

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8287 OF 2015

M/s Ghai Construction

A Proprietary concerned owned by
and represented through

Shri Japalsign Hardayalsing Ghai,

Age : 60 Years, Occu. : Business,

Having office at Shop No. 2, Tulsi

Arcase, CIDCO, Cannught Place,

Aurangabad.

.. Petitioner

Versus

1. The Maharashtra State Road
Development Corporation Ltd.,
A Government Company having
been incorporated under the
Companies Act, 1956, having
its Registered Office at
Nepeansea Road, Priyadarshini
Park, Mumbai – 36,
Through its Managing Director.

2. The Chief Engineer,
Maharashtra State Road Development
Corporation, having Camp Office at
Bandhkam Bhavan, Behind
Old High Court Building,
Aurangabad.

.. Respondents

Shri Amol K. Gawali, Advocate for the Petitioner.

The Respondent No. 1 is served.

Shri Shrikant V. Adwant, Advocate a/w Ms. Neha Kamble and
Mr. Harish Adwant, Advocates for the Respondent No. 2.

CORAM : SANDEEP V. MARNE, J.

CLOSED FOR JUDGMENT ON : 08.12.2022

JUDGMENT PRONOUNCED ON : 13.12.2022

JUDGMENT :-

. Rule. Rule made returnable forthwith. With the consent of parties taken up for final hearing.

2. By the present petition, petitioner challenges order dated 14.07.2015 passed by the Civil Judge Senior Division, Aurangabad directing that the issue No. 2 relating to jurisdiction shall be tried as a preliminary issue.

3. Petitioner-plaintiff has filed Spl. C. S. No. 276 of 2009 for recovery of amount of Rs. 652.06 Lakhs along with interest. In para No. 32 of the plaint, following averments are made with regard to territorial jurisdiction.

32. The Plaintiff says that the Plaintiff resides at Aurangabad, the contractual work was to be executed near Sawangi village at Aurangabad-Jalgaon Road, which is within the territorial jurisdiction of this Hon'ble Court and the Defendant No. 2 being the local head at Aurangabad of the Defendant No. 1, as such, this Hon'ble Court has got territorial jurisdiction to try and entertain the suit.

4. Defendants have resisted the suit by filing their written statement. They have challenged the territorial jurisdiction of the Civil Court at Aurangabad by relying upon Clause 8.2 of the offer document, which reads thus :

"The contract shall be governed and construed in accordance with the law of India. No suit or other proceedings relating to this offer, its conditions and performance of breach of contract shall be filed or taken in any Court of Law except Principal Court of Ordinary Civil Jurisdiction at Mumbai, which shall have exclusive jurisdiction to the exclusion of any outside court."

5. The Trial Court has framed following issues by its order dated 17.02.2011.

Issues

1. Whether plaintiff construction company prove that due to the unilateral change made in toll rates it sustained loss as alleged ?
2. Whether the defendant corporation proves this court has no jurisdiction to try and decide present suit ?
3. Is suit barred by limitation ?
4. Is plaintiff company entitled to get suit amount ?
5. Is plaintiff company entitled to get interest on suit amount ?
6. Is defendant corporation entitled to get compensatory costs, if yes, details ?
7. What order, decree and costs ?

6. It is the contention of the petitioner-plaintiff that without there being any application by any party and without hearing the petitioner-plaintiff, the Trial Court all of a sudden passed order dated 14.07.2015 directing that the issue No. 2 relating to jurisdiction shall be tried as a preliminary issue. Therefore, present petition is filed challenging order dated 14.07.2015.

7. Appearing for petitioner Mr. Gawali, learned counsel would first take an objection about manner in which the impugned order has been passed. He would submit that after having framed issues as far back on 17.02.2011 and after commencement of the Trial, there was no occasion for the Trial Court to direct that the issue No. 2 relating to jurisdiction being tried as a preliminary issue. He would further submit that the petitioner-plaintiff had filed affidavit of examination in chief in

the year 2014 itself and the defendants avoided to cross examine the petitioner-plaintiff and suddenly made an oral request to the Trial Court, which has led to passing of the impugned order. He would further submit that the issue of jurisdiction in the present case is a mixed issue of fact and law and that therefore same cannot be tried as a preliminary issue.

8. Referring to the provisions of Order XIV Rule 2 of the Code of Civil Procedure (for short “Code”), Mr. Gawali would contend that the provisions under Sub Rule 2 of Rule 2 of Order XIV of the Code can be invoked only if the Court forms an opinion that determination of particular issue would dispose of the suit itself. He would submit that since the objection raised is about territorial jurisdiction, even if the objection is upheld, the same would not terminate the *lis* between the parties and that the Court will have to at the most return the plaint under the provisions of Order VII Rule 10 of the Code. Since the suit will not get disposed of as a result of decision on objection about territorial jurisdiction, the issue with regard to territorial jurisdiction in the present case cannot be tried as a preliminary issue.

