

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.7099 OF 2015
WITH
WRIT PETITION NO.7100 OF 2015
WITH
WRIT PETITION NO.7101 OF 2015

Ravindera Jagannath Patil and others ... Petitioners
Vs.
M/s. Meera Developers Pvt. Ltd. and another ... Respondents

Mr. P. S. Dani, Senior Advocate i/b. Mr. Adesh Patil i/b. Ms Anusha P. Amin
for Petitioners.

Mr. Cyrus Ardeshir and Ms Prachi Dhanani for Respondent No.1.

Mr. Vineet B. Naik, Senior Advocate i/b. Veritas Legal for Respondent No.2.

CORAM : R. G. KETKAR, J.

DATE : 24TH JULY, 2015

P.C. :

Heard Mr. Dani, learned Senior Counsel for petitioners, Mr. Ardeshir, learned Counsel for respondent No.1 and Mr. Naik, learned Senior Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiffs have challenged the judgment and order dated 23.06.2015 passed by the learned 3rd Joint Civil Judge, Senior Division, Thane below exhibit-48 (wrongly mentioned as 'exhibit-46') in Special Civil Suit No.200 of 2012. By that order, the learned trial Judge allowed the application filed by the defendant No.1 for framing preliminary issue namely, whether the Suit is barred under Order XXIII, Rule 3-A of the Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this Petition, Mr. Dani submitted that the petitioners, hereinafter be referred to as plaintiffs, have instituted Suit on or about

14.03.2012 inter alia praying for - (a) declaration that the suit agreement dated 02.03.1989 which was modified and altered by the supplementary agreement dated 02.02.1990 executed by and between the plaintiff as a vendor and defendant No.1 as a purchaser in respect of the suit property which is duly registered in the office of the Sub-Registrar of Assurance on 12.02.1990 stands cancelled, ineffective and not binding upon plaintiff; (b) declaration that the suit agreement dated 19.06.1992, which was entered into between the defendant No.1 as a vendor and defendant No.2 as a purchaser in respect of the suit property is illegal, bad in law, ineffective and not binding upon the plaintiff; (c) setting aside the consent decree dated 03.11.2007 passed in Special Civil Suit No.662 of 1994 and for declaration that it is not binding upon the plaintiffs; (d) declaration that the Power of Attorney dated 03.11.2007 executed by the plaintiff in favour of Mr. Mangalprabhat Lodha and Mr. Bharat K. Shah of defendant No.2, which is registered with the Sub-Registrar for Assurance, Thane at serial No.1100/2007 is revoked, cancelled and not subsisting and (e) perpetual injunction restraining defendants from entering into the suit property.

4. Mr. Dani submitted that during the pendency of the Suit, plaintiffs took out application at exhibit-5. By order dated 09.05.2012, the learned trial Judge allowed the application and issued injunction restraining defendants from entering into the suit property; for creating third party interest. Aggrieved by that decision, defendant No.2 preferred Appeal from Order in this Court. By order dated 17/18th October 2013, the order passed by the trial Court was quashed and set aside. Aggrieved by that decision, plaintiffs approached the Apex Court. By order dated 14.01.2015, the Apex Court disposed of the S.L.P. and directed both the parties to maintain status-quo.

5. Mr. Dani submitted that the Apex Court observed that the issues raised in the Special Leave Petitions pertain to the merits of the controversy in the Suit, and therefore, they ought to be adjudicated by the trial Court. Any pronouncement on the inter se rights of the parties will affect either of the parties. The Apex Court, therefore, refrained from adjudicating the issues raised in the S.L.P.s and directed the trial Court to dispose of the Suit as expeditiously as possible, preferably within a period of 1 year from the date of receipt of the copy of the order. It was also made clear that all the observations / findings as recorded by the High Court in the order will not come in the way of the disposal of the Suit on merits by the learned trial Judge.

