

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION
WRIT PETITION NO. 4512 OF 2018

Frida Akbar Munshi	]	Petitioner
Vs.		
Santosh Virdatt Jarsa & Ors.	]	Respondents

.....

Mr. Surendra M. Sharma, for petitioner.
 Mr. K.B. Adyanthaya, for Respondents No.1 to 5.

.....
CORAM : R.G. KETKAR, J.

DATE : 18TH APRIL, 2018.

P.C.

Heard Mr. Sharma, learned Counsel for the petitioner and Mr. Adyanthaya, for Respondents No.1 to 5 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as “defendant” has challenged the judgment and order dated 12th March, 2018 passed by the Appellate Bench of Small Causes Court, Mumbai (Bandra Branch) in Revision Application No.6 of 2018. By that order, the Appellate Court allowed the Revision Application filed by the respondents, hereinafter referred to as “plaintiffs” and set aside the order dated 14th December, 2017 passed by the learned Judge Court Room No.38 of the Court of Small Causes at Mumbai below Exhibit 45 in R.A.D Suit No.408 of 2015 and dismissed the application Exhibit 45 taken out by the defendant for framing preliminary issue u/s 9-A of the Code of Civil Procedure, 1908 (for short 'C.P.C') to the following effect;

“Whether the Hon'ble Court has no jurisdiction to try and entertain the present suit?”

3. In support of this Petition, Mr. Sharma invited my attention to paragraph 11 of the plaint to contend that the plaintiffs therein asserted thus;

“The Plaintiffs state that the said Mr. Virdatt Mahendrapal Jasra (Sharma), had registered his said business of tailoring “New Punjab Tailors” with the BMC authorities (Shops and Establishments registration department), and the said Shops and Establishments department, had issued registration certificate under Bombay Shops and Establishments Act, in respect of said tailoring business of “New Punjab Tailors” in the suit premises. The Plaintiffs state that in the said registration certificate the name of the said Mr. Jamalbhai Haji Gani and Mrs. Khatijabai Jamal Gani recorded as owners of the suit premises and the Mr. Virdatt Mahendrapal Jasra (Sharma), as conductor of the said tailoring business in the name and style of “New Punjab Tailors”, in the suit premises. Hereto annexed and marked Exhibit-”C” colly, are some of the photocopies of the said Bombay Registration certificates issued by the BMC., in respect of the suit premises, the Plaintiff hereby crave leave of this Hon'ble Court to refer to and rely upon the same as and when produced before this Hon'ble court”.

He submitted that as the plaintiffs themselves have asserted that they are conductors of the tailoring business in the suit premises. The learned trial Judge rightly framed issue whether the Court has jurisdiction to entertain and try the suit? The Appellate Court, however, interfered with that order in the Revision Application and dismissed the application Exhibit 45. He relied upon Section 9-A, Order-XIV Rule (2) (2) of C.P.C. He, therefore, submitted that the impugned order deserves to be set aside, thereby, restoring trial Court's order of framing issue of jurisdiction as a preliminary issue.

4. On the other hand, Mr. Adyanthaya supported the impugned order. He submitted that interim applications were disposed of and stage of section-9A was over. The suit was at the stage of framing issues under Order-XIV of C.P.C. The learned trial Judge without assigning any reason had framed preliminary issue. For the reasons recorded in paragraph 13 of the impugned order, no case is made out for interfering with the impugned order.

5. I have considered rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that the plaintiffs and defendants have filed various application for interim relief namely application Exhibit 10, Exhibit 17, Exhibit 20, Exhibit 21, Exhibit 28, Exhibit 30 and Exhibit 36. It is also not in dispute that all these applications were disposed of by the learned trial Judge. In other words, stage of section 9-A was over. Mr. Sharma did not dispute this position also. Thus, on the basis of the pleadings of the parties, the Court has to frame issues under Order-XIV of the C.P.C.

Order-XIV, Rule(2) (2) reads thus:

“2.Court to pronounce judgment on all issues._

(1)...

- (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”.

6. A perusal of the above provisions shows that 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 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;
- (b) a bar to the suit created by any law for time being in force.

7. Mr. Sharma submitted that issue of jurisdiction in the present case is a pure question of law and, therefore, the trial Court was justified in framing issue of jurisdiction as a preliminary issue.

8. It is not possible to accept this submission. From perusal of the plaint, it is evident that the plaintiffs have prayed for declaration that they are lawful tenants of the suit premises. As against this, the defendants are disputing that contention and are not accepting the plaintiffs as tenant or a licensee. Defendants are contending that the plaintiffs are conductor of the business. Thus, it cannot be said that the defendants are accepting that the plaintiffs are either tenant or licensee. In fact, Mr. Sharma submitted that the plaintiff's father was inducted as a conductor and was paying royalty. Plaintiff's father never paid any rent to the defendant and even the present plaintiffs did not pay any rent.

9. Mr. Adyanthaya states that as recorded in paragraph 7 of the order dated 31st January, 2017, the plaintiffs are depositing Rs. 2000/- per month from January, 2017 onwards towards rent of the suit premises. I am not going into this question at this juncture and whether plaintiffs are tenants or licensee as claimed by them and whether they are conductors as claimed by the defendant as it is not a pure question of law. It is a mixed question of law and fact which can be decided on the basis of the evidence adduced by the parties. In short, it cannot be treated as a pure question of law so as to frame issue of jurisdiction under Order-XIV, Rule-(2) (2) of the C.P.C.

10. In view thereof, no case is made out for interfering with the impugned order except to the extent of directing the trial Court to frame issue of jurisdiction as one of the issues and shall try this issue along with other issues on the basis of the evidence adduced by the parties and shall not try as a preliminary issue. Subject to this clarification, Petition fails and the same is dismissed.

11. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in memorandum of Appeal as contemplated by Section 105(1) of C.P.C.

[R.G. KETKAR, J.]