

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.141 OF 2015
 IN
 NOTICE OF MOTION NO.465 OF 2013
 WITH
 NOTICE OF MOTION (L) NO.2906 OF 2014

...

Roohi Rashid Khan Nee Roohi Kedarnath Sethi
 and another ...Appellants

versus
 Sucheta Karampal Anand and another ...Respondents

...

Mr.Kirti Munshi a/w Mr.Prabhakar Jadhav for Appellants.
 Ms.Rajani Iyer, Senior Advocate, with Mr.V.V.Divekar and Mrs.Ashwini
 Padelkar i/by Divekar & Co. for Respondent No.1.

...
CORAM : A.S.OKA &
A.A. SAYED, JJ.

DATED : 4 JULY 2016

P.C.:

Heard the learned Counsel appearing for the Appellants. The order impugned is dated 18 September 2014 passed by the learned single Judge. The Appellants are the Plaintiffs and the Respondents are the Defendants. There are two parts of the order. The first part of the order directs framing of a preliminary issue of limitation in exercise of the powers under section 9A of the Code of Civil Procedure, 1908 (for short "the said Code"). In the second part, the learned single Judge refused to grant ad-interim relief in terms of prayer clause (a) of Notice of Motion No.465 of 2013 as against the first Defendant.

2. The submission of the learned Counsel appearing for the Appellants is that before framing a preliminary issue of limitation, the learned Judge ought to have examined the case to ascertain whether the preliminary issue really arises. The second submission is that there was no reason to deny the ad-interim relief in terms of prayer cause (a) of the Notice of Motion as against the first Defendant, especially when the said relief was granted against the second Defendant. He submitted that even the blood sample given by the second Defendant as per the order dated 16 January 2014 has expired and therefore, a direction be issued to the second Respondent to give a fresh blood sample.

3. We have considered the submissions. As far as the order directing framing of a preliminary issue under Section 9A of the said Code is concerned, nothing is decided on merits by the learned single Judge. Therefore, to that extent such Appeal is not maintainable. After finding that at the hearing of a Notice of Motion for grant of interim relief a plea of bar of limitation was raised, in view of the mandatory provisions of sub-section (1) of section 9A, the preliminary issue has been framed.

4. The prayer clause (a) of the Notice of Motion No.465 of 2013 reads thus:

“(a) That pending the hearing and final disposal of this Suit, this Hon'ble Court be pleased to direct and order Defendant Nos.1 & 2 to undergo a DNA ext (deoxyribonucleic acid test);”

5. Paragraphs 6 to 9 of the impugned order read thus:

“6. Counsel on behalf of the plaintiff makes an application in terms of prayer 'a' with regard to defendant No.1.

7. An application for ad-interim relief has not been made in this suit. The Notice of Motion came up for hearing on 16th January, 2014. Part order in the Notice of Motion came to be passed. That was for reliefs against defendant No.2 in respect of prayer clause 'a' of the Notice of Motion under which defendant No.2 agreed to undergo a DNA test.

8. On 16th April, 2014 no application for the DNA test of defendant No.1 was made. No order in that behalf was passed. The Notice of Motion has now appeared for hearing. It is seen that the preliminary issue is raised. No relief in the Notice of Motion can be granted until the preliminary issue is decided.

9. Hence application as against defendant No.1 in terms of prayer 'a' of the Notice of Motion for undergoing a DNA test is at present refused.”

6. Thus, it is clear that the only relief which was pressed was interim relief in terms of prayer clause (a) as against the first Defendant. The learned Judge has recorded that on 16 April 2014, the prayer clause (a) was pressed only as against the second Defendant. No relief was sought against the first Defendant. In any case, the learned single Judge has only

denied the ad-interim relief in terms of prayer clause (a) as against the first Defendant and the Notice of Motion is kept pending in view of mandate of section 9A of the said Code. If ultimately the preliminary issue of limitation is answered against the Defendants, the prayer clause (a) of the Notice of Motion can always be considered on merits.

7. As regards the direction sought against the second Defendant in this Appeal, we must record here that the same was not sought before the learned single Judge and therefore, the prayer made by the learned Counsel appearing for the Appellants cannot be gone into in this Appeal. It is for the Appellants to take out appropriate application in that behalf.

8. Learned Counsel appearing for the Appellants submits that the Appellants may be granted liberty to move the learned single Judge for grant of ad-interim relief in terms of other prayers of the Notice of Motion.

9. From the impugned order, it is crystal clear that at the time of hearing before the learned single Judge, only the prayer (a) as against the first Defendant was pressed into service. Therefore, there is no question of granting any such liberty as prayed by the Appellants.

10. Accordingly, there is no merit in the Appeal and the same is dismissed. We, however, make it clear that we have made no adjudication on merits of the prayers made in the pending Notice of Motion.

11. In view of disposal of the Appeal, Notice of Motion (st) No.2906 of 2014 does not survive and the same is disposed of.

(A.A. SAYED, J.)

(A.S.OKA, J.)