6. Mr. Dani submitted that defendant No.1 made application at exhibit-46 on 16.06.2015 for deleting issues No.5 and 7 framed on 07.08.2012 and for re-framing / re-casting issues as set out in paragraph 4 of that application. He submitted that application at exhibit-46 is still pending. Defendant No.1 thereafter filed application on 19.06.2015 exhibit-48 for framing and deciding preliminary issue namely, whether the Suit is barred under Order XXIII, Rule 3-A C.P.C. By the impugned order, the learned trial Judge has allowed that application.

7. Mr. Dani submitted that without framing issues under Order XIV, Rule 2 C.P.C., the learned trial Judge framed preliminary issue, which is illegal. In view of the order of the Apex Court, it was expected from the learned trial Judge to decide all the issues raised in the Suit. In short, the trial Court cannot decide the Suit in a piecemeal manner and ought to decide all the issues that arise between the parties. He further submitted that the issue framed by the learned trial Judge is not an issue of law only. It is a mixed question of law and fact. The plaintiffs have instituted Suit on the ground that defendants have not complied the

compromise terms by making the balance payment. The plaintiffs want to lead evidence on that point. In other words, the Suit cannot be disposed of only on the basis of the preliminary issue framed in pursuance of the impugned order. He submitted that the learned trial Judge committed error in exercising discretion in framing the preliminary issue.

8. On the other hand, Mr. Naik supported the impugned order. He submitted that the learned trial Judge has allowed application exhibit-5. Aggrieved by that order, defendant No.2 preferred Appeal from Order. He submitted that in paragraph 29, the learned Single Judge observed that the factual background covers the case against the plaintiffs as contemplated under Order 23, Rule 3A C.P.C. In paragraph 30, it was observed that though the learned trial Judge referred provisions of Order 23, Rule 3A C.P.C., he did not decide the issue of maintainability of the Suit. The parties are at liberty to raise appropriate plea / preliminary issue of jurisdiction. In paragraph 40, this Court gave liberty to the parties to apply for deciding the preliminary issues and / or such issues, if any. Plaintiffs challenged that order before the Apex Court. The Apex Court's order, however, does not preclude defendants from applying to the trial Court for framing preliminary issue. He submitted that the learned trial Judge has already framed issues at exhibit-36 on 07.08.2012 and additional issue was framed on 22.04.2015. The learned trial Judge has also re-cast issues on 09.06.2015. He submitted that recording of evidence is yet to commence.

9. Mr. Naik submitted that defendant No.1 herein had instituted Special Civil Suit No.662 of 1994 against the plaintiffs and defendant No.2 herein for declaration that the notices dated 11.10.1992 and 01.12.1992 issued by the defendants are illegal, null and void and not

binding upon the plaintiffs and for further declaration that the agreement dated 02.03.1989 as modified by supplementary agreement dated 02.02.1990 between the plaintiffs and defendants is subsisting and binding on them; for direction to the defendants to jointly and / or severally / specifically perform the agreement dated 02.03.1989 duly registered with the Sub-Registrar of Assurances on 12.02.1990 and to sell, alienate and transfer Survey No.90 admeasuring 7082 sq.mtrs. on the terms and conditions, more particularly set out in that agreement. Parties thereto entered into consent terms and filed Purshis exhibit-59 for passing decree in terms of the consent terms. Accordingly, on 03.11.2007, the learned trial Judge decreed the Suit in terms of the consent terms.

