

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2055 OF 2023

Kaizar F Pithapurwala and Ors. ... Petitioners

Versus

Khurshid Safakat Hussain Ladhi and Ors. ... Respondents

— —
Mr. Ashwin Bhadang with Mr.Shabbir Kapadia for the Petitioners.
Mr. Rafique Ahmed Shaikh for the Respondent.
— —

CORAM : SHARMILA U. DESHMUKH, J.

DATE : July 31, 2023.

P. C. :

1. Heard.

2. By this petition, the challenge is to the order dated 24th May, 2022 and 30th July, 2022 passed in Special Civil Suit No.3943 of 2009. By the order dated 24th May, 2022, the City Civil Court at the stage of judgment has taken into consideration the order dated 24th April, 2009 passed in earlier Suit No.521 of 2009 directing the return of plaint for presentation to proper Court by holding that the City Civil Court has no pecuniary or inherent jurisdiction to try and entertain the suit. By order dated 30th July, 2022, an application was moved that submission, which has been recorded in the order of 24th May, 2022 that the plaintiffs will take appropriate steps for transfer of

the suit back to the High Court has been incorrectly recorded. By the order of 30th July, 2022, the City Civil Court directed the plaintiffs to take necessary steps till the next date failing which necessary orders will be passed in that regard.

3. Heard learned counsel for the parties.

4. Learned counsel appearing for the Petitioners submits that the earlier Suit No.521 of 2009 was instituted, initially in the Civil Civil Court and by order dated 24th April, 2009, the Court had directed the plaint to be returned on the ground of lack of pecuniary as well as inherent jurisdiction. He would further submit that accordingly, a fresh plaint was filed in this Court being Suit No.1387 of 2009, however, on account of increase in the pecuniary jurisdiction of the City Civil Court the suit came to be transferred to the City Civil Court. He would further contend that evidence was led and at the stage of judgment, despite there being no issue raised as regards jurisdiction, the City Civil Court has taken into consideration the previous order of 24th April, 2009 and has held that the Court cannot dispose of the suit on merits. He would further submit that the suit which was filed in the City Civil Court was a fresh suit and cannot be construed as continuation of the earlier suit. He has also invited the attention of this Court to the issues framed, which are at the page 71

of the petition and would submit that as no issue of jurisdiction was framed, it was incumbent on the Court to frame an issue of jurisdiction and permit the parties to lead evidence. He would further submit that as the evidence has been led on all the issues there has to be pronouncement on all the issues, after permitting the plaintiffs to lead evidence on the issue of jurisdiction. He would further submit that even if it is accepted that there is the earlier decision of 24th April, 2009 an issue as regards *res judicata* is required to be framed which has not been done in the present case.

5. In support of his submissions, he relies upon the decision of this Court in the case of *Jagdish Hari Thatte & Ors. vs. Municipal Corporation of Greater Bombay & Anr.* reported in *2006 SCC OnLine Bom 1236*, and the decision of this Court in the case of *Asif Ahmedally Porbunderwalla vs. Mrs.Daulat Akbarali Porbunderwall and Ors.* passed in Notice of Motion No.1085 of 2011 in SC Suit No.2393 of 2001.

6 *Per contra*, learned counsel appearing for the Respondents submits that present proceedings are in fact the continuation of the earlier suit. He has tendered copy of the earlier suit and would contend that the same suit has been filed before the City Civil Court. He has also tendered the written submissions in which Section 3(a) of the City Civil Court Act is reproduced and

would urge that the City Civil Court jurisdiction as regards the testamentary or matrimonial jurisdiction is barred. He also raised an objection as regards the maintainability of the writ petition and would contend that the order is revisable as the proceedings come to an end qua the City Civil Court. He would further urge that the proper course to be adopted would be an alternate remedy under Section 12 of the Bombay City Civil Court Act, 1948, in which case, the High Court may for special reason at any stage remove from trial by itself any suit or proceedings from the City Civil Court. He relies upon the decision of the Apex Court in the case of the ***Shiv Shakti Coop. Housing Society, Nagpur Vs. Swaraj Developers and Others***, reported in ***(2003) 6 SCC 659***, for support as regards the contention of maintainability of revision application.

7. Considered the submissions.

8. The undisputed position is that the earlier suit came to be filed in the City Civil Court, which came to be returned on the ground of lack of pecuniary and inherent jurisdiction by order dated 24th April, 2009. Subsequently, a fresh suit came to be filed in this Court, which again came to be transferred to the City Civil Court by virtue of increase in the pecuniary jurisdiction of the City Civil Court. The written statement which was filed by the defendant did not raise any

objection as to jurisdiction as the same was filed in this Court. After the transfer to the City Civil Court, there was no amendment to the written statement raising the issue of jurisdiction and the issues framed which are on record does not contain an issue of jurisdiction. There has been much debate as regards whether the suit which was filed afresh is a continuation of the earlier suit or can be considered a fresh suit. In that respect, the decision in the case of *Asif Ahmedally Porbunderwalla* (supra) is squarely applicable to the facts of this case.