9. Mr. Gawali would further contend that either the issue of territorial jurisdiction is required to be treated as mixed question of law and fact requiring evidence to be led by the parties and in the event the same is to be treated as pure question of law, then in absence of evidence, the Court will have to accept the contents in the plaint as true. Inviting my attention to para 32 of the plaint, he would submit that considering correctness of those contentions, there can be no iota of doubt the Court has

territorial jurisdiction. Mr. Gawali would rely upon provisions of Section 20 of the Code, particularly explanation thereof in support of his contention that since the defendants have a subordinate office at Aurangabad, the suit has rightly been filed in the Court at Aurangabad.

10. In support of his contentions, Mr. Gawali has relied upon the judgment of the Apex Court in the case of **M/s Patel Roadways Limited, Bombay Vs. M/s Prasad Trading Company** reported in ***AIR 1992 SC 1514***.

11. Per contra, Mr. Adwant learned counsel for the respondent No. 2 would invite my attention to Clause 8.2 of Volume I of offer document in support of his contention that parties specifically agreed to a stipulation that the jurisdiction of the Court would be at Mumbai. He would further submit that the issue of territorial jurisdiction is a pure question of law, which can be decided by interpreting the relevant clause of agreement as also provisions of the Code requiring no evidence. He would therefore submit that the Trial Court has rightly directed trial of issue No. 2 relating to jurisdiction as a preliminary issue.

12. Mr. Adwant would further contend that there was no necessity of filing of any application for passing of the impugned order as the provisions of Order XIV Rule 2 of the Code specifically empower the Court to form an opinion as to whether the suit itself can be disposed of by trying one of several issues.

13. In support of his contentions Mr. Adwant relies upon judgment of the Apex Court in the case of **A. B. C. Laminart Pvt.**

Ltd and another Vs. A. P. Agencies, Salem reported in **(1989) 2 SCC 163** and in a case of **Ramesh B. Desai and others Vs. Bipin Vadilal Mehta and others** reported in **(2006) 5 SCC 638**.

14. Rival contentions of the parties now fall for my consideration.

15. The power of a Court to determine and try any of the issue as a preliminary issue and to postpone settlement of other issues is traceable to Order 14 Rule 2 of the Code, which reads thus :

CODE OF CIVIL PROCEDURE

ORDER XIV

Settlement of issues and determination of suit on issues of law or on issues agreed upon

1. Framing of issues.—

[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 the 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.]

16. The provision of Sub Rule 2 of Rule 2 of Order XIV of the Code is couched in such a manner that it is the Court who has to form an opinion as to whether case or any part thereof can be disposed of on an issue of law only. The Court may either itself form an opinion on its own or form such an opinion on an

application being made by either of the parties. Since the satisfaction is required to be recorded by the Court itself, no formal application for trial any of the issues as preliminary issue is required to be filed. Therefore, the objection of Mr. Gawali about the Court passing the impugned order in absence of a formal application for framing of preliminary issue deserves summary rejection.

17. In the present case, parties to the contract have agreed that the jurisdiction of the Courts for filing of any suit or other proceedings would be exclusively at principal court of ordinary civil jurisdiction at Mumbai and the jurisdiction of all other Courts is specifically excluded. Whether this clause can validly confer jurisdiction in respect of disputes between the parties on a particular Court is something which is to be decided while trying the issue relating to jurisdiction. However, all that is required to be noted is that at this stage the defendants in the suit have raised specific objection to the jurisdiction of Court at Aurangabad to try the suit filed by the petitioner-plaintiff in contravention of the agreement.

18. Petitioner-plaintiff desires that the issue relating to jurisdiction be tried along with other issues relating to the merits of its claim. This would entail adducing of evidence by both the parties in support of their respective contentions and lengthy trial on each and every issue framed. At the end of the trial, if the Court arrives at the conclusion that it lacks jurisdiction to entertain the suit, the entire efforts in leading evidence and conducting trial would be wasted. It is precisely with this objective that provision in the form of Sub Rule 2 of Rule 2 of

Order XIV of the code has been made.

19. Mr. Gawali has contended that answering of issue of jurisdiction against plaintiff does not amount to disposal of the suit. I am not impressed with this submission. What is contemplated of 'disposal' under Sub Rule 2 of Rule 2 of Order XIV of the Code and not 'termination of *lis*'. The *lis* may however terminate *qua* that Court where suit is instituted as the suit would get disposed of in the event of Court arriving at a conclusion that it lacks jurisdiction to try it. Even otherwise the submission of Mr. Gawali falls foul of specific language of Sub Rule 2 of Rule 2 of Order XIV of the Code, which recognizes trial of issue of jurisdiction of the Court as issue of law at preliminary stage. Being conscious of the position that *lis* between the parties would not get terminated by answering the issue of jurisdiction, the legislature has still included the issue of jurisdiction which can be tried as a preliminary issue under Order XIV Rule 2. The contention therefore deserves rejection.

