

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 2783 OF 2013

Smt Chitra Anil Vaidya

Petitioner

Vs

Jivraj Baloo Trust and Ors

.. Respondents

Mr.D.B.Savant and Vinayak Salokhe, Advocate for Petitioner.
Mr.Omprakash Kulkarni, Advocate for Respondent no.4-Rohan
Developers.

CORAM : R.G.KETKAR,J.

DATE : 04/08/2016

PC:

1. Heard Mr. D.B.Savant, learned counsel for the petitioner and Mr.Omprakash Kulkarni, learned counsel for respondent no.4 at length. Mr. Savant seeks leave to delete respondents no. 1 to 3 on the ground that respondent no.4 is the only contesting defendant. On the oral application made by Mr. Savant, leave to delete respondents no. 1 to 3 is granted. Amendment shall be carried out forthwith.

2. Rule. Mr.Kulkarni waives service for respondent no.4. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff', has challenged the Judgment and order dated 2.11.2012 passed by the learned Judge presiding over Court Room no.20 of the Court of Small Causes Court at Mumbai below Exhibit 36 in R.A.D.Suit

No. 859 of 2009. By that order, the learned trial Judge allowed the application filed by respondent no.4, hereinafter referred to as 'defendant no.5', for giving direction to the plaintiff to lead her evidence first upon the preliminary issue. On 27.7.2009, the learned trial Judge has framed the following preliminary issue.

“Does defendant no.5 prove that this Court has no jurisdiction to entertain and try the suit?

4. Petitioner-plaintiff has instituted suit in respect of the premises in question for declaration that she is the lawful tenant in possession of the suit premises. Defendant no.5 filed application for framing preliminary issue on the ground that the plaintiff is not a tenant. By order dated 27.7.2009, the learned trial Judge framed the above preliminary issue. It is against this order as also the order dated 2.11.2012 passed by the learned trial Judge, the plaintiff has instituted the present petition.

5. In support of this petition, Mr. Savant submitted that the plaintiff asserts that she is tenant and defendant no.5 denies that the plaintiff is a tenant. He submitted that whether the plaintiff is a tenant or not, is not a pure question of law. It is a mixed question of law and fact. He invited my attention to Order 14 of C.P.C and submitted that the learned trial Judge was not justified in framing preliminary issue. It is a matter of full-fledged trial in a declaratory suit and cannot be said to be preliminary issue.

6. Mr. Savant further submitted that defendant no. 5 has

instituted Short Cause Suit No.1473 of 2013 in the Bombay City Civil Court, inter alia, contending that the defendant (plaintiff herein) has no right, title and interest in the suit property. Defendant no.5 has sought direction from the City Civil Court against the defendant to vacate the suit premises. By order dated 8.12.2014 the learned trial Judge ordered return of plaint under Order VII, Rule 10 of C.P.C. for presenting it before appropriate forum. Mr Savant submitted that defendant no.5 has not challenged the said decision and has thus attained finality. Mr. Savant therefore submitted that the impugned orders may be set aside.

7. On the other hand, Mr. Kulkarni supported the impugned orders. He submitted that the learned trial Judge was justified in passing the order on 27.7.2009, thereby, framing preliminary issue as also directing the plaintiff to lead her evidence first, upon preliminary issue. He, however, did not dispute that the suit instituted by defendant no. 5 in the City Civil Court was held to be not maintainable and plaint was ordered to be returned under Order VII, Rule 10 of C.P.C. and that defendant no.5 did not challenge that order.

8. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. As noted earlier, the plaintiff has instituted suit for declaration of her tenancy rights claiming that

she is lawful tenant in possession of the suit premises. Defendant no.5 on the other hand contends that the plaintiff is not a tenant. In my opinion, whether the plaintiff is a tenant or not, is not a pure question of law. It is a mixed question of law and fact. Order XIV, Rule 2 reads thus;

“2. Court to pronounce judgment on all issues— (1) Notwithstanding that a case may be disposed of on 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. ”

Perusal of order 14, Rule (2), extracted herein above, shows that if Court is of opinion that the case or any part thereof can 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. In the present case, question whether the plaintiff is or is not a tenant, is not a pure question of law.

9. That apart, as noted earlier, defendant no.5 had instituted suit in Bombay City Civil Court. By reasoned order dated

8.12.2014, the learned trial Judge ordered return of plaint under Order VI, Rule 10 of C.P.C. No material is produced on record to show that defendant no.5 has challenged that order. In other words, defendant no.5 has accepted the correctness of the said order. In view thereof also, I am of the opinion that the learned trial Judge was not justified in framing preliminary issue and consequently directing the plaintiff to lead her evidence first on that preliminary issue. The learned trial Judge will frame this issue along with other issues and try the same while deciding the suit. Hence, the following order.

(i) Order dated 27.7.2009 framing preliminary issue as also order dated 2.11.2012 below Exh.36 directing the plaintiff to lead her evidence first, are quashed and set aside and the application for framing preliminary issue and application Exh.36 are dismissed.

(ii) Defendant no.5 is at liberty to file application before the trial court for framing issue as to whether Small Causes Court has jurisdiction to try and decide the suit along with other issues. Learned trial Judge will decide all the issues together.

(iii) Rule is made absolute in the aforesaid terms with no order as to cost. All contentions on merits are expressly kept open.

(R.G.KETKAR, J.)