10. Mr. Naik submitted that in view of Section 96(3) C.P.C., no appeal lies from a decree passed by the Court with the consent of parties. He further submitted that Section 47 lays down that all questions arising between the parties to the Suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate Suit. He submitted that perusal of the prayers (a) to (d) in the present Suit clearly shows that plaintiffs have challenged the consent decree passed on 03.11.2007 which ratifies the agreement dated 02.03.1989 modified by supplementary agreement dated 02.02.1990 as also ratifies the agreement dated 19.06.1992 entered into between the defendant No.1 herein as a vendor and defendant No.2 as a purchaser. Mr. Naik invited my attention to clauses 1 to 3 of the consent terms and submitted that plaintiffs have received Rs.80 lacs. Defendant No.2 has issued undated cheques of Rs.70 lacs and Rs.30 lacs. The payment of Rs.70 lacs was to be made to the plaintiffs on obtaining the sale permission from the concerned authorities. Payment

of Rs.30 lacs was to be made on obtaining title clearance. It also provided that dishonour of any cheque and non payment of full cheque amount within 30 days from the date of dishonour will result in cancellation of the consent terms. He submitted that undated cheques were handed over to the Advocate for the plaintiffs and the cheques are retained by the plaintiffs' then Advocate till date.

11. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. I have already indicated that plaintiffs have instituted Suit praying for cancellation of agreement dated 02.03.1989 as modified and altered by supplementary agreement dated 02.02.1990 as also for declaration that the agreement dated 19.06.1992 entered into between defendants No.1 and 2 is illegal and not binding on the plaintiffs. Plaintiffs have also challenged the consent decree dated 03.11.2007 passed in Special Civil Suit No.662 of 1994 and prayed for cancellation of the Power of Attorney dated 03.11.2007 executed by the plaintiffs in favour Mr. Mangalprabhat Lodha and Mr. Bharat K. Shah of defendant No.2 is invalid. Perusal of the prayer clauses in the present Suit prima facie shows that prayers revolve around the validity of the consent decree passed on 03.11.2007.

12. Clauses 1 to 3 of the consent terms are to the following effect:

1. The defendant Nos.1/1, 1/2, 3 and plaintiff do hereby jointly and severally agree and declare that the suit agreement, dated 1st March, 1989 modified by a supplementary agreement dated 2nd February 1990 in respect of the suit property viz. all that piece and parcel of land bearing Revenue Survey No.90, Hissa No.3/B admeasuring 8960 sq.mtrs., lying, being and situated at Village Ghodbunder, Taluka and District Thane and now within the limits of Mira Bhayander Municipal Corporation more particularly described in the Schedule written hereunder, in favour of the plaintiff is perfectly legal, valid and binding upon the defendants, subject to following modification.

2. The defendant Nos.1/1, 1/2, 3 and plaintiff do hereby jointly and severally agree and declare that the plaintiff has, on the basis of a legal and valid agreement dated 19th June 1992 transferred, alienated and assigned the rights, titles and interests in the suit property viz, all that piece and parcel of land bearing Revenue Survey No.90, Hissa No.3/B, admeasuring 8960 sq.mtrs. lying, being and situated at Village Ghodbunder, Taluka and District Thane and now within the limits of Mira Bhayander Municipal Corporation more particularly described in the Schedule written hereunder, unto and in favour of the defendant No.6 M/s. Mahavir Associates. The defendant Nos.1/1, 1/2, 3 and plaintiffs do hereby jointly and severally agree confirm, ratify and approve the transfer and assignment of the suit property and all the rights, titles and interest in that regard in favour of the defendant No.6 M/s. Mahavir Associates and further agree and declare to sell, transfer, alienate and assign the suit property to and in favour of the defendant No.6 M/s. Mahavir Associates.

3. The defendant Nos.1/1, 1/2 and 3 do hereby jointly and severally agree and declare that they are their predecessors have already received a part consideration / price in respect of the suit property from the plaintiff. It is hereby agreed that the defendant No.6 M/s. Mahavir Associates shall pay to the defendant Nos.1/1, 1/2 and 3 a further sum of Rs.1,80,00,000/- (Rupees One Crore Eighty Lacs Only) in full and final settlement of all their claims in respect of the balance consideration / price. The said balance consideration of Rs.1,80,00,000/- (Rupees One Crore Eighty Lacs Only) shall be paid in the following manner:-

- a) Rs.80,00,000/- (Rupees Eighty Lacs Only) at the time of execution of these Consent Terms.
- b) Rs.70,00,000/- (Rupees Seventy Lacs Only) on obtaining the sale permission from the concerned authorities.
- c) Rs.30,00,000/- (Rupees Thirty Lacs Only) on obtaining title clearance from the advocates of defendant No.1/1, 1/2, 3 and 8 to 11. Dishonour of any cheque and non payment of full cheque amount within 30 days from the date of dishonour will result in cancellation of this consent term.