9. In that case this Court considered the decision of the Apex Court in the case of *Hanamanthappa and another vs. Chandrashekharappa and others* reported in 1997 (9) SCC 688. This Court, after consideration of the said decision has observed in paragraph 25 that the suit filed afresh after return of the plaint should be subject to limitation, pecuniary jurisdiction and payment of Court fees. In the facts of that case, there was a challenge on the ground that in the fresh suit which was filed, there was certain averments which did not find place in the original plaint presented before the Court having no jurisdiction. While considering the said position, this Court after taking into consideration the decision of the Apex Court in the case of *Hanamanthappa* (supra) has held that the fresh suit can be treated as fresh suit and the matter can be proceeded with in accordance with the law and that these proceedings would

not be treated as proceedings in continuation of the proceedings filed before the City Civil Court by the plaintiff but would be a fresh suit subject to the limitation, pecuniary jurisdiction and payment of court fees. I am respectfully bound by the said decision. This Court has held that the fresh suit cannot be treated as proceedings in continuation of the proceedings filed before the Court having no jurisdiction and in that view of the matter the plaint in the present case, which was filed before this Court has to be treated as fresh suit. The decision answers the submission raised by the learned counsel for the Respondents that the suit is in a continuation of the earlier proceedings. That being so, the question that now arises is whether the City Civil Court without framing any issue as regards jurisdiction or the bar of *res judicata* could have declined to render a finding on all the issues or the proper course would have been to frame a necessary issue of jurisdiction and permit the parties to lead evidence. In that respect, if we consider the provisions of Order 14 Rule 2 of the Code of Civil Procedure, 1908, which reads as under:

“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.”

10. The provisions of Order 14 Rule 2, mandate that 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 and it is only where the Court is of the opinion that the case or any part thereof may be disposed of on issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court and for that purpose may postpone the settlement of the other issue. In the present case, if the issue of jurisdiction would have been framed as a preliminary issue the same has been decided before the other issues are decided. However, in the present case, it is only after evidence has been led on all the issues that the trial Court has considered the point of jurisdiction. While considering so, if the trial Court was of the view that it did not have the jurisdiction to entertain the proceedings, the proper course would have been frame an issue of jurisdiction and permit parties to lead evidence in that respect.

11. Considering the decision of this Court, in the case of **Asif Porbandarwala** (supra) as the fresh proceeding was not a continuation of the earlier proceedings, the fresh suit was subject to the limitation, jurisdiction, Court Fees, i.e. all objections which have been taken to the jurisdiction of the City Civil Court. The trial Court in my opinion exceeded its jurisdiction by treating the fresh plaint as a continuation of the earlier proceedings and declining to dispose of the suit on merits in view of the earlier order dated 24th April, 2009. As regards, the submission of the learned counsel for the Respondents that the Petitioners have an alternate remedy under Section 12 of the Bombay City Civil Court Act the same provide that this High Court may by a special reason and at any stage remove from trial by itself any suit or proceedings from the City Civil Court. This provision is not applicable to the present case, where the only issue is whether the fresh suit is a continuation of the earlier proceedings and as to whether the order passed in the earlier suit would construe as a bar of jurisdiction to the fresh suit without any issue in that respect being framed.

12. As regards the other submissions that the writ petition is not maintainable as the same is revisable order, considering that the order in question will not result in the list being decided, in opinion, the writ petition is maintainable.

13. It is also pertinent to note that the decision of this Court in Appeal from Order which was filed by the Petitioners against the impugned order in which this Court has held that the order in question cannot be construed as a return of plaint within the meaning of Rule 2 (10) of Order 7 of the CPC and as such, have granted liberty to the Petitioners to challenge the impugned order in appropriate proceedings, which the petitioners have done by filing the present petition.

14. In light of the discussion above, the impugned order dated 24th May, 2022 and 30th July, 2022 is hereby quashed and set aside. The matter is remanded to the City Civil Court to frame an issue of jurisdiction. Upon the issue of jurisdiction being raised, the parties are permitted to lead evidence, if required, on the issue of jurisdiction. Considering that the evidence has been led on all the issues which have been framed, the City Civil Court to pronounce the decision on all issues.

15. Considering that the impugned order came to be passed at the stage of judgment and evidence is now required to confine only as regards the issue of jurisdiction, the City Civil Court is requested to decide the same as expeditiously and in any event within a period of six months from today.

16. Needless to clarify that all the rights and contentions of both the parties are expressly kept open and all objections as regards the provisions of City Civil Court Act, the effect of the earlier order dated 24th April, 2009 and objection on the ground of *res judicata* is kept open.

17. Writ Petition stands allowed in the above terms.

(Sharmila U. Deshmukh, J.)

(This order is corrected pursuant to the Speaking to the Minutes order dated 3rd August, 2023)