parties to lead evidence on the basis of the issues so framed and it is not appropriate stage to interfere with the impugned orders in view of the mandate of Section 9-A of C.P.C.

8. I have considered rival submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. Section 9-A of C.P.C. reads thus :

“9-A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue.-- (1) Notwithstanding anything contained in this

Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction."

9. In the present case, perusal of application Exhibit-14 shows that defendant No.2 has raised preliminary issue pertaining to limitation as also jurisdiction. In the case of ***Gunwantbhai Shah (supra)***, the trial Court dismissed the suit on the ground that the suit was instituted on 4.4.1994 for specific performance of the agreement dated 18.12.1964. The Appeal preferred by the plaintiffs was dismissed. The plaintiffs prayed that the appeal before the High Court of Bombay. The High Court confirmed the decisions. In paragraph-11, Apex Court observed that the question as to

how long a plaintiff, even if he had performed the whole of his obligations under an agreement for sale, in which a time for performance is not fixed, could keep alive his right to specific performance and to come to court after 29 years seeking to enforce the agreement, may have also to be considered by the court especially in the context of the fact that the relief of specific performance is discretionary and is governed by the relevant provisions of the Specific Relief Act, 1963. These questions cannot be decided as preliminary issues and they are not questions on the basis of which the suit could be dismissed as barred by limitation. The question of limitation has to be decided only on the basis of Article 15 of the Limitation Act and said question could be dealt with only after evidence is taken and not as a preliminary issue unless, of course, it is admitted in the plaint that the plaintiffs had notice that performance was refused by the defendants and it is seen that the plaintiffs approached the Court beyond three years of the date of notice.

10. In paragraph-13, Apex Court held that the suit insofar as it related to the prayer for a perpetual injunction restraining the defendants from interfering with the possession of the plaintiffs cannot be held to be barred by limitation. Thus, the issues involved in the case before Apex Court were centering around the plea based on law of limitation.

11. In the case of **Govinda Donde (supra)** the plaintiff had instituted the suit claiming reliefs of declaration that the sale deed dated 2.8.1965 is illegal and not binding on the plaintiffs and defendant Nos.4 to 8 and for cancellation of said document; for perpetual injunction restraining defendants No.1 to 3 from dispossessing the plaintiffs and defendant No.6 from the suit premises illegally. By order dated 9.6.2011 the learned trial Judge had framed preliminary issue of limitation. After considering the prayer clauses (a) and (b) of the suit, it was observed that the preliminary issue of limitation will not result in final disposal of the suit is for relief of injunction, Article 113 is applicable. The learned Single Judge, therefore, referred the question as to whether in exercise of powers under Section 9-A of C.P.C. trial Court is competent to frame an issue, disposing of the suit in part or the cause of action in part.

12. In the present case, defendant No.2 has filed application for framing preliminary issue on two counts, namely, issue of limitation as also issue of jurisdiction. The decision relied upon by Mr. Joshi, therefore, do not advance his case. If ultimately the Court holds that it has no jurisdiction to entertain and try the suit, it can dispose of the suit in entirety.

13. In the case of **Ashok Sadarangani and another Vs. Union of India & Ors., AIR 2012 SC 1563**, Apex Court

observed in paragraph-19 thus :

“19. As was indicated in Harbhajan Singh's case (supra), the pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. The reference made in Gian Singh's case (AIR 2011 SC (CRI.) 30: 2011 AIR SCW 305) (supra) need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

14. In view thereof merely because reference is pending before the Larger Bench, that by itself is not a ground for deferring the hearing of this Petition. In view thereof, I do not find that the learned trial Judge has committed any error in framing preliminary issue. Hence, Petition fails and the same is dismissed. The learned trial Judge will decide the issues uninfluenced by the observations made in the impugned orders and in this order on the basis of the material on record and in accordance with law. It is needless to clarify that pending the final adjudication of preliminary issues, the learned trial Judge shall consider the provisions of 9-A[2] for grant of ad-interim relief.

(R. G. KETKAR, J.)