If after actual survey, the area of the suit property is found to be more than the one mentioned in respective original 7/12 extract at the date of suit agreement, then the defendant Nos.1/1, 1/2 and 3 shall be entitled to the said excess area found after survey. If after actual survey, the area of the suit property is found to be less than the one mentioned in the respective 7/12 extract then in that event, the defendant Nos.1/1, 1/2, 3 shall pay the proportionate consideration to the defendant No.6 in respect of the

said deficient area found. Survey shall be completed by Def.6 within months from signing of this consent term and payment will not be withheld for survey.

13. Perusal of clause 1 prima facie indicates that plaintiffs accepted that the agreement dated 01.03.1989 modified by a supplementary agreement dated 02.02.1990 is perfectly legal, valid and binding upon the defendants. Clause 2 thereof prima facie shows that plaintiffs confirmed, ratified and approved the agreement dated 19.06.1992 executed by and between defendant No.1 and defendant No.2. Clause 3 thereof shows that defendant No.2 was to make payment of Rs.1,80,00,000/- in full and final settlement of all the claims of the plaintiffs. It is not in dispute that plaintiffs have received Rs.80 lacs at the time of execution of the consent terms. Plaintiffs were to receive Rs.70 lacs on obtaining the sale permission from the concerned authorities and Rs.30 lacs on obtaining title clearance certificate.

14. Section 47 C.P.C. lays down that all questions arising between the parties to the Suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate Suit. Section 96(3) lays down that no appeal lies from a decree passed by the Court with the consent of parties. Order XXIII, Rule 3-A C.P.C. lays down that no Suit shall lie to set aside the decree on the ground that the compromise on which the decree is based was not lawful. In other words, Order XXIII, Rule 3-A does not permit instituting a Suit challenging compromise decree on the ground that it was not lawful.

15. Having regard to the fact that earlier Suit namely, Special Civil Suit No.662 of 1994 was disposed of in terms of the consent terms, the question “whether Suit is barred under Order XXIII, Rule 3A, is a pure

question of law or is a mixed question of law and fact?” In the present case, it is not dispute that at exhibit-36, the learned trial Judge had framed the issues on 07.08.2012. It is also not in dispute that on 22.04.2015, the learned trial Judge has framed additional issue namely, whether the Suit is maintainable in the present form. On 09.06.2015, the learned trial Judge has re-cast the issue. It is not in dispute and rather is evident from record that the evidence is yet to be led.

16. Order XIV, Rule 2 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 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.”

17. Perusal of Order XIV, Rule 2(1) shows 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. Sub-rule (2) (b) thereof provides 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 bar to the Suit created by any law for the time being in force and for that purpose, if it thinks fit, may 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 basis.

18. Mr. Naik submitted that the learned trial Judge has framed the issues and recording of evidence is yet to commence. Mr. Dani was not in a position to convert this position. He was not in a position to show that evidence is being recorded in the Suit. The provisions of Order XIV, Rule 2 C.P.C. came up for consideration before this Court in the case of *Kusumkant T. Nagda Vs. Mariam Bi Ebrahim*, **2005 (3) Bom.C.R. 340**. In that case, the parties were permitted to lead evidence in regard to all issues. It was only at the stage of writing the order, the trial Court confined its decision to only first issue that of jurisdiction. It was observed, in paragraph 9, thus,

