

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5959 OF 2017

Mrs Cheryal Ramesh Dalvi

..Petitioner

Vs.

Mrs Ujjwala Dushyant Mahale and Others

..Respondents

Mr. A. I. Pai a/w Mr. S. V. Joshi, Ms. Neuty Nilesh Thakkar, for the
Petitioner.

Mr. Ashutosh Khadeparkar, for Respondent No.1.

CORAM :- B. P. COLABAWALLA, J.
DATE :- JUNE 13, 2017.

P. C.:

This Writ Petition filed under Article 227 of the Constitution of India challenges the order dated 23rd December, 2015 passed by the Trial Court and the order dated 19th April, 2017 passed by the same Court in its review jurisdiction.

2 The short point by which the Petitioner is aggrieved by these two orders is that the Trial Court allowed the application of the Petitioner to frame two preliminary issues under Order 14 Rule 2 of the Code of Civil Procedure, 1908 (for short "CPC") but

allowed the parties to lead evidence on those preliminary issues, if they so desired. According to the Petitioner, this was impermissible and therefore a limited challenge to the said order seeking a direction that the preliminary issues framed ought to be decided without allowing the parties to lead any evidence.

3 According to the Petitioner, R. A. E Suit No.835/1466/2008 was filed by Respondent No. 1 herein against the Petitioner as well as Respondent Nos.3 and 4 herein. Respondent No.1 as well as Respondent Nos.3 and 4 are siblings and according to the Petitioner, there are serious disputes between them and which is evidenced by a Partition Suit filed in this Court being Partition Suit No.3299 of 2006.

4 Be that as it may, in this R. A. E. Suit No.835/1466/2008, the Petitioner herein filed his Written Statement and thereafter the Trial Court framed the issues on 14th August, 2012. Issue No. 1 that was framed was whether the Court has jurisdiction to entertain and try the Suit. Issue No.2 was whether the Suit was maintainable. Over and above, these two issues, there were several other issues that were also framed. Thereafter, additional issues were also framed by the Trial Court

on an application made by the Petitioner herein.

5 Once all issues were framed, Respondent No.1 herein (the Plaintiff before the Trial Court) filed its affidavit of examination in chief on 11th February, 2014. Thereafter, even the documents relied upon by Respondent No.1 herein were exhibited by the Trial Court after hearing detailed objections of the Petitioner and the Trial Court fixed the date for cross examination. It is only at this time that the Petitioner filed an application being Exhibit-36 under Order 14 Rule 2 read with Section 151 of the CPC to dismiss the Suit by trying the issue of jurisdiction and maintainability of the Suit as a preliminary issue. It is this application of the Petitioner that was decided on 23rd December, 2015, after hearing both sides. The operative part of the order records that the two issues as mentioned earlier regarding jurisdiction and maintainability are to be tried as a preliminary issue and the settlement of the rest of the issues be postponed. The Trial Court, however, recorded that both parties are at liberty to lead evidence, if they so desire. It is basically aggrieved by this order that the Petitioner is before me in my writ jurisdiction under Article 227 of the Constitution of India.

6 In this factual backdrop Mr Pai, learned counsel for the Petitioner submitted that these two issues, namely, regarding jurisdiction and maintainability involve a bar to the Suit created by law, and therefore, could be finally decided without any evidence and the need for a full-fledged trial. According to Mr. Pai, there was no landlord - tenant relationship between the Petitioner and Respondent No.1. According to the Petitioner, one of the other co-owners namely (Defendant No.2 to the Suit) always acted as landlord and owner of the suit premises. The tenancy agreement dated 30th May, 2006 was also duly registered between the erstwhile tenant and the Petitioner and the other co-owner (Defendant No.2 to the Suit). According to the Petitioner, Respondent No.1 was never its landlord. Since the undivided share of Respondent No.1 in the suit premises is yet to be determined by the competent court, the eviction suit was not maintainable and Small Causes Court therefore had no jurisdiction to entertain and try the suit. According to Mr. Pai, in the facts of this case, all these contentions could have been examined and preliminary issues decided without giving any opportunity to the parties to lead their respective evidence. It was wholly unnecessary, according to Mr. Pai. He, therefore, submitted that

under Article 227 of the Constitution of India this Court ought to interfere with the impugned orders insofar as they give an opportunity to the parties to lead evidence on the preliminary issues.

