

Mr. Atul Damle, Senior Advocate i/b. Mr. Jayesh M. Joshi for Petitioners.
Mr. Mayur Khandeparkar for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : JANUARY 06, 2017

Heard Mr. Damle, learned Senior Counsel for petitioners and Mr. Khandeparkar, learned Counsel for respondent No.1 at length. On the oral application made by Mr. Damle, leave to delete respondent No.2 is granted as in the present Petition respondent No.1, being the original plaintiff, is the only contesting respondent. Amendment shall be carried out forthwith. Rule. Mr. Khandeparkar waives service for respondent No.1. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioners, hereinafter referred to as 'defendants No.1 and 3', have challenged the judgment and order dated 05.11.2016 passed by the learned 13th Joint Civil Judge Senior Division, Thane below exhibit-81 in Special Civil Suit No.241 of 2001. By that order, the learned trial Judge rejected the application made by defendants No.1 and 3 for framing issues according to the directions contained in the order dated 05.08.2005 passed by the Apex Court while disposing of Special Leave Petition No.7106 of 2005 and for proceeding with the Suit.

3. It appears that by order dated 01.01.2003, the learned trial Judge held issue of jurisdiction against respondent No.1, hereinafter referred to as 'plaintiff', and ordered return of plaint for presentation in the proper Court. Aggrieved by that decision, plaintiff preferred Appeal from Order in this Court. By judgment and order dated 14/15 and 21.02.2005, this Court partly allowed the appeal. This Court remitted the matter to the trial Court for deciding the issue of jurisdiction afresh in the light of the law laid down in the judgment. The learned trial Judge was directed to permit both the parties to lead evidence on the question that was indicated in paragraphs 30 and 31 of the judgment. Aggrieved by that order, plaintiff preferred Special Leave Petition before the Apex Court. The Apex Court disposed of the Special Leave Petition on 05.08.2005 by observing that the order impugned was merely an order of remand for retrial of the preliminary issue on jurisdiction. All the points and contentions raised in the Special Leave Petition were kept open to be urged before the trial Court and the trial Court was to decide those issues after permitting parties to lead evidence on the same.

4. It appears that applications at exhibit-5 and 66 were filed in the Suit praying for repair of machinery. By order dated 24.08.2007, the learned trial Judge allowed application exhibit-66 and directed the defendants to repair machine and the plaintiff was given liberty to claim the expenses incurred by him for repairing after amending his claim. Aggrieved by this decision, Appeal from Order No.191 of 2008 was filed in this Court. Appeal from Order was disposed of as withdrawn on 12.06.2008 and this Court expected the trial Court to accord to the matter the urgency that it may deserve, considering the pendency in his Court.

5. On 01.07.2013, the learned trial Judge framed as many as 8 issues

at exhibit-74. On behalf of the plaintiff, Vijay Devji Aiya, Director made affidavit in lieu of examination-in-chief on 14.03.2014 covering all the issues that were framed by the learned trial Judge at exhibit-74. Defendants No.1 and 3 thereafter filed application at exhibit-81 on 13.08.2014 praying for framing of issues according to the directions given by the Apex Court while disposing of the Special Leave Petition No.7106 of 2005 and proceeding with the Suit. By the impugned order, the learned trial Judge has rejected the application and directed both the parties to proceed with the Suit on day to day basis without fail as the Suit is 16 years old. It is against this order, defendants No.1 and 3 have instituted the present Petition.

6. In support of this Petition, Mr. Damle has taken me through the order dated 14/15 and 21.02.2005 passed by this Court in Appeal from Order No.191 of 2003, and in particular paragraphs 30, 31 and 32. He has also invited my attention to the order dated 05.08.2005 passed by the Apex Court while disposing of the S.L.P. and the issues framed by the learned trial Judge on 01.07.2013 at exhibit-74. Mr. Damle submitted that the learned trial Judge ought to have framed only two preliminary issues, namely, (i) whether page No.2 containing clause 16 of the invoice dated 10.04.1995 was received by the plaintiff? and (ii) whether the said clause is binding on the plaintiff. After framing these preliminary issues, the learned trial Judge should have permitted parties to lead evidence only on these two issues and should not conduct full-fledged trial on the basis of the issues framed at exhibit-74. He, therefore, submitted that appropriate directions may be given to the learned trial Judge in that regard.

7. On the other hand, Mr. Khandeparkar submitted that while deciding Appeal from Order, this Court had already decided the issue of jurisdiction. He has invited my attention to the order of the Apex Court

wherein the Apex Court has observed that all the points and contentions raised in the S.L.P. by the plaintiff were kept open to be urged before the trial Court and the trial Court was directed to decide those points / contentions after permitting parties to lead evidence on the same. He submitted that the learned trial Judge framed issues on 01.07.2013. No objections were raised either by the plaintiff or by the defendants. Parties have understood their respective case, and therefore, they did not object to framing of the issues by the trial Court on 01.07.2013. In fact, after passing of the order by this Court and the Apex Court, applications for interim relief, being applications exhibit-5 and 66 were filed. Defendants No.1 to 3 filed their reply at exhibit-68 opposing application exhibit-66. After hearing both sides, the trial Court allowed application exhibit-66 on 24.08.2007. He submitted that after issues were framed, affidavit in lieu of examination-in-chief was made by Vijay Devji Aiya, Director of plaintiff on 14.03.2014 covering all the issues framed by the learned trial Judge. No objections were raised by defendants No.1 and 3. He has invited my attention to paragraph 4 of the application exhibit-81 and submitted that in fact defendants No.1 and 3 are trying to enlarge the enquiry and therefore, filed application praying for framing issues as per the orders passed by the Apex Court in S.L.P. He further submitted that after deciding the preliminary issue of jurisdiction, the learned trial Judge may be directed to forthwith proceed with the Suit having regard to the fact that the Suit is pending since 2001.

