

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7020 OF 2017

Mr. Ataur Rahman A. Mulla	...Petitioner
<i>Versus</i>	
Mrs. Gohartaj Mahmood Pasha Mulla	...Respondent

....
Mr. S.C. Wakankar, Advocate for the Petitioner.
Mr. Prasad Kulkarni i/b. Prasad Kulkarni & Asso. for the Respondent.
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CORAM : R. G. KETKAR, J.

DATE : 11th APRIL, 2018

P.C.

1. Heard Mr.S.C. Wakankar, learned counsel for the petitioner and Mr.Prasad Kulkarni, learned counsel for the respondent, at length.
2. Rule. Mr.Kulkarni waives service on behalf of the respondent. 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.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the judgment and order dated 24.1.2017 passed by the learned 7th Small

Causes Court, Pune below Exhibit-32 in Civil Suit No.154/2013. By that order, the learned trial Judge held that the issue of jurisdiction is required to be treated as a preliminary issue and decided first. The learned trial Judge directed the parties to lead evidence on the preliminary issue.

4. In support of this Petition, Mr.Wakankar submitted that the respondent, hereinafter referred to as the 'defendant', had filed application Exhibit-29 on 29.2.2016 for framing additional issues. The plaintiff filed reply dated 21.3.2016 opposing that application. The learned trial Judge disposed of the application Exhibit-29 by framing additional issues. The plaintiff filed application Exhibit-32 on 9.12.2016 *inter alia* contending that the application for temporary injunction was already disposed of and the issue of jurisdiction cannot be framed under Section 9-A of Code of Civil Procedure, 1908 (for short,'C.P.C.'). The issue of jurisdiction as alleged by the defendant is a mix issue of law and facts for which evidence is required to be adduced. As per Order XIV Rule 2 of C.P.C. only a pure question of law which does not require any evidence can be framed. However, the issue involving mix issue of law and fact cannot be framed as a preliminary issue. The evidence of the plaintiff is already filed on record covering all the issues and, therefore, the trial of the suit cannot be divided. And, therefore, the order passed

by the trial Court to treat the issue of jurisdiction as a preliminary issue be set aside.

5. He submitted that the learned trial Judge rejected the application and directed the parties to lead evidence on the preliminary issue. He submitted that said direction is contrary to the provisions of Order XIV Rule 2 of C.P.C.. The impugned order, therefore, requires to be set aside.

6. On the other hand, Mr. Kulkarni supported the impugned order. He relied upon the decision of Apex Court in the case of **Surya Dev Rai vs. Ram Chander Rai and ors., (2003) 6 SCC 675** and in particular paragraph-38 - principles (4) and (5) thereof. He invited my attention to paragraphs-4 and 6 of the plaint. In paragraph-4, the plaintiff asserted that he informed the society that the suit flat is given to the defendant and her husband as a Caretaker and that the plaintiff has been paying the Municipal taxes and other outgoings as also maintenance charges. In paragraph-6, the plaintiff asserted that simply in order to enable the reduction in maintenance charges, the plaintiff addressed a letter dated 20.3.2003 to the society and informed the society that the plaintiff had gifted the suit flat to the defendant and, therefore, the maintenance charges be levied as if the flat is owner

occupied. It is further asserted that at no point of time, the plaintiff had ever gifted the suit flat to the defendant, nor the plaintiff had any intention to gift the suit flat to the defendant. Since at no point of time the gift ever took place, none of the ingredients of gift were or are satisfied.

7. Mr. Kulkarni submitted that the parties are governed by Mohammedan Law and oral gift, namely, Hiba is permissible under Mohammedan Law. HE relied upon Order XII Rule 6 of C.P.C. He submitted that the direction contained in the concluding portion of the order, namely, directing the parties to lead evidence on the preliminary issue may be set aside and the learned trial Judge may be directed to decide the issue on the basis of assertions made in the plaint only.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is no doubt true that as contended by the plaintiff in the application Exhibit-32 that the application for temporary injunction was already disposed of and, therefore, the issue of jurisdiction cannot be framed under Section 9-A of C.P.C.

9. Order XIV Rule 2 of C.P.C. reads thus :

ORDER XIV
SETTLEMENT OF ISSUES AND DETERMINATION OF SUIT ON ISSUES
OF LAW OR ON ISSUES AGREED UPON

2. Court to pronounce judgment on all issues.--

- (1) Notwithstanding that a case may be disposed of on a 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.”

10. A perusal of Order XIV Rule 2(2) shows that where issues both of law and/or 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. In view of this provision, the issue of jurisdiction can be framed as a preliminary issue as it is a pure question of law and no evidence is required to be adduced. Mr. Kulkarni submitted that on the basis of assertions made in the plaint itself, the plaintiff has claimed that he has gifted the suit flat to the defendant. In view thereof, it is not necessary to lead evidence.

11. Accordingly, the impugned order dated 24.1.2017 passed by the learned 7th Small Causes Court, Pune below Exhibit-32 in Civil Suit No.154/2013 stands set aside. The learned trial Judge will frame the preliminary issue and decide the same on the basis of assertions in the plaint and without the parties leading evidence in that regard. Rule is made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)