

Arun

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INTERIM APPLICATION NO. 2299 OF 2020
IN
APPEAL NO. 88 OF 2021**

Dhirajlal Raishi Chheda & Anr	...Applicant
<i>In the matter between</i>	
Dhirajlal Raishi Chheda & Anr	...Appellant
<i>Versus</i>	
Mukesh Raishi Chheda & Ors	...Respondents

**Mr AS Khandeparkar, with PA Sarwankar, i/b Sarwankar & Co for
the Appellant.**
Mr Uttam S Rane, for Respondents Nos. 1 and 2.

**CORAM G.S. Patel &
 M.G. Sewlikar, JJ.**
DATED: 9th June 2022

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1. In our view, the Appeal is thoroughly misconceived. It is directed against an Order of 11th March 2020 of the learned Single Judge, BP Colabawalla, J. The matter was before him for settling issues. To a very great surprise, it is at this stage that several submissions were made and the result was the 13-page impugned Judgment.

2. Initially, there was a Notice of Motion No. 4507 of 2006 for striking of the Plaint under Order VI Rule 16 of the Code of Civil Procedure 1908 (“CPC”). There was also an Application for rejection of the Plaint on the basis that it was barred by limitation and not maintainable. That Notice of Motion was dismissed on 26th February 2008. That order was carried in Appeal and the Appellate Court passed an order saying that the learned Trial Judge “may” try the issue of limitation and jurisdiction first as provided under Order XIV Rule 2 of the CPC . Then, RY Ganoo, J by an order of 30th November 2010 framed two issues regarding jurisdiction and limitation under Order XIV Rule 2 of the CPC. Even at that time Defendants Nos. 1 and 2 said that they would have to lead evidence. The matter proceeded to evidence which was completed.

3. The submission before the learned Single Judge, and now before us, was that now that the evidence was over no further issues should have been framed but the Court should have decided only the preliminary issues.

4. The Plaintiffs drew the learned Single Judge’s attention to the decision of the Supreme Court in *Nusli Neville Wadia v Ivory Properties and Others*¹ for the proposition that where an issue requires evidence it cannot be held as a preliminary issue but has to be dealt with along with other issues in the Suit. The submission before the learned Single Judge on behalf of the Plaintiffs was that all issues should be framed and decided together.

1 (2019) SCC OnLine 1313.

5. The learned Single Judge then considered the provisions of Order XIV Rule 1 of the CPC. We reproduce the whole of Order XIV below.

“ORDER XIV

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

1. **Framing of issues.** — (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds:

- (a) issues of fact,
- (b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

[2. Court to pronounce judgment on all issues.—(1)

Notwithstanding that a case may be disposed of on an 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.]

3. Materials from which issues may be framed. - The Court may frame the issues from all or any of the following materials:-

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit;

(c) the contents of documents produced by either party.

4. Court may examine witnesses or documents before framing issues. — Where the Court is of opinion that the issues cannot be correctly framed without the examination of some person not before the Court or without the inspection of some document not produced in

the suit, it [may adjourn the framing of issues to a day not later than seven days], and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by summons or other process.

[5. Power to amend and strike out issues. —(1) The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in controversy between the parties shall be so made or framed.

(2) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.]

6. Questions of fact or law may by agreement be stated in form of issues.—Where the parties to a suit are agreed as to the question of fact or of law to be decided between them, they may state the same in the form of any issue, and enter into an agreement in writing that, upon the finding of the Court in the affirmative or the negative of such issue, —

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some liability specified in the agreement;

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct; or

(c) one or more the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.

7. **Court, is satisfied that agreement was executed in good faith, may pronounce judgment.** - Where the Court is satisfied, after making such inquiry as it deems proper, -

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided,

it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement; and, upon the judgment so pronounced, a decree shall follow.”