6 On the other hand, Mr. Khandeparkar, the learned counsel appearing on behalf of Respondent No.1, submitted that there was absolutely nothing wrong with the order passed by the Trial Court. He submitted that looking to the facts as set out above, this application was made at a very belated stage and was done only as an after thought and to stall the trial of the suit. Mr. Khandeparkar was at pains to point out that this application was made only once a date was fixed for cross examination of Respondent No.1 (Plaintiff in the suit). According to Mr. Khandeparkar, the Trial Court ought to have decided all the issues together after allowing the parties to lead their respective evidence but merely because the Trial Court has, in its discretion, decided to first rule upon the issues of jurisdiction and maintainability by allowing the parties to lead their respective evidence, cannot, in the peculiar facts and circumstances of this case, be faulted. He, therefore, submitted that there was no merit in this Writ Petition and the same ought to be dismissed with

costs.

7 I have heard the learned counsel for the parties at length and have perused the papers and proceedings in the Writ Petition. I have also given a careful consideration to the impugned orders. The sequence of the events in this case are really undisputed. It is not in dispute that in this suit issues were framed as far back as on 14th August, 2012. On this date, the issue of jurisdiction and maintainability were framed along with several other issues. Thereafter, Respondent No.1 also filed its affidavit of examination in chief on 11th February, 2014. After this, the Trial Court undertook the exercise of hearing both parties and exhibited documents relied upon by Respondent No.1 and fixed the matter for cross examination of Respondent No.1 (Plaintiff in the suit). It is only at this time that the Petitioner herein filed the present application. Looking to these undisputed sequence of events, I find that the Trial Court ought not to have entertained this application at all and should have decided all issues together. However, having done so and exercising its discretion to decide the first two issues on jurisdiction and maintainability as preliminary issues by allowing the parties to lead their evidence, I do not find that the discretion exercised by the Trial Court is so

perverse that would require my interference under Article 227 of the Constitution of India. The orders passed by the Trial Court on 23rd December, 2015 as well as 19th April, 2017 are detailed and with cogent reasons. I, therefore, find no need to interfere with the same.

8 I must mention here that Mr. Pai relied upon a judgment of this Court in the case of **Meher Singh v/s Depak Sawhny and Another reported in 1998 (3) MH L J 940**. Relying upon the aforesaid decision, he sought to contend that Section 9A of the CPC (as applicable to Maharashtra) was a distinct departure from Order 14 Rule 2. He submitted that vide Section 9A it was open to the parties to lead evidence whilst deciding the preliminary issue of jurisdiction, under Order 14 Rule 2, the Court could not permit parties to lead evidence.

9 On carefully going through this decision, I do not find any such proposition being laid down therein. It is true that this decision does lay down that there is a distinct departure between Section 9A and Order 14 Rule 2. This departure is not on the issue of whether the Court can allow a party to lead evidence under either of the two provisions but is rather whether the

preliminary issue is to be decided first or whether it can be decided with all other issues. What this decision holds is that under Section 9A, when a preliminary issue is raised on the point of jurisdiction, the Court has no discretion to decide it with all other issues. It has to be decided as a preliminary issue and if need be, by allowing the parties to lead their evidence. On the other hand, Order 14 Rule 2 sub-rule (1) clearly stipulates that notwithstanding that a case may be disposed off on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. Sub-rule (2) of Order 14 Rule 2 carves out an exception and states that where issues, both of law and of fact 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. It is therefore clear that under Order 14 Rule 2, the Court has the discretion to decide a preliminary issue first or to decide it with all other issues. In contra distinction, under Section 9A no such discretion vests with the Court. At least, to my mind, it is this departure that is discussed and contemplated in Meher Singh's case (supra). In any event,

Meher Singh's case does not anyway lay down that the Court is absolutely barred from allowing the party to lead evidence when it exercises its discretion to decide the preliminary issues under Order 14 Rule 2. In the peculiar facts of this case and considering the timing of the application made by the Petitioner under Order 14 Rule 2, I do not find that the Trial Court was in any error in allowing the parties to lead evidence on these two preliminary issues.

10 In view of the foregoing discussions, I find no merit in this Writ Petition. It is accordingly dismissed.

11 It is clarified that I have not opined on the merits of the matter and all contentions of both parties on merits are specifically kept open.

(B. P. COLABAWALLA, J.)