

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5583 OF 2015

Mrs. Meera Gobind Gehani	]
of Mumbai Indian Inhabitant,	]
presently residing at 163, Maker "A"	]..... Petitioner.
Cuffe Parade, Mumbai 400 005	] (Orig.Plaintiff)

Versus

1]	M/s. Mayuresh Developers and	]
	Construction Pvt. Ltd.	]
	A Private Limited Company	]
	incorporated under the provisions	]
	of the Companies Act, 1956,	]
	and having its Registered Office at	]
	428, Kalbadevi Road, Ist floor,	]
	Abhay Bhavan, Mumbai – 400 002	]
		]
2]	Amco Investment and Finance	]
	Pvt. Ltd. a Private Limited Company	]
	Incorporated under the provisions	]
	of the Companies Act, 1956 and	]
	having its Registered Office at 428,	]
	Kalbadevi Road, Ist Floor, Abhav	]
	Bhavan, Mumbai 400 002	]
		]
3]	Hon. Chairman/Hon. Secretary	]
	Bella Vista Co-op. Hsg. Society	]
	Ltd. Plot No.46/47/48, Sector 15	]..... Respondents
	CBD Belapur Navi Mumbai – 400 614	] (Orig. Defendants)

Mr. J P Sen, Senior Advocate and Mr. Farhan Dubash a/w Mr. Vishesh Malviya and Ms. Spenta Havewala i/by M/s. Federal & Rashmikant for the Petitioner.

Mr. Arun Tripathi a/w Mr. Vagish Mishra and Mr. Nishant Tripathi i/by M/s. M Tripathi & Co. for the Respondent No.1.

Respondent Nos.2 and 3 are deleted.

CORAM : R. M. SAVANT, J.
DATE : 21st September 2015

ORAL JUDGMENT

1 At the outset the learned Senior Counsel appearing on behalf of the Petitioner i.e. the original Plaintiff seeks deletion of the Respondent Nos.2 and 3 as in the context of the challenge raised in the above Petition, they are formal parties. The said Respondent Nos.2 and 3 are accordingly deleted at the risk of the Petitioner. Amendment to be carried out during the course of the week.

2 Rule, with the consent of the learned counsel for the parties made returnable forthwith and heard.

3 The writ jurisdiction of this Court under Article 227 of the Constitution of India is invoked against the order dated 24/02/2015 passed by the learned Judge, City Civil Court, Greater Mumbai by which order the Application (Exhibit 3) filed by the Petitioner/Plaintiff for consideration of the Chamber Summons for amendment of the plaint prior to the consideration of the Notice of Motion raising a preliminary issue under Section 9A of the Code of Civil Procedure came to be rejected.

4 It is not necessary to burden this order with unnecessary details

having regard to the nature of the directions to be issued, suffice it would be to state that the suit in question being Suit No.309 of 2010 was initially filed in this Court seeking relief of a declaration that the agreement dated 21/10/2005 executed by the Respondent No.1 herein in favour of the Defendant No.2 in respect of the shop/showroom No.32 is bad in law, illegal, fraudulent, void ab initio and not valid and/or binding on the Petitioner and ought to be cancelled. The said suit was filed after obtaining leave under Clause 12 of the Letters Patent (Bombay). After the suit was filed, Chamber Summons bearing No.884 of 2012 came to be filed by the Petitioner i.e. the original Plaintiff on 09/07/2012 seeking amendment of the plaint so as to incorporate the relief of specific performance of the agreement dated 21/10/2005 against the Defendant No.1. Whilst the said chamber summons was pending the pecuniary jurisdiction of the City Civil Court, Bombay came to be enhanced and all the suits having valuation of less than Rs.One crore were transferred to the City Civil Court, Bombay and it is on transfer that the suit now bears Suit No.103046 of 2010.

5 The Respondent No.1 herein who is the original Defendant No.1 filed Notice of Motion No.2166 of 2013 in the City Civil Court invoking Section 9A of the Code of Civil Procedure and sought framing of a preliminary issue of jurisdiction and sought relief of the return of plaint to the Petitioner/original Plaintiff for filing it in the appropriate Court in the event the City Civil Court

comes to a conclusion that it lacks territorial jurisdiction to try and entertain the suit.