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, by order dated 01.01.2003, the learned trial Judge answered issue of jurisdiction against the plaintiff and ordered return of plaint for presentation before the appropriate Court. That order was challenged by the plaintiff by filing Appeal from Order No.191 of 2003. By judgment and order dated 14/15 and 21.02.2005, Appeal from

Order was partly allowed. Paragraphs 30 to 32 of that order read thus,

30. Therefore, in my view, it was necessary for the trial Court to decide the question whether the relevant page was transmitted to the Appellant and was received by the Appellant. The trial Court was required to give a decision on the said point before deciding the preliminary issue.

31. In this view of the matter, the impugned order will have to be quashed and set aside and the matter will have to be remanded to the trial Court. In so far as the effect of the clause no.16 is concerned, it being the question of law, I have decided with same. I have held that if the said clause was incorporated in the binding contract between the parties, the suit filed by the Appellant in the trial Court was not maintainable. Thus after remand if the trial Court finds that page no.2 containing clause no.16 was received by the Appellant and was binding on the Appellant, the plaint will have to be returned for presentation to proper Court. The order of remand will be only for considering the question whether the page containing the clause no.16 was received by the Appellant and was binding on the Appellant.

32. In this view of the matter, I pass the following order :-

i. Subject of the observations made above, impugned Judgment and order is quashed and set aside and the matter is remanded to the learned trial Judge for deciding the issue of jurisdiction afresh in the light of law laid down in this judgment.

ii. Parties will appear before the learned trial Judge on Monday the 28th March 2005 at 11-00 a.m.

iii. The learned trial Judge permit both the parties to lead evidence on the question which is indicated in paragraph nos.30 and 31 of this judgment.

iv. After permitting the parties to lead evidence, the preliminary issue will be decided in the light of what has been held in this judgment.

v. The trial Court will permit the parties to lead evidence and will pass the order on or before 31st August 2005.

vi. Appeal is partly allowed in above terms with no order as to costs.”

9. Perusal of paragraph 30 shows that this Court directed the trial Court to decide the question whether the relevant page i.e. page No.2 of

invoice dated 10.04.1995 was transmitted to the plaintiff and was received by the plaintiff. Perusal of paragraph 31 shows that this Court decided the effect of clause 16 and held that if the said clause was incorporated in the binding contract between the parties, the Suit filed by the plaintiff in the trial Court was not maintainable. The question that was to be gone into by the trial Court was whether in fact page No.2 containing clause 16 of the invoice was received by the plaintiff and was binding on the plaintiff. It was clarified that the order of remand will be only for considering the question whether page containing clause 16 was received by the plaintiff and was binding on the plaintiff.

10. Aggrieved by this decision, plaintiff preferred S.L.P. before the Apex Court, which was disposed of by passing the following order on 05.08.2005:

“The impugned order is merely an order of remand for retrial of the preliminary issue on jurisdiction. All the points and contentions raised in this Special Leave Petition will be open to be urged before the trial Court, which shall decide it after permitting parties to lead evidence on the same.

The Special Leave Petition is disposed of with the above observations.”

11. Perusal of the Apex Court order shows that the Apex Court disposed of the S.L.P. as the order impugned therein was merely an order of remand for retrial of preliminary issue of jurisdiction. Thus, the Apex Court did not interfere with the order of remand made by this Court.

12. In the light of this, whether the learned trial Judge was justified in framing preliminary issues, other than those contemplated by this Court. The answer has to be in the negative. This Court directed the trial Court to frame preliminary issue only as regards whether page No.2 containing clause No.16 of the invoice dated 10.04.1995 was transmitted to the

plaintiff and whether that was received by the plaintiff and whether that clause is binding on the plaintiff. This Court also expected the trial Court to permit the parties to lead evidence only on these issues. Mr. Khandeparkar submitted that while deciding Appeal from Order, this Court already decided the issue of jurisdiction. In view of paragraphs 30 to 32 of the order quoted hereinabove, I do not find any merit in this submission. Equally, I do not find any merit in the submission of Mr. Khandeparkar that parties understood their respective case, and therefore, did not raise objection to framing of issues by the learned trial Judge at exhibit-74 as also filing of affidavit in lieu of examination-in-chief by Vijay Devji Aiya, covering all the issues framed by the learned trial Judge at exhibit-74.

13. In view thereof, it is necessary to direct the trial Court to decide the following preliminary issues and permit the parties to lead evidence thereon:

- (i) Whether page No.2 containing clause 16 of the invoice dated 10.04.1995 was transmitted to the plaintiff and was received by the plaintiff or not?
- (ii) If answer to the above issue is in the affirmative, whether clause 16 is binding on the plaintiff or not?

14. In case, the trial Court answers the preliminary issue in favour of the plaintiff, it will proceed with the Suit on the basis of the issues framed at exhibit-74. In case the trial Court answers the preliminary issue against the plaintiff, it will thereafter pass appropriate order. Subject to this clarification, no case is made out for interfering with the impugned order. Rule is discharged accordingly with no order as to costs.

(R. G. KETKAR, J.)