

Special Civil Suit No. 129/2011

Order below Exh.114

1) Defendants No. 4 and 5 have filed present application to try issue in respect of limitation as preliminary issue u/order 14 Rule 2 of Civil Procedure Code, 1908 (for short C.P.C.). It is submitted on behalf of these defendant that the issues have been framed below Exh. 19. Issue no. 9 is framed in respect of limitation of the present suit. It is contended on their behalf that it is necessary in the interest of justice to decide the said issue at the initial stage itself to avoid protracted litigation. Therefore these defendants prayed to frame issue in respect of limitation as preliminary issue u/order 14 Rule 2 of C.P.C.

2) Plaintiff resisted the said application by filling say below this application itself. It is contended on behalf of plaintiff that these defendants had already preferred an application of the same nature vide Exh. 118. The said application came to be filed. However these defendants did not prefer any appeal or revision against said order. So also the copy of the order dated 17/08/2015 in S.L.P. No. 22438/2015 is available on record. In view of the said order it is necessary to expedite hearing of the suit. These defendant have filed this application with malafide intention at belated stage to protract the litigation. Considering above said facts and circumstances of the case, the application Exh. 114 deserves to be rejected with cost.

3) I have gone through the case. Heard both sides. I have framed following points and recorded my findings thereon for the reasons discussed hereinafter.

Points	Findings
1. Whether issue no. 9 in respect of limitation be tried as preliminary issue under order 14 rule 2 of CPC ?	"In the Negative"
2 .What order ?	As per final order

REASONS

4) Heard Learned Advocate Shri. V.N. Vinchurkar for defendant Nos. 4 and 5 and Learned Advocate Shri D.J. Bhosale for plaintiff at length.

As to Point No. 1

5) Before discussing the case it is necessary to discuss admitted facts of the case. Plaintiff has filed the present suit for specific performance of contract Dated 16/12/2001 in respect of suit property i.e. eastern side admeasuring 2H. 42R agricultural field situated village Takali, Taluka-Pandharpur. It is alleged by plaintiff that defendants nos. 1 to 3 have executed agreement of sale dated 16/12/2001 in respect of suit property in his favour and handed over its possession to him by accepting ten lac rupees out of consideration amount of rupees 12 lac. The execution of alleged agreement of sale is disputed by defendants nos. 1 to 3. It is also an admitted fact that plaintiff has instituted RCS

No. 472/2002 against defendant nos. 1 to 3 for perpetual injunction restraining these defendants from interfering in his peaceful possession over suit property. It also not in dispute that plaintiff has filed an application to withdraw the said suit with leave of court with liberty to file fresh suit on the same cause of action, seeking specific performance of contract dated 16/12/2001 and for perpetual injunction. It is also admitted that defendant nos. 1 to 3 had resisted the said application. However after hearing both sides permission was granted to withdraw the said suit with liberty to file fresh suit on the same cause of action, seeking specific performance of contract dated 16/12/2001 and for perpetual injunction by awarding costs to these defendants.

6) It is also an admitted fact that defendant nos. 4 to 6 who are alleged purchasers of suit property have filled and application to frame preliminary issue under section 9A of CPC. After hearing both the parties, my learned predecessor has framed preliminary issue under section 9A CPC in respect of limitation vide common order below Exh. 31 and 38 Dated 13/03/2012. The said order was challenged by defendants before Hon'ble Bombay High court in writ petition no. 7459/2012 and the said order was confirmed. Thereafter plaintiff has filed Civil Appeal No. 1085/2015 Kamlakar Eknath Salunkhe v/s Baburao Vishnu Javalkar & others before Hon'ble Supreme court. Hon'ble apex court has allowed the appeal and held that question of limitation cannot be treated as preliminary issue under section 9A of CPC.

7) Thereafter it has been held by Hon'ble Supreme Court in the case of FORESHORE CO-OPERATIVE HOUSING SOCIETY LTD.v/s PRAVEEND D. DESAI (dead) thr. Lrs. And others reported in 2015 (3) Mh.L.J. Page 315 that the ruling of supreme court in the case of Kamlakar Salunkhe v/s Baburao Vishnu Javalkar & others cited supra is not a binding precedent in view of previous ruling of constitution bench of three judges of Hon'ble Supreme court on the same point and therefore preliminary issue in respect of limitation under section 9A of CPC is maintainable.

8) Thereafter Hon'ble Supreme court held in the case of Jagdish Shyamrao Thorve v/s Shri Mohan Sitaram Dravid & others in special Leave to Appeal (C) No. 22438/2015 Dt. 17/08/2015 that the authority in Kamlakar Eknath Salunkhe v/s Baburao Vishnu Javalkar & others is a binding precedent on the later bench which passed the ruling in the case of FORESHORE CO-OPERATIVE HOUSING SOCIETY LTD. v/s PRAVEEND D. DESAI (dead) thr. Lrs. And others cited supra and directed the registry to place the matter before Hon'ble chief justice of India to constitute a larger bench on this point.

9) It has to be mentioned that defendant no. 4 and 5 have filed an application Dated 31/01/2015 Exh. 96 to frame issues in this case and sought to expedite the trial of the case. Thereafter issues were framed vide Exh. 99 on 24/02/2015 and the matter was fixed for filing list of witnesses. Thereafter interlocutory application was filed on behalf

of plaintiff for recasting of issues. So also these defendants have filed an application Exh. 111 for hearing of preliminary issue under section 9A of CPC in view of decision of Hon'ble supreme court in the case of Foreshore CO-OPERATIVE HOUSING SOCIETY LTD. V/s PRAVEEND D. DESAI (dead) thr. Lrs. And others cited supra. However these defendants did not proceed with hearing of the said application and therefore it came to be filed.