20. It is also contended on behalf of the petitioner that in absence of evidence, contents of plaint are required to be treated as true for the purpose of determination of preliminary issue. It is further contended that the moment evidence is needed in support of averments in the plaint, the issue becomes mixed question of law and fact. That as the Court has not recorded evidence before deciding the issue of jurisdiction, Court has no option but to treat contents of plaint as true. In my view, it is too premature to deal with this contention of Mr. Gawali. Whether to accept the averments made in the plaint relating to jurisdiction as true or not is something which the Trial Court would decide at

the time of determination of issue relating to jurisdiction. However, I may only add here that unlike the restriction while deciding application for rejection of plaint under Order VII Rule 11 of the Code, the Court while deciding the preliminary issue under Sub Rule 2 of Rule 2 of Order XIV of the Code can look into the contents of written statement as well. Therefore this submission also deserves rejection.

21. Mr. Adwant has relied upon the judgment of the Apex Court in the case of **A. B. C. Laminart Pvt. Ltd and another** (supra). Para Nos. 20 and 21 whereof reads thus :

20. When the Court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ouster expression or clause properly. Often the stipulation is that the contract shall be deemed to have been made at a particular place. This would provide the connecting factor for jurisdiction to the Courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, *ipso facto* take away jurisdiction of other Courts. Thus, in *Salem Chemical Industries v. Bird & Co., A.I.R. 1979 Madras 16* where the terms and conditions attached to the quotation contained an arbitration clause provided that : "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an Arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the Court at Calcutta, and when a part of the cause of action had arisen at Salem, the Court there had also jurisdiction to entertain the suit under section 20(c) of the Code of Civil Procedure.

21. From the foregoing decisions it can be reasonably deduced that where such an ouster clause occurs, it is pertinent to see whether there is ouster of jurisdiction of other Courts. When the clause is clear, unambiguous and specific accepted notions of contract would bind the parties and unless the absence of *ad idem* can be shown, the other Courts should avoid exercising jurisdiction. As regards construction of the ouster clause when words like 'alone', 'only', 'exclusive' and the like have been used there may be no difficulty. Even without such words in appropriate cases the maxim '*expressio unius est exclusio alterius*'--expression

of one is the exclusion of another may be applied. What is an appropriate case shall depend on the facts of the case. In such a case mention of one thing may imply exclusion of another. When certain jurisdiction is specified in a contract an intention to exclude all others from its operation may in such cases be inferred. It has therefore to be properly construed.

22. However, the judgment in **A. B. C. Laminart Pvt. Ltd and another** (supra) may be relevant for the purpose of interpreting Clause 8.2 of the Volume I of the offer document. At this stage, I am not determining that issue. Therefore, judgment is not relevant at this stage.

23. The judgment of the Apex Court in the case of **Ramesh B. Desai and others** (supra) is relied upon by Mr. Advant to explain the scope and power under Sub Rule 2 of Rule 2 of Order XIV of the Code in para No. 13 of the judgment. The Apex Court has held as under :

"13. Sub-rule (2) of Order XIV Rule 2 CPC lays down 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 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. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna vs. Brig. F.J. Dillon AIR 1964 SC 497, and it was held as under:- (SCR p. 421)

"Under O. 14 R. 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 the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as

preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the [Amending Act](#), 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

24. Both Mr. Adwant and Mr. Gawali contend that the judgment in the case of **Ramesh B. Desai and others** (supra) operates in their favour. In my view, the judgment would not assist either of them. Though the judgment tends to suggest that the Code does not confer jurisdiction upon a Court to try issue of mixed question of law and fact as preliminary issue, in the present case, I have already held that the issue of jurisdiction is purely a question of law. Therefore, the judgment in the case of **Ramesh B. Desai and others** (supra) is of little assistance to the present case.

25. Mr. Gawali has relied upon the judgment of the Apex Court in the case of **M/s Patel Roadways Limited, Bombay** (supra) in which it is held as under :

"The linking together of the place where the cause of action arises with the place where a subordinate office is located clearly shows that the intention of the legislature was that, in the case of a corporation, for the purposes of clause (a), the location of the subordinate office, within the local limits of which a cause of action arises, is to be the relevant place for the filing of a suit and not the principal place of business."

26. The above findings again would be relevant while deciding the exact Court which would have jurisdiction to entertain the present suit. Since the controversy involved in the present petition is narrow, I am not supposed to decide that issue at this stage. Therefore, the judgment is not relevant.

27. In conclusion I hold that the issue of territorial jurisdiction in the present case is a pure question of law, which can be tried by the Court as a preliminary issue under the provisions of Sub Rule 2 of Rule 2 of Order XIV of the Code. The Trial Court has correctly directed issue No. 2 relating to jurisdiction to be tried as a preliminary issue. There is no infirmity in the order passed by the Trial Court. The petition is devoid of merits. It is dismissed without any orders as to costs. Rule is discharged.

28. However, considering the fact that the suit is pending since 2009 and the Trial thereof remained suspended on account of interim stay granted by this Court, it would be appropriate to request the Trial Court to expedite the proceedings in the suit. The Trial Court is expected to decide the preliminary issue determined by it in expeditious manner and depending upon its decision on that issue, further course of action be adopted.

[SANDEEP V. MARNE, J.]

bsb/Dec. 22