“9. Even under Order 14, Rule 2 of the Code of Civil Procedure, the trial Court could have considered the question of jurisdiction as a preliminary issue although all other issues have been framed only if it had found it related to the issue of law only. In such circumstances, all other issues are to be settled later, after the issue of jurisdiction is determined. In the present case, the trial Court has not adopted even this procedure as laid down under Order 14, Rule 2 and instead the trial Court has framed all issues including the issues relating to the merits of the case. The parties have been permitted to lead evidence in regard to all issues. It is only at the stage of writing the order that the trial Court has confined its decision to only first issue, that of jurisdiction. In my view, it is clearly an erroneous procedure adopted by the Court. The trial Court ought to have decided all issues since evidence had been led on all issues which had been framed together. The stage of deciding the preliminary issue under Section 9A had long gone by and it was, therefore, erroneous on the part of the trial Court to return the plaint without deciding the other issues framed by it.”

19. In that case, the Court had recorded the evidence on all the issues and recording of evidence was over. The trial Court instead of writing judgment and answering all issues, proceeded to dispose of the Suit only on the preliminary issue. In the instant matter, however, recording of evidence is yet to commence.

20. In the case of *Jagdish H. Thatte Vs. Municipal Corporation*, **2007 (1) Bom.C.R.577**, following issue was referred to the Division Bench

for consideration:

“While deciding the suit finally after parties have led evidence on all issues when a Court comes to the conclusion that it lacks jurisdiction to hear and decide the suit, whether it is necessary for the Court to decide other issues on merits at the time of or before passing the order of return of plaint?”

21. While answering reference, the Court observed in paragraphs 10 and 11 as under:

“10. A perusal of sub-rule (2) of Rule 2 of Order XIV makes it clear that when issue 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 issue of law only, it may try that issue first when that issue relates to (a) jurisdiction of the Court; or (b) the bar to the suit created by any law for the time being in force. Thus, it is not disputed that issue of jurisdiction of the Court can be tried as a preliminary issue. But, now in view of Order XIV, Rule 2(2) of the said Code it gives discretion to the Court. It is not mandatory on the Court to decide the question of jurisdiction or other issue relating to the maintainability of the suit as preliminary issue. If we carefully read the wording of the issue that has been referred to this Division Bench for consideration, it is very clear that it contemplates the situation where the Court has decided not to try the issue with regard to jurisdiction as preliminary issue and parties have in fact led evidence on all the issues and the suit is ready for final judgment. It is also needless to say that in view of the provisions of Order VII, Rule 10, plaint can be returned at any stage. It obviously means that it can be done so even while deciding the suit finally. The main question is whether it is necessary for the Court to record finding on all issues when the Court has not followed the course contemplated under Order XIV, Rule 2(2) of the said Code.

11. While answering the issue in question, one has to bear in mind the object with which that Rule 2(1) has been substituted by the Code of Civil Procedure (Amendment) Act, 1976, w.e.f. 1-2-977. It is substituted to provide that, although a suit can be disposed of on preliminary issue, the Court shall ordinarily pronounce judgment on all issues. This is obviously in order to avoid piecemeal trial and protraction of litigation. It may happen that in a given case issue with regard to jurisdiction of the Court or bar to the suit created by any law for the time being in force may not be tried as a preliminary issue and allowed to be tried along with other issues, and after parties adducing evidence fully, at the final stage the trial Court may come to the conclusion that it lacks jurisdiction and as such may dismiss the suit on that ground