(Emphasis added)

6. The learned Single Judge went on to consider and interpret Order XIV Rule 2 extracted above. Apart from the plain language of it, which makes it clear, firstly, that there is discretion because an opinion has to be formed by the Court, then there is also a restriction because sub-Rule 2 says that a preliminary issue may be decided first *only* if it relates to the matters set out in sub-clause (a) or sub-clause (b). That there is a discretion vested in the Court is clear from the word “may” in the latter part of sub-rule 2 and the phrase “if it thinks fit”.

7. There is in addition the support that we garner from the decision of the Supreme Court in *Ramesh B Desai v Bipin Wadilal*

*Mehta & Ors.*² This was cited before the learned Single Judge and we reproduce the relevant portion below.

“13. Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the 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 v. Brig. F.J. Dillon* [(1964) 4SCR 409 : AIR 1964 SC 497] and it was held as under: (SCR p. 421)

“Under Order 14 Rule 2, Code of Civil Procedure 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 depend upon the decision of issues of fact, would result in a lopsided trial of the suit.”

Though there has been a slight amendment in the language

2 (2006) 5 SCC 638

or Order 14 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 issues 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.**”

(Emphasis added)

8. Another factor is that the provisions of Section 9A as applicable to Maharashtra in the CPC have now been deleted.

9. In the *Nusli Wadia* case, the Supreme Court also held that where disputed facts are required to be examined there can be no such disposal on a preliminary issue.

10. Further, it is clear from the CPC itself that issues can be framed and can be cast at any time before judgment is pronounced. An additional issue can only in fact even be framed in appeal. There is no embargo against this either. This submission by Mr Khandeparkar that it was impermissible for the learned Single Judge to frame other issues or to decide to try all issues together is, in our view entirely unwarranted and without basis.

11. Mr Khandeparkar submits that once there was an order placing the Suit for final hearing on the preliminary issue, it was impermissible for the Court to frame any other issue. There is no substance to this argument whatsoever. Additional issues can be framed, as we have noted at any stage.

12. Apart from this, we find that by the impugned order no rights of the parties have been decided at all. Although the order contains reasoning, we do not think it is an appealable order in view of the three-Judge decision of the Supreme Court in *Shah Babulal Khimji v Jayaben D Kania & Anr.*³ No rights have been adjudicated at all.

13. Sections 104 and 105 of the CPC reads thus:

“104. Orders from which appeal lies. — (1) An Appeal shall lie from the following orders, and save as otherwise expressly provided in the body of this Code or by any law for the time being in force, from no other orders:—

⁸⁹[*****]

⁹⁰[(ff) an order under section 35-A;]

⁹¹[(ffa) an order under section 91 or section 92 refusing leave to institute a suit of the nature referred to in section 91 or section 92, as the case may be;]

(g) an order under section 95;

(h) an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree;

(i) any order made under rules from which an appeal is expressly allowed by rules:

⁹⁰[Provided that no appeal shall lie against any order specified in clause (ff) save on the ground that no order, or an order for the payment of a less amount, ought to have been made.]

(2) No appeal shall lie from any order passed in appeal under this section.

3 (1981) SCC 1786.

105. Other orders. — (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a Court in the exercise of its original or appellate jurisdiction; but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in sub-section (1), where any party aggrieved by an order of remand ⁹²[***] from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.”

(Emphasis added)

14. Thus, the impugned order is not appealable at all.

15. Finally, we are mindful of the observations of the Supreme Court in paragraph 14 of its decision in *Wander Limited And Another v Antox India Private Limited*.⁴ Where the view of the Trial Court is a plausible view, that is to say, not one that is perverse, arbitrary or capricious, the appellate court will not substitute its view. We believe the impugned order is not merely plausible. It is the only correct view in the facts and circumstances of the case.

16. There is no substance to the Appeal whatsoever. It is dismissed.

17. In view of this, the Interim Application does not survive and is disposed of accordingly.

4 1990 (Supp) SCC 727.

18. No costs.

(M.G. Sewlikar, J)

(G. S. Patel, J)