

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

CIVIL REVISION APPLICATION NO. 186 OF 2017

Gaurishankar s/o Mohanmaharaj Vyas
Deceased through LRs & others

Applicants

Versus

Bada Balaji Mandir
& others

Respondents

Mr. P.G. Karande, advocate holding for Mr. D.R. Bhadekar,
advocate for applicants.

Mr. S.S. Rathi, advocate for respondents 2 and 3.

CORAM : M.S. SONAK, J.

DATE : 22nd JANUARY, 2018

PER COURT:

1. Prima facie, this proceeding appears to have been filed to delay hearing of the appeal before the appellate Court even though, the entire appeal, including the point, which this Civil Revision Application now seeks to urge as a preliminary point, is ready for hearing since the year 2013. Appellate Court has made such observation and considering the facts and circumstances of the present case, it appears that such observation has been made with justification.

2. In this case, respondents 2 and 3 instituted suit for eviction of applicants, which suit, has been decreed and eviction of applicants has been ordered vide judgment and order dated 24.09.2012. Applicants instituted appeal i.e. Regular Civil Appeal No. 410/2012 before the appellate Court and applied for interim relief to restrain execution of eviction decree. The application was

disposed of by the appellate Court by order dated 06.12.2012 staying execution of the eviction decree subject to certain conditions. Upon taking into consideration the plea made by respondents herein that applicants have continued construction activities over the suit property despite eviction decree, the learned appellate Court, by order dated 06.12.2012 itself, expedited hearing of appeal and ordered listing the same after paper book is prepared. The record indicates and even, the impugned order states that the paper book was prepared and the appeal itself in its entirety was ready for final hearing in the year 2013 itself.

3. Mr. Karande, learned counsel for applicants submits that respondents have filed an application before the appellate Court seeking interim relief restraining the applicants from undertaking any construction activities in the suit property pending the appeal. He submits that since such application came to be filed, the applicants were entitled and have accordingly filed application under section 9(A) of the Code of Civil Procedure urging that preliminary issue be framed as to limitation as well as jurisdiction of the Civil Court in entertaining the suit in which eviction decree has been made. Mr. Karande submits that rejection of such application by impugned order dated 01.09.2017 is contrary to the decision of the Hon'ble Supreme Court in the case of **Foreshore Co-operative Housing Society Ltd. Vs. Praveen D. Desai**, 2015(3) Mh.L.J. 315 as well as **Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd. Vs. Jagruti Industriars and another**, 2008(4) Mh.L.J. 471. He submits that in the first decision it has been made clear that the issue of limitation can be treated as a preliminary issue under section 9(A) of the Code of Civil Procedure

and, in the second decision, it has been held that such issue can be raised even at appellate stage.

4. Mr. Karande submits that learned appellate Court, by refusing to treat the issue of limitation and jurisdiction as preliminary objection under section 9(A) of the Code of Civil Procedure, has failed to exercise jurisdiction vested in it and therefore, the impugned order warrants interference.

5. Mr. Rathi, learned counsel for respondents 2 and 3 submits that since the main appeal is itself ready for disposal since the year 2013, the appellate Court, was quite justified in directing that all the issues can be taken up for consideration while deciding or disposing of the main appeal itself. He submits that applicants are only bent up delaying the proceeding on one ground or the other and therefore, the revisional jurisdiction, which is discretionary, ought not to be exercised in favour of such applicants.

6. As noted earlier, the main appeal was itself ready for final hearing since the year 2013. At the stage of final hearing, obviously, the appellate Court will have to consider the issue of limitation as well as jurisdiction of the Court which has made decree which is impugned before it. Appellate Court has held that at this stage, to bifurcate the proceeding at the instance of applicants will not be appropriate. The appellate Court has held that this application was taken out mainly to delay final hearing of the appeal. As observed earlier, there is justification for such observation in the facts and circumstances of the present case.

