

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.10420 OF 2015

M/s. S. P. Builders and Ors.] ... Petitioners

Versus

Mr. Prakash Jethalal Thakkar and Ors.] ... Respondents

Mr. Prabhakar M. Jadhav for Petitioners.

Mr. Raj Patel i/b Mr. Mohan Patel for Respondent No.1.

CORAM :- M. S. SONAK, J.

DATE :- OCTOBER 21, 2015

P. C. :-

1. The challenge in this petition is to the orders dated 02/07/2015 and 07/09/2015 made by the Trial Court and the Revisional Court respectively dismissing the petitioners' application purportedly made under Section 9A of the CPC objecting to the very entertainment application made by the respondent no.1-plaintiff seeking leave to amend the suit.

2. The respondent no.1 is the plaintiff in R.A.E. Suit No.691/1217 of 2008 seeking eviction of the petitioners, *inter alia*, on the ground of unlawful sub-letting. At the stage before the Trial Court in the suit would commence, the the respondent no.1-plaintiff, by invoking the provisions contained in Order 6 Rule 17 of CPC, applied

for leave to amend the plaint. Thereupon, the petitioners took out an application, purporting to invoke the provisions of Section 9A of the CPC objecting to the very entertainment of the application seeking leave to amend on the ground that such application is barred by law of limitation. The second objection raised was that the respondent no.1-plaintiff had even earlier filed application seeking leave to amend and the same was allowed on 09/04/2015. The contention is that there is nothing disclosed in the present application seeking leave to amend as to why such amendment was not filed earlier. The Trial Court as well as the Revisional Court have dismissed this application with costs, without specifying the quantum of costs.

3. Mr. Prabhakar Jadhav, learned Counsel for petitioners, has placed reliance upon the decision of this Court in the case of ***Mukund Ltd. vs. Mumbai International Airport and others***¹, to submit that the provisions under Section 9A of CPC are of an imperative nature and are mandatory. Once an issue of jurisdiction is raised at the hearing of an application for the grant of interim relief or for setting aside an order granting interim relief, the Court is under an obligation to decide the issue as a preliminary issue before deciding the question of interim relief. Mr. Jadhav contends that this principle will also apply in the matter of deciding an application under Order 6 Rule 17 of CPC seeking leave to amend the plaint. Mr. Jadhav further submitted that there is no explanation for delay of 8 years in seeking leave to amend.

¹ 2011 (2) Mh.L.J. 936

4. Mr. Raj Patel, learned Counsel for respondent no.1-plaintiff, has, at the outset, submitted that the provisions of Section 9A of CPC do not apply at the stage of consideration of an application seeking leave to amend under Order 6 Rule 17 of CPC, which in any case, cannot be regarded as an application seeking interim relief. Mr. Patel further clarified that the earlier amendment which was permitted by order dated 09/04/2015 was only for the purposes of bringing legal heirs of some of the respondents on record. Mr. Patel further submitted that the trial in the suit is yet to commence and therefore, there was no legal bar to seeking leave to amend the plaint. Mr. Patel submitted that the entire objective of the petitioner is to delay the eviction suit, particularly since the petitioner is a builder and it is the case of the respondent no.1-plaintiff that the petitioner is unlawful sub-tenant in respect of the suit premises. Mr. Patel therefore submitted that this petition warrants dismissal with exemplary costs.

5. Having heard the learned Counsel for parties and perused the record, there is no case made out to interfere with the impugned order. At the outset, the provisions contained in Section 9A of CPC apply to objection to the jurisdiction of the Court to entertain the suit itself and not objection to entertaining application seeking leave to amend the suit. Section 9A of CPC provides that notwithstanding anything contained in the Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay,

injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. From this, it is clear that the objection under Section 9A of the CPC must be to the jurisdiction of the Court to entertain the suit. If the objection, which is contained in the affidavit-in-reply filed by and on behalf of the petitioner is perused, then it is clear that the objection does not relate to the jurisdiction of the Court to entertain the suit itself, but rather, the objection is to the maintainability of the application seeking leave to amend. In such a situation, there is clearly no question of applicability of Section 9A of the CPC. There is nothing in the decision of the Division Bench of this Court in the case of **Mukund Ltd.** (*supra*) to even remotely suggest that the provisions of Section 9A of CPC will apply to the objection regards maintainability of seeking leave to amend the suit.

6. The application seeking leave to amend is yet to be decided. Therefore, there is no question of advertent to the parameters normally applicable in matters of allowing or disallowing application seeking leave to amend the plaint. However, since contention based upon delay has been raised, it would be appropriate to clarify that mere delay by itself is not ground to reject leave. If some additional reliefs are applied for or if some new cause of action

is sought to be introduced, delay may be a relevant to consider whether discretion needs to be exercised. Depending upon facts and circumstances of the case, the Court is empowered to grant leave to amend, making it clear that the issue of limitation is left open for decision as the suit proceeds. In any case, this is not a matter on basis of which the Court can hold that the very application seeking leave to amend is not maintainable. Accordingly, there was no question of whether the invoking the provision of Section 9A of CPC or even principles analogous thereto. Besides, in the present case, the trial in the suit is yet to commence. For this reason, the proviso to Order 6 Rule 17 of CPC will also not be attracted.

7. There is no merit in the submission based upon earlier leave to amend which was granted by order dated 09/04/2015. The said amendment was in the context of bringing on record legal representatives of some of the respondents. Accordingly, there is merit in the submission of Mr. Patel that the entire purpose of objecting to the very entertainment of application seeking leave to amend was to protract the eviction proceedings. There is no jurisdictional error or perversity of approach insofar as the impugned orders are concerned.

8. This petition is accordingly dismissed with costs of Rs.50,000/- (Rupees Fifty Thousand Only) payable by the petitioners to the respondent no.1-plaintiff. Such costs shall be paid within a period of four weeks from today. The Trial Court to ensure that such

costs are paid by the petitioners within a period of four weeks from today. In case the costs are not paid, the Trial Court is at liberty to consider whether orders striking off the defence of the petitioners need to be passed. No doubt, the Trial Court shall afford every possible opportunity to the petitioners to show cause as to why defence should not be struck off, despite failure on their part to pay costs of Rs.50,000/- within a period of four weeks from today.

9. Further, the Trial Court is directed to dispose of R.A.E. Suit No.691/1217 of 2008 as expeditiously as possible and in any case, within a period of one year from today.

10. This petition is accordingly dismissed with costs as aforesaid.

11. All concerned to act on basis of authenticated copy of this order.

(M. S. SONAK, J.)