6 It seems that when the Chamber Summons filed by the Plaintiff and the Notice of Motion filed by the Respondent No.1 came up for hearing before the City Civil Court, the Respondent No.1 insisted upon the Notice of Motion being heard prior in point of time than the Chamber Summons. This has resulted in the Plaintiff filing the instant Application (Exhibit 3) for the Chamber Summons seeking amendment of the plaint, be heard prior in point of time than the hearing on the preliminary issue raised by way of the Notice of Motion.

7 The said Application (Exhibit 3) has been rejected by the Trial Court by the impugned order dated 24/02/2015. The said rejection is on the ground that if the objection to the jurisdiction is raised under Section 9A of the Code of Civil Procedure then the Court has to decide the said issue as a preliminary issue first as in the event the objection raised by the Defendant is refused then the Plaintiffs' Chamber Summons for amendment can be considered. This is the gist of the reasoning of the Trial Court for rejecting the said Application (Exhibit 3).

8 The learned Senior Counsel Shri J. P. Sen appearing for the

Petitioner would contend that though the preliminary issue is raised under Section 9A of the Code of Civil Procedure it is not as if the Trial Court is divested of its powers to entertain any application filed in the suit in question. The learned Senior Counsel in support of the said proposition relied upon the judgment of a learned Single Judge of this Court reported in 2004 Vol. 106(2) Bom. LR. 417 in the matter of Immigrants Ideal Producers Co-operative Society Ltd. and Anr. v/s. Jahanara Moiz Dalal as also the unreported judgment of another learned Single Judge of this Court in Chamber Summons No.585 of 2013 in Suit No.553 of 2012 in the matter of M/s. Tirupati Balaji Enterprises v/s. Anthony Patrick Lewis and ors wherein the judgment in Immigrant Society's case (supra) has been referred to by the learned Single Judge. In so far as the Immigrant Society's case (supra) is concerned, in paragraph 16 of the said judgment the learned Single Judge considered the aspect of whether an application could be considered notwithstanding the fact that an issue under Section 9A of the Code of Civil Procedure is pending adjudication. The learned Single Judge formulated the question, whether the learned Trial Judge was ousted from his jurisdiction to allow the amendment of the plaint altogether because of the issue under Section 9A of the Code of Civil Procedure being framed. The learned Single Judge has observed that the answer to the said question must be in the negative as in the facts of the said case the learned Single Judge was of the view that the application for amendment was not mala fide nor was it an effort to delay the disposal of the

application questioning the jurisdiction of the Court.

9 Per contra, the learned counsel appearing on behalf of the Respondent No.1 herein Shri Tripathi would support the impugned order and would seek to make submissions on the merits of the case sought to be incorporated by the amendment sought in the plaint.

10 Having heard the learned counsel for the parties, I have considered the rival contentions.

11 In so far as the application for amendment is concerned, as indicated above the said application was filed on 09/07/2012 whilst the suit was pending in this Court. On the pecuniary jurisdiction of the City Civil Court being enhanced, the suit as well as the application for amendment was transferred to the City Civil Court . Hence this is not a case where the application for amendment of the plaint was filed after the application under Section 9A of the Code of Civil Procedure was filed by the Respondent No.1 but the application for amendment was filed much before the jurisdiction of the City Civil Court was questioned by the Respondent No.1. In my view, therefore, the facts in *Immigrant Society's* case (supra) can be said to be identical to the facts of the present case as in the present case also it cannot be said that to foreclose the preliminary issue that the application for amendment

has been filed. Having regard to the proposition of law that has been laid down by the said two judgments viz. that the Court is not divested of its powers though a preliminary issue under Section 9A of the Code of Civil Procedure is framed, in my view, the Trial Court has erred in rejecting the Application (Exhibit 3) filed by the Plaintiff for the Chamber Summons for amendment being considered prior in point of time than the application invoking Section 9A of the Code of Civil Procedure. In that view of the matter the impugned order dated 24/02/2015 would have to be quashed and set aside and is accordingly quashed and set aside. Resultantly, the Application (Exhibit 3) would stand allowed. The Trial Court is directed to hear and decide the Chamber Summons No.884 of 2012 prior in point of time than the Notice of Motion No.2166 of 2013 filed by the Respondent No.1 for framing a preliminary issue. The above Writ Petition is allowed to the aforesaid extent. Rule is accordingly made absolute with the parties to bear their respective costs of the Petition.

12 Needless to state that the contentions of the parties in respect of the amendment sought vide the said Chamber Summons are kept open for being urged before the Trial Court. The Trial Court would undoubtedly decide the same on its own merits and in accordance with law.

[R.M.SAVANT, J]

Certified to be true and correct copy of the original signed Order.