

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
**Writ Petition NO. 3722 OF 2014**

DARSHAN MANDIR CO-OPERATIVE  
HOUSING SOCIETY LIMITED

...Petitioner

*Versus*

M/S. DARSHAN ENTERPRISES  
AND ORS

...Respondents

....

Mr. Ketan Joshi i/b. Mr. S.A. Sawant, Advocate for the Petitioner.  
Mr. Nikhil Karnavat a/w. Sausthwana Arun i/b. Maniar  
Srivastava Associates, for Respondent No.3.

....

CORAM : R. G. KETKAR, J.

DATE : 5<sup>th</sup> FEBRUARY, 2016

P.C.

1. Heard Mr. Ketan Joshi, learned Counsel for the petitioner and Mr. Nikhil Karnavat, learned Counsel for respondent No.3, at length.

2. Mr. Joshi orally applies for deleting respondent Nos.1 and 2. On the motion made by Mr. Joshi leave to delete respondent Nos.1 and 2, at the risk of the petitioner, is granted. Amendment shall be carried out forthwith.

3. Rule. M/s Maniar Srivastava Associates waives service on behalf of respondent No.3. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition

is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 7.2.2014 passed by learned Judge presiding over Court Room No.8 of City Civil Court, Dindoshi, Mumbai below Exh.13 in L.C. Suit No.1425 of 2011. By that order, learned trial Judge rejected the application Exh.13 taken out by the plaintiff for deciding Chamber Summons No.811/2012 before deciding the preliminary issue framed under Section 9A of Code of Civil Procedure, 1908 (for short, 'CPC').

5. The plaintiff has instituted Suit on 15.7.2011 *inter alia* praying for direction to the defendants to specifically perform and comply with the statutory obligation cast upon them under the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion, Construction, Sale, Management and Transfer) Act, 1963 (for short, 'MOFA'); direction to the defendant No.1 herein to execute the conveyance and transfer all their right, title and interest in respect of final plot No.746 (old final plot No.723), O.P. No.422 of TPS III, Borivali admeausiring 1770.30 sq. mtrs at Borivali, Taluka Borivali, Mumbai Suburban District,

Opp. Soniwadi, Simpoli Road, Borivali (W), Mumbai (for short, 'suit property'); for perpetual injunction restraining the defendants from utilize, exploiting, consuming or otherwise dealing with any part of the balance FSI/TDR of the suit property amongst other prayers. It appears that on 19.7.2011, ad-interim relief is granted in favour of the plaintiff.

6. Defendant No.3 filed application under Section 9A of CPC sometime in September, 2011. Learned trial Judge framed two preliminary issues. Pending consideration of preliminary issue framed under Section 9A of CPC, the plaintiff filed Chamber Summons on 4.12.2013 for amending the plaint so as to claim declaration that the conveyance dated 24.9.2007 executed by defendant no.2 in favour of defendant no.3 in respect of suit property is illegal, null and void and non-est and not binding on the plaintiff. The plaintiff thereafter took out application at Exh.13 for disposing of the Chamber Summons before deciding the preliminary issue. By the impugned order, learned trial Judge rejected the application.

7. Mr. Joshi submitted that learned trial Judge should have decided the Chamber Summons for amending the plaint and should not have adjourned the hearing of the Chamber

Summons till the decision on the preliminary issues. In support of this contention, he relied upon the decision of this Court in the case of ***Immigrants Ideal Producers Co-operative Society Ltd. and another vs. Jahanara Moiz Dalal, 2004(2) Bom. C.R. 597*** and in particular paragraphs-16 and 17 thereof.

8. On the other hand Mr. Karnavat submitted that the Court has to be vigilant in order to ensure that the hearing of the plea questioning its jurisdiction is not delayed by procedural strategies which will defeat the legislative object. Where a procedural application appears to be a device for delaying a decision on the jurisdiction, the Court will not be justified but be duty bound to not defer a decision on the plea of jurisdiction. He submitted that defendant no.3 filed application under Section 9A of CPC in September, 2011. The plaintiff took out Chamber Summons after more than one year that is to say on 4.12.2012 and took out application at Exh.13 on 4.12.2013 for deciding the Chamber Summons before deciding the preliminary issue. As the plaintiff has obtained ad-interim relief on 9.7.2011, the plaintiff is adopting delaying tactics by filing application for amendment.

9. I have considered the rival submissions advanced by

learned Counsel for the parties. I have perused the material on record.

10. In the case of Immigrants Ideal Producers Co-operative Society Ltd. (supra), learned Single Judge of this Court (Coram: Dr. D.Y. Chandrachud, J., as learned Chief Justice then was), considered the earlier decision of this Court in the case of ***Shri Arjun Dada Gadage v. Mallappa Gurappa Chougule, 2004(1) Bom.C.R. 741*** decided by this Court [Coram: A.M. Khanwilkar, J. as learned Chief Justice then was]. After considering the decision in the case of Arjun Gadage (supra) in para-16, it was observed that “the question, however, in the present case is a more limited issue and that is as to whether the learned trial Judge was ousted from his jurisdiction to allow the amendment of the plaint altogether. The answer must be in the negative. It must be emphasised that in the present case, there is a finding recorded by the learned trial Judge that the bonafides of the plaintiffs could not be questioned. The application for amendment was not malafide nor was it an effort to delay the disposal of the application questioning the jurisdiction of the Court.”

11. In that case in para-14 it was observed that “section 9-A stipulates that the hearing of the application shall not in any case be adjourned to the hearing of the suit. The application for interim relief may be for a stay, injunction, appointment of a Receiver or otherwise. The words “or otherwise” bring in all applications for interim relief other than those spelt out earlier. This is evident from the use of the words 'whether by way of' before the specified categories of interim relief that are listed out. In other words, Section 9-A applies where at the hearing of an application for the grant or setting aside of an order of interim relief an objection as to jurisdiction is taken. The words "or otherwise" are not intended to cover applications other than those for the grant of interim relief. Those words are a residuary category of all application for interim relief and not of applications other than for interim relief.” In para-17 of the report, the Court also observed that the Court should ensure that by the proposed amendment the matter which does not lie within the jurisdiction of the Court is sought to be brought within the jurisdiction of the Court by way of an amendment.

12. In the present case, the plaintiff has taken out Chamber Summons for amending the plaint so as to incorporate

prayer by way of declaration that the conveyance deed dated 24.9.2007 executed by defendant No.2 in favour of defendant No.3 is illegal, null and void and not binding on the plaintiff. The plaintiff has also valued the suit for that amended prayer for the purpose of court fees and jurisdiction at Rs.36 Lakhs as per Section 6(iv)(ha) of the Maharashtra Court Fees Act. The Chamber Summons is taken out on 4.12.2012 and by that time the pecuniary jurisdiction of the City Civil Court is enhanced upto Rs.1 Crore. In other words, the proposed amendment also will not go beyond the pecuniary jurisdiction of the City Civil Court.

13. In view of decision of this Court in the case of Immigrants Ideal Producers Co-operative Society Ltd. (supra), I am of the opinion that the learned trial Judge was not justified in rejecting the application Exh.13 thereby postponing the hearing of the Chamber Summons. Hence, the impugned order is set aside. Application at Exh.13 is allowed. Rule is made absolute in the above terms with no order as to costs. Order accordingly.

( R. G. KETKAR, J.)