or direct to return the plaint to the plaintiff for presentation to the proper Court. In such a case, if the said order is challenged in the Appellate Court, and the Appellate Court comes to the conclusion that the finding recorded by the trial Judge with regard to jurisdiction or tenability of the suit is not correct then the Appellate Court would necessarily be required to remand the matter if no findings on other issues are recorded by the trial Judge. Naturally, then I that event there would be protraction of litigation. So, considering this aspect and to avoid to undergo gamut of litigation again, amendment has been introduced, whereby, it is made clear 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. So, this is in fact the mandate laid down by the amended provision. If we carefully consider the provisions of Order XIV Rules 2(1) and (2) together, then, it is absolutely clear that once the course contemplated under sub-rule (2) of Rule 2 of Order XIV of the said Code is not followed by the Court then the Court must necessarily follow the other course which says that the Court shall record the findings on all the issues. If, even after not adopting the course contemplated under sub-Rule(2) of Rule 2 of Order XIV, Court is allowed to dispose of the matter merely on one issue of jurisdiction or maintainability, even after full trial of the suit, then it would amount to allowing the Court to proceed against the letter and spirit of the amended mandatory provision of Order XIV Rule 2(1). So, once the parties and the Court have chosen not to try the issue with regard to jurisdiction or maintainability of the suit as a preliminary issue and on the contrary evidence is led on all the issues and the matter is fixed for final order or judgment then it is necessary for the Court to record findings on all the issues. If the Court is allowed to pas final order without giving finding on other issues and dispose of the matter simply on the point of jurisdiction at such stage, the very purport of the provision of Order XIV, Rule 2 would be defeated. We are, therefore of the considered opinion that the view taken by the learned Single Judge of this Court in a case *Kusumkant T. Nagda V. Mariambi Ibrahim*, 2005(3) Bom.C.R. 340 : 2005(1) All.M.R. 255 is correct.”

22. The Division Bench answered the reference by holding that it is not open for the Court to dispose of the matter merely on the issue of jurisdiction or maintainability, after full trial of the Suit, which would amount to allowing the Court to proceed against the letter and spirit of the amended mandatory provisions of Order XIV, Rule 2(1) C.P.C. The issue referred was whether the Court, after recording evidence of the

parties, can proceed to decide the Suit only on one issue when the Court had recorded evidence on all the issues. While answering the issue, the Division Bench recorded that it was incumbent upon the Court to answer all the issues involved in the Suit.

23. In the case of *Satpuda Tapi Parisar Sahakari Sakhar Karkhana Limited Vs. Jagruti Industries and another*, **2008 (5) Bom.C.R. 484**, two questions were referred to the Division Bench, namely (1) whether an application for framing of issue regarding jurisdiction whether pecuniary or territorial can be framed at a latter stage and whether the Court is obliged to decide that issue then as preliminary one? and (2) whether the object of introduction of Section 9-A C.P.C. can be made applicable to the applications that may be filed at latter stage of the suit? While answering the issues, the Division Bench observed in paragraphs 34 and 36 as under: [3/03/2008](#)

“34. No statute can provide for all situations when legislature enacts a law. It may neither be feasible nor comprehensible to legislate a law which could operate as a straight-jacket formula for all classes, situations and stage of proceedings. It is also neither permissible nor proper for the Court to provide a strait-jacket formula regulating exercise of statutory powers. The provisions of Section 9A of the Code are prefaced with a non-obstate clause. These provisions, as applicable in the State of Maharashtra, are required to be enforced in preference to any other provisions contained in the Code and even any other law for the time being in force. When the provisions of Section 9A can be invoked is reflected in the language of the Section itself. In consonance with the law aforesaid in different judgments of this Court, it is essential that an application for injunction or for vacating injunction or grant of such other relief or even an application for setting-aside the orders as spelt out under these provisions, should be pending before the Court. In the proceeding, an objection in regard to the jurisdiction of the Court ought to be taken by the parties who desire to have such issue determined at the initial stage itself. In that event, the Court is expected to deal with the application by framing a preliminary issue of jurisdiction and after granting the parties an opportunity even to lead evidence to decide such an issue at the first instance and not to defer it for determination along with the suit. Thus, it is obvious that once an application for the relief of injunction,

