

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 414 OF 2016**

Shri Rajendra Namdeo Jadhav Petitioner
Vs
1.Shr Suresh Vasudeo Raut and
Ors .. Respondents

Mr. C.S.Joshi a/w Mr.B.C.Joshi, Advocate for Petitioner.
Ms. Yogita Deshmukh, Advocate for Respondents no. 1 to 4.
Mr. P.J.Thorat, Advocate for respondent no.20.

CORAM : R.G.KETKAR,J.
DATE : 04/02/2016

PC:

1. Heard Mr. C.S.Joshi, learned counsel for the petitioner, Ms Yogita Deshmukh, learned counsel for respondents no. 1 to 4 and Mr. P.J.Thorat, learned counsel for respondent no.20 at length. On the oral application made by Mr. Joshi, respondents no. 5 to 19 and 21 to 39 are deleted. Amendment shall be carried out forthwith.

2. Rule. Learned counsel for respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as 'plaintiff no.9', has challenged the Judgment and order dated 31.8.2015 passed by the learned Civil Judge, Sr.Dn., Palghar below Exhibit 17 in Special Civil Suit No.29 of 2014. By that order, the learned trial Judge

rejected the application made by plaintiff no.9 for deciding application Exh.5 taken out by the plaintiff for interim order before deciding the preliminary issues. Parties shall hereinafter be referred as per their status in the trial Court.

4. Mr. Joshi submitted that the plaintiffs have instituted suit for declaration, partition and separate possession and for perpetual injunction restraining the defendants from creating third party interest. During the pendency of the suit, the plaintiffs took out application Exh.5 seeking temporary injunction restraining the defendants from creating third party interest. Defendants no. 1 to 3 filed their reply dated 19.4.2014 opposing the application Exh.5. Defendants no. 1 to 4 filed application under section 9A read with Order VII, Rule 11(d) of C.P.C. on 19.7.2014. By order dated 23.6.2015, the learned trial Judge framed three preliminary issues. It is at that stage the plaintiffs filed application Exh.17 praying for deciding application Exh.5 before deciding preliminary issues. By the impugned order, the learned trial Judge has rejected the application.

5. Mr. Joshi submitted that in view of Section 9A of C.P.C., the learned trial Judge ought to have considered whether the plaintiffs have made out case for grant of ad-interim order. The learned trial Judge was not precluded under section 9A(2) to proceed with application for consideration as to whether the plaintiffs have made out case for grant of ad-interim order. He

submitted that the learned trial Judge may be directed to consider whether the plaintiffs have made out a case for grant of ad-interim order pending consideration of preliminary issues.

6. On the other hand, Mr. Thorat submitted that the plaintiffs did not file application under section 9A(2) requesting the court to consider grant of ad-interim relief. Though the preliminary issues are framed on 23.6.2015, matter is adjourned for deciding the preliminary issues.

7. I have considered the rival submissions made by the learned counsel appearing for the parties. I have also perused the material on record. Section 9-A reads thus;

“9-A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as preliminary issue -

(1) Notwithstanding any thing contained in this 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 for 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. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in sub-section (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction.”

Perusal of section 9-A (1) shows that if at the time of hearing of any application for grant of interim relief, an objection to jurisdiction of the court to entertain such a suit is taken by any

of the parties to the suit, Court has to determine issue as to preliminary issue at the time of hearing of interim application, before granting interim relief. Sub section (2) thereof lays down notwithstanding anything contained in sub- section (1), at the hearing of any such application, the court may grant such interim relief as it may consider necessary pending determination by it as to preliminary issue as to the jurisdiction. Plain words of section 9-A do not admit any doubt. In my opinion, though the plaintiffs prayed deciding Exh.5 application before preliminary issues are decided, the learned trial Judge was not precluded from considering the grant of ad-interim order in terms of section 9-A(2) of C.P.C. In my opinion, the learned trial Judge was not justified in rejecting the application. Hence, impugned order is set aside and the learned trial judge is directed to consider whether the plaintiffs have made out a case for grant of ad-interim order, pending determination of preliminary issues so framed. All contentions of the parties on merits are expressly kept open.

8. Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)