7. In the Civil Revision Application, neither the copy of application seeking interim relief restraining further construction in the suit property, which is stated to have been taken out by respondents 2 and 3, is placed on record nor even the date of such application is stated. Upon query, it was submitted that such application was filed some time after 2013.

8. In this case, the applicants chose not to raise the issue of limitation or jurisdiction as a preliminary issue or otherwise in the trial Court.. This does not mean that there is any bar to raising of such issue before the appellate Court because, if the suit is barred by limitation, then, it is the duty of the Court to take into consideration such issue irrespective of whether or not the same is raised by any party to the suit. Same is the position with regard to issue of jurisdiction. Therefore, there can be no bar to applicants raising the issue of limitation or jurisdiction in their appeal. Infact, the applicants have raised such issue in the appeal. The impugned order does not state that such issues are not going to be considered. All that the impugned order states is that such issues will be considered at the stage of disposal of appeal itself, particularly, since the appeal is ready for final hearing since 2013 and, for one reason or the other, the applicants are not proceeding with the appeal. It is significant to note that applicants have already obtained interim order restraining execution of eviction decree. Therefore, inference that applicants want to delay disposal of the main appeal is not completely illegitimate.

9. In Foreshore Co-operative Housing Society Ltd. (supra), the

Hon'ble Supreme Court has held that even the plea of limitation can be raised as a preliminary objection under section 9A of the Code of Civil Procedure. In *Satpuda* (supra) it is held that powers under section 9(a) of the Code of Civil Procedure can be exercised by the appellate Court. However, in neither of the decisions, the facts and circumstances of the case were, in any way were similar to the facts and circumstances of the present case.

10. In **A Kanthamani Vs. Nasreen Ahmed**, (2017) 4 SCC 654, the Hon'ble Supreme Court did not permit preliminary issue regarding maintainability of the suit to be raised for the first time at the appellate stage before the Supreme Court. The Hon'ble Supreme Court held that since no plea was raised in the written statement, a fortiori, no issue was framed and, in consequence, neither the Trial Court nor the High Court could render any finding on the plea. It is well-settled principle of law that the plea regarding the maintainability of suit is required to be raised in the first instance in the pleading (written statement); then only such plea can be adjudicated by the Trial court on its merit as a preliminary issue under Order 14 Rule 2 of the Code of Civil Procedure. Once a finding is rendered on the plea, the same can then be examined by the first or/and second Appeal Court. It is only in appropriate cases that the Court prima facie finds by mere perusal of plaint allegations that the suit is barred by any express provision of law or is not likely maintainable due to any legal provision; a judicial notice can be taken to avoid abuse of judicial process in prosecuting such suit. Such is, however, not a case here.

11. Jurisdiction under section 115 of the Code of Civil Procedure, which is invoked by applicants, is discretionary. The discretion cannot be exercised to facilitate the applicants to prolong hearing of the appeal even though, the appeal is ready for final hearing since 2013. The object of Section 9A is not to prolong but to shorten. To accept the applicants' contention would mean to delay the hearing of the appeal, which is what the applicants seem to want, because they are armed with a stay on execution of eviction order. The revisional jurisdiction cannot be exercised for such purpose.

12. There is no question of any prejudice to applicants because, appellate Court, has made it clear that all the objections raised by applicants will be considered at the stage of final disposal of the appeal. In any case, it is clarified that the issue of limitation and jurisdiction should also be considered by the appellate Court alongwith other issue which arise in the appeal. There is neither any jurisdictional error nor perversity in the reasoning of the appellate Court in the impugned order.

13. For the aforesaid reasons, Civil Revision Application is dismissed with cost of Rs. 5,000/-.

14. The appeal is ordered to be disposed of finally on its own merits and in accordance with law, after taking into consideration the issue of limitation as well as jurisdiction, as expeditiously as possible and, in any case, before 31st May, 2018.

15. All concerned to act on authenticated coy of this order.

(M.S. SONAK, J.)

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