10) In the backdrop of above mentioned circumstances of the case, defendant nos. 4 and 5 have filed the present application to frame issue no. 9 in respect of limitation as preliminary issue under section 14 rule 2 of CPC. Before discussing these facts it is necessary to go through provision of order 14 rule 2 of CPC. It is as follows:

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.

11) From the bare perusal of 14 rule 2 sub-section (b), it is crystal clear that court has discretion to postpone settlement of the other issues and can try preliminary issue where one of the issues relates to a bar to the suit created by any law for the time being in force. Thus there is no dispute that court can exercise discretion to try any issue as preliminary issue where a bar to suit is created by any law. However it is vehemently argued on behalf of plaintiff that the issue of limitation is mixed question of law and facts in the present case and therefore it cannot be treated as preliminary issue by postponing trial of remaining issues.

12) It is argued on behalf of defendant no. 4 and 5 that the issue of limitation is not mixed question of law and facts in the present case. The issue of limitation in present case can be disposed of at initial stage without recording findings as to other issues. On the other hand learned advocate for plaintiff vehemently argued that plaintiff has withdrawn RCS No. 472/2002 with permission of court and with liberty to file suit on same cause of action for specific performance of contract dated 16/12/2001. Therefore the limitation in this case starts from the date of cause of action of previous suit and it is necessary to record evidence to decide the said point. It is also argued on behalf of plaintiff that the issue of limitation is interlinked with other issues framed in this case and therefore it is necessary to pronounce judgment in respect of all the issues after recording the entire evidence.

13) I have gone through the entire record of the case. As already discussed, plaintiff had filed RCS No. 472/2002 against defendant nos. 1 to 3 for perpetual injunction in respect of suit property and it was withdrawn with liberty of court file fresh suit for specific performance of contract on the same cause of action. So also it is pertinent to note that the present application has been filed defendant no. 4 and 5 who are alleged purchasers of suit property. The alleged agreement of sale dated 16/12/2001 was executed by defendant nos. 1 to 3 in favour of plaintiff. It appears that entire litigation took place between these parties. So also perusal of issue nos. 1 to 8 reveals that they are interlinked to each other.

14) It is pertinent to note that question of limitation involving points of fact, should not be decided as preliminary issue. Generally limitation depends on the cause of action and questions relating to cause of action deals with the nature of the cause of action, date of commencement of the cause of action, and actions and particular manners of parties to fix the cause of action and the result of such cause of action. All these are questions of fact. Therefore considering peculiar facts and circumstances of the case it is necessary to record finding regarding limitation after recording entire evidence in respect of all the issues. Thus issue of limitation cannot be decided independently by postponing decision of other issues.

15) Leaned advocate V. N. Vinchurkar for defendant no. 4 and 5 relied upon ruling in the case of FORESHORE CO-OPERATIVE HOUSING

SOCIETY LTD. V/s PRAVEEND D. DESAI (dead) thr. Lrs. And others cited supra and contended that as per the ratio of above said ruling preliminary issue regarding limitation can be framed under order 14 rule 2 of CPC. I have gone through the ruling carefully. The ratio of above the ruling is not disputed. However it has been laid down in the said ruling that issue of limitation can only be decided as preliminary issues under order 14 rule 2 of CPC where it is not a mixed question of law and facts. However as already discussed at length, the issue of limitation is mixed question of law and fact in present case and it is interlinked with other issues. Therefore it cannot be tried as preliminary issue by postponing settlement of other issues. Thus the ratio of above cited ruling is not helpful to these defendants in the present case.

16) So also it has been held in the ruling of Hon'ble supreme court in the case of Ramesh B. Desai & others v/s Bipin Vadilal Mehta & others reported in AIR 2006 Supreme court page 3672 that court cannot try Mixed question of issue of law and fact as preliminary issue under order 14 rule 2 of CPC. The Civil Procedure Code 1908. 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. From the ratio of above cited ruling it is crystal clear that mixed question of law and fact cannot be treated as preliminary issue under order 14 rule 2 of CPC. As already discussed at length, issue of limitation is mixed question of law and fact in the present case and it has to be decided after recording evidence in respect of all the issues.

Therefore preliminary issue in respect of limitation cannot be framed under order 14 rule 2 CPC. Therefore ratio of above said case law is applicable to facts and circumstances of the case.

17) Thus in view of facts and circumstances of the case issue in respect of limitation cannot be tried as preliminary issue under order 14 rule 2 of CPC by postponing settlement of other issues. Therefore I answer point no. 1 "in the negative"

As to Point No. 2

18) In view of my negative finding as to point no. 1 the present application deserves to be rejected with cost. It is pertinent to note that the issues were framed prior to one and half years back in view of application of these defendants. Hon'ble apex court has directed this court to dispose of the suit as early as possible. Therefore both parties to expedite hearing of the suit. Therefore, I proceed as to pass the following order

ORDER

1. The application Exh. 114 is rejected with cost.

Date:- 20/07/2016

(H.B. Sirsalkar)
Civil Judge Sr. Div. Pandharpur

CERTIFICATE

I affirm that the contents of this PDF file order is same word to word as per the original order

- a) Name of the Stenographer/Jr. Clerk : A.K. B. Shaikh . Sure
- b) Court : C.J.S.D. Pandharpur
- c) Order signed by P. O. : 20/07/2016
- d) Order uploaded on : 06/09/2016.