

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 10207 OF 2013

Phoenix Mills Ltd. .. Petitioner
vs.
Amar Tea Pvt. Ltd. .. Respondent

Mr. Prasad Dani, Senior Advocate a/w. Ms Kirtida Chandarana, Mr. Siddharth Subramaniyam i/b Mahernosh J. Humranwala for the Petitioner.

Mr. Vaibhav Sugdare a/w. Mr. Jignesh Shah for the Respondent.

CORAM : M. S. SONAK, J.
DATE : 1 JULY 2015.

P.C. :-

1] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

2] This petition is directed against the following orders:

- (a) The order dated 15 January 2013, by which the learned Small Causes Court has directed the framing of preliminary issue under Section 9A of the Code of Civil Procedure, 1908 (CPC) as applicable to the State of Maharashtra;
- (b) The order dated 7 February 2013, by which the learned Small Causes Court has directed the petitioner (defendant in the suit) to lead evidence on the preliminary issue before the respondent (plaintiff in the suit); and

(c) The order dated 25 April 2013, by which the learned Small Causes Court has rejected the review against the aforesaid order dated 7 February 2013.

3] There is common ground that in case the order dated 15 January 2013, directing framing of preliminary issue under Section 9A of the CPC is interfered with, then there is no necessity or occasion to decide upon the legality and validity of the remaining two orders.

4] In the suit as instituted by the respondent, the interim relief was applied for. In the reply filed by the petitioner opposing grant of any interim relief on merits, there was no specific objection raised to the jurisdiction of the Civil Court to entertain the suit. There was no specific plea urging the framing of any preliminary issue under Section 9A of the CPC. In para 5 of the affidavit in reply, however, the petitioner did crave leave to refer to and rely upon the written statement as part of reply to the application opposing interim relief. In the written statement, the objections have been raised to the jurisdiction of the Court, *inter alia*, in paras 3, 4 and 5 thereon.

5] The impugned order dated 15 January 2013 itself records that the learned Small Causes Court made a query to the learned counsel appearing for both the parties as to whether the preliminary issue regarding jurisdiction under Section 9A of the CPC was required to be framed or not. The learned counsel for the respondent-plaintiff submitted that there was no such necessity, but it left the matter to the discretion of the Court. Learned counsel for the petitioner-defendant expressly made a statement that no application has been urging the framing of any preliminary issue, again, left the matter for the learned Small Causes Court to decide the matter. Learned Small Causes Court relying upon the decision of the Division Bench of this Court in case of *Mukund Ltd. vs. Mumbai International Airport & ors. - 2011 (5) Bom. C.R. 456*, proceeded direct the framing of the preliminary issue under Section 9A of the CPC.

6] Ms Kirtida Chandarana, learned counsel for the petitioner, has submitted that the impugned order dated 15 January 2013 is vulnerable, inasmuch as the same is based upon misreading the decision of this Court in case of *Mukund Ltd. (supra)*, and in any case misconstruction of the scope and import of the provisions contained in Section 9A of the CPC, as applicable to the State of

Maharashtra. The learned counsel submitted that in the present case, the objection as to jurisdiction of the Civil Court was not at all raised at the hearing of the application for interim relief and further, considering the nature of objections raised, there was no scope for framing the same as preliminary issue.

7] Mr. Vaibhav Sugdare, learned counsel for the respondent, defended the impugned orders, by submitting that the issue of jurisdiction was indeed raised or at least the same can be deemed to have been raised by virtue of the averments in paragraph 5 of the affidavit-in-reply opposing interim relief. In this paragraph, the contents of written statement were referred to and relied upon in the written statement, there was objection raised to the jurisdiction of the Civil Court. Mr. Sugdare submitted that the Division Bench of this Case in case of *Mukund Ltd. (supra)* has held that once such objection is raised, it is not open for the defendant to abandon the same or in any case, the Civil Court, cannot ignore the same, but is bound to frame the preliminary issue under Section 9A of the CPC. Mr. Sugdare pointed out that the provisions contained in Section 9A of the CPC are in the nature of an exception to provisions contained in Order 14, Rule 2 of the CPC and therefore, it is imperative that there is compliance.

8] After hearing the learned counsel for the parties and perusing the record, in my judgment, this was not a case where there was any warrant for framing the preliminary issue under Section 9A of the CPC, as applicable to the State of Maharashtra. The provision which no doubt begins with *non obstante* clause makes the framing of preliminary issue imperative, where the objection to jurisdiction of the Court is raised at the hearing of an application for the grant of interim relief, whether by way of stay, injunction, appointment of receiver or otherwise. Once such issue of jurisdiction is raised at the hearing of the application for grant of interim relief, or for setting aside of interim relief already granted, the Court is under an obligation to decide that issue as a preliminary issue before deciding the question of interim relief and the determination of such issue cannot be postponed to the trial of the suit. This is what has been held by the Division Bench of this Court in case of *Mukund Limited (supra)*.

9] In case of *Mukund Limited (supra)*, the question arose as to what is the effect when objection to jurisdiction is not raised at the hearing of the application for interim relief. This was answered in para 15, by observing thus:

“15. It has been urged on behalf of the appellant that section 9-A is attracted when “an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties” at the hearing of an application or interim relief. It has been urged on behalf of the appellant that if no such objection is raised, then the provisions of section 9-A are not attracted. Now, undoubtedly if an objection to the jurisdiction of the Court to entertain a suit is not taken at the hearing of an application for interim relief or for setting aside an order granting interim relief, then section 9-A has no application.”

10] From the aforesaid, it is clear that where an objection to the jurisdiction of the Court to entertain a suit is not taken at the hearing of the application or setting aside of an order granting interim relief, then Section 9A of the CPC has no application. Further, the provisions contained in Section 9A of the CPC have been analysed in case of *Mukund Limited (supra)* at para13. Therein, it is observed that first part of Section 9A refers to the stage at which the objection is taken; the stage being at the hearing of the application for granting or setting aside an order granting interim relief. The second part of the provision elucidates the nature of the objection; the objection being to the jurisdiction of the Court to entertain the suit. Accordingly for the provisions contained in Section 9A to be attracted the objection as to jurisdiction has to be raised at the stage of hearing of an application for grant of interim relief or setting aside an order granting interim relief. In the present case, it cannot

be said that the objection as to jurisdiction was raised at the stage of hearing of the application for grant of interim relief. In fact, as the impugned order itself indicates, a query was posed by the learned Small Causes Court to the learned counsel for the parties as to whether they were raising the objection as to the jurisdiction at the stage of hearing of the application of interim relief and the response was that they were not. In such circumstances, there was no occasion or reason to make a direction for framing of preliminary issue.

11] Although, it is not necessary to decide this issue, it does appear at least *prima-facie* that from the nature of objections which have been raised in the written statement, the same do not appear to be objections which are required to be decided as preliminary issues. However, in view of the circumstance that no objection to jurisdiction was raised at the stage of hearing of the application for interim relief, there is no necessity to decide on the question as to whether the nature of objection as raised were indeed objections entertainable under section 9A of the CPC.

12] The circumstance that reference was made to the written statement in the reply opposing the application for interim relief can

hardly be said to be sufficient, in the facts and circumstances of the present case to conclude that the objection as to jurisdiction was indeed raised at the hearing of the application for interim relief.

13] In the light of the aforesaid, the impugned order dated 15 January 2013 is set aside. There is accordingly, no necessity to decide upon the legality and validity of the orders dated 7 February 2013 and 25 April 2013, as such orders cannot survive, without the order dated 15 January 2013

14] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M. S. SONAK, J.)

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