appointment of Court receiver, stay, etc; has been finally decided by the Court in accordance with law, the rigours of Section 9A would lose their significance and statutory application. Thereafter, the test applicable would be that of Order 14, Rule 2 of the Code, where the Court is to form an opinion as to whether along with other issues, the issue relating to the jurisdiction or bar to the maintainability of the suit under any other law should or should not be treated as preliminary issue. Whether it should be decided preferably at the initial stage or along with all issues relating to the merits of the case, is injudicial discretion of the Court. This judicial discretion of the Court is then in no way controlled by the provisions of Section 9A of the Code as the stage indicated by the legislative mandate under Section 9A is over. Similar power obviously could be exercised by the Appellate Court as well. We have already noticed that the consistent view of this Court has been that there is no conflict between the provisions of Section 9A and Order 14, Rule 2 of the Code. On their correct and harmonious interpretation, the said provisions are intended to achieve the same object i.e. expeditious disposal of the preliminary issue relating to the jurisdiction of the Court.

36. In view of the above discussion, we answer the question as follows:

(i) An application for framing of issue relating to jurisdiction of the Court can be filed at any stage of the proceedings in the suit. The provisions of Section 9-A of the code are attracted only when the conditions stated in that provision are satisfied at the time when question are satisfied at the time when question of jurisdiction is raised before the Court. Once the stage contemplated under Section 9-A of the Code is over (i.e. the application for interim orders has been decided), then these provisions lose their mandatory character and significance. Where after the application for framing of an issue relating to jurisdiction and its determination in accordance with the law would be controlled by the provisions of Order 14, Rule 2 of the Code.

(ii) However, if an application for grant of vacation of reliefs specified under section 9-A of the Code has already been decided by the Court of competent jurisdiction, in that event, the proceedings in the suit would be controlled by the provisions of Order 14 Rule 2 of the Code. The formation of opinion and exercise of discretion by the Court cannot be regulated by any strait-jacket formula and essentially it must be left in the discretion of the court, depending on the facts and circumstances of a given case. The Court will obviously exercise such jurisdiction applying the well accepted canons of civil jurisprudence. In other words and construed objectively, the

provisions of section 9A are not mandatory and subject to what has been stated above it may not be necessary for the Court to decide the issue at the threshold. If the application for interim relief is pending, section 9-A of the Code will operate with all its rigour and irrespective of the stage of such application."

24. Thus, there can be no dual opinion that as regards the proposition that once the stage for determination of issue as preliminary one as required under Section 9-A C.P.C. is over, the further proceedings of the matter are covered by the provisions of Order XIV, Rule 2 C.P.C. It would be within the discretion of the Court to decide any of the issue as preliminary issue or to take up the said preliminary issue for consideration along with other issues after recording evidence of the parties. In the instant matter, the Court has exercised discretion and before completion of recording of the evidence, took up application Exhibit-48 presented by the defendant No.1 for framing and deciding preliminary issue. Even on touchstone of permissibility to render decision on preliminary issue under Order XIV, Rule 2 C.P.C., I am of the view that the Court was within its bounds in framing the said issue.

25. In the impugned order, the learned trial Judge has held that the preliminary issue goes to the root of the matter. It is not a mixed question of law and fact. Defendant No.1 has filed application at exhibit-48 for framing issue whether the Suit is barred under Order XXIII, Rule 3-A C.P.C. and deciding the same as a preliminary issue. Having regard to the consent terms filed by and between the parties as also the assertions made in the plaint, I do not find that the learned trial Judge committed any error in that regard. In view thereof, I do not find that the learned trial Judge has committed any error in exercising the discretion and framing the issue of bar under Order XIII, Rule 3-A C.P.C. as a preliminary issue. In the light of above discussion, no case is made out for invocation of powers under Article 227 of the Constitution

of India. Petitions fail and the same are dismissed. The learned trial Judge will decide the preliminary issue uninfluenced by the observations made herein and in accordance with law.

(R. G. KETKAR, J.)

Minal Parab