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

APPEAL (L.) NO.900 OF 2015

Sandeep Gopal Raheja
Adult, of Mumbai,
Indian Inhabitant, residing at
Raheja Bay, Mount Mary,
Bandra (West),
Mumbai – 400 050

... Appellant
(Orig. Defendant No.1)

Versus

1. Sonali Nimish Arora,
Adult, of Mumbai, Indian Inhabitant,
residing at D.C. House, Plot No.4,
J.V.P.D.Scheme, Vile Parle (West),
Mumbai – 400 049

... Respondent No.1
(Orig. Plaintiff)

2. Sabita Rajesh Narang,
Adult, of Mumbai, Indian Inhabitant,
residing at Narang House, 40, Pali Hill,
Zig Zag Road, Bandra (West),
Mumbai – 400 050

... Respondent No.2
(Orig. Defendant No.3)

3. Durga Sandeep Raheja
Adult, Mumbai, Indian Inhabitant,
residing at Raheja Bay, Mount Mary,
Bandra (West),
Mumbai – 400 050

... Respondent No.3
(Orig. Defendant No.2)

Mr. D.J. Khambatta, Senior Counsel a/w Mr. Karl Tamboly a/w Mr. Vivek Vashi, Ms. Alya Khan and Ms. Aditi Bhansali I/by Vivek A. Vashi for the Appellant.

Mr. Rohit Kapadia, Senior Counsel a/w Mrs. Teresa Daulat, Ms. Suvarna A. and Ms. Rutika Motwani for the Respondent No.1.

Dr. Birendra Saraf I/by Loshika Bhulchandani for the Respondent No.3.

CORAM : A.S. OKA & P.D.NAIK, JJ.

DATE ON WHICH SUBMISSIONS WERE HEARD : 20.04.2016

DATE ON WHICH JUDGMENT IS PRONOUNCED : 05.08.2016

JUDGMENT (PER A.S. OKA, J.):

1 By order dated 3rd February, 2016 this Appeal was ordered to be disposed of finally at the stage of admission. The present Appeal is preferred by the first defendant for challenging the order dated 15th October, 2015 passed by the learned Single Judge in Suit No.103 of 2015. On 12th February, 2015, preliminary issues were framed in Suit No.103 of 2015 filed by the first respondent – original plaintiff. The preliminary issues read thus :-

- “1. Whether the Suit is maintainable by virtue of Order XX Rule 9(1) of the Code of Civil Procedure, 1908, if Suit No.2363 of 2012 has abated?
2. If the answer to issue (a) is in the affirmative, then :
 - (i) Whether the Plaintiff proves that the Suit is within limitation, as per the Limitation Act, 1963?
 - (ii) Whether the Suit is barred by the provisions of the Benami Transaction (Prohibition) Act, 1988?”

2 Suit No.2362 of 2012 was filed by one Mr. Gopal L. Raheja in September, 2012. The present Appellant who is the son of said Gopal is the first Defendant in the said suit. The first Respondent herein is the

younger daughter of Gopal. The second Respondent is the elder daughter of Gopal and the third Respondent is the Appellant's wife. A Notice of Motion was taken out being Notice of Motion No.2261 of 2012 by the said Gopal for claiming interim reliefs. The Appellant filed a reply to the Notice of Motion addressed a plea that the suit was barred by the provisions of Limitation Act, 1963 and the Benami Transactions (Prohibition) Act, 1988. By an order dated 27th February, 2012 the learned Single Judge framed preliminary issues based on the plea of bar of limitation and bar of the provisions of the Benami Transactions (Prohibition) Act, 1988 (for short “the Benami Transactions Act”). The said two preliminary issues were fixed for recording of evidence. Gopal – original plaintiff filed affidavit in lieu of examination-in-chief. The said affidavit was filed on 6th March, 2014 but the said Gopal died on 18th March, 2014 before recording of his cross-examination.

3 The first Respondent filed Suit No.103 of 2015 (the suit subject matter of the present Appeal) for administration of the estate of Gopal. Notice of Motion No.133 of 2015 was taken out by the first Respondent in the said suit for interim relief. On 2nd February, 2015 a reply was filed by the Appellant raising a plea of bar of limitation as well as bar of the suit under the Benami Transactions Act. On 27th

February, 2015, preliminary issues were framed by the learned Single Judge which are reproduced in the first paragraph above. On 15th April, 2015 the first Respondent made a statement that she was not desirous of leading any evidence on the said preliminary issues. After the death of Gopal the first Respondent got herself transposed as a plaintiff in Suit No.2363 of 2012. She also filed her affidavit in lieu of examination in chief for the purposes of hearing of preliminary issues.

4. In Suit No.2363 of 2012, a declaration was claimed that family arrangement set out in the plaint is valid, subsisting and binding on the parties thereto. A prayer was made directing the defendants in the said suit to specifically perform the said family arrangement. Various other reliefs were claimed in the said suit. It is pointed out by the Appellant that in Suit No.2363 of 2012 reliefs were claimed in respect of the shares described as Class-II shares and Class-III shares. It was claimed by Gopal in the said suit that Class-II shares were transferred from his sole name to the joint names of himself and the present Appellant in the year 2001 and Class-III shares were transferred in the names of the Appellant, the third Respondent and/or their children and/or their holding companies. The contention raised by Gopal is that the said shares exclusively belong to him and the same were held by the Appellant, the third Respondent and/or their children for him in fiduciary capacity.

5 The preliminary issues framed in Suit No.103 of 2015 came up for hearing on 15th February, 2015. The learned Senior Counsel appearing for the first Respondent made a statement during the course of hearing that in the Suit No.103 of 2015, the first Respondent has claimed administration of assets that were the property of said Gopal excluding those that Gopal in his suit said were held in trust. The learned Single Judge by the impugned order dated 15th October, 2015 in Suit No.103 of 2015 held that no preliminary issues arise in the said suit and those framed on 12th February, 2015 were ordered to be deleted.

6 The learned Senior Counsel appearing for the Appellant relied upon the decision of the Apex Court in the case of *Forehore Co-operative Housing Society Limited Vs. Praveen D. Desai & Ors.*¹. He submitted that once a preliminary issue of jurisdiction is raised by way of reply to the application for interim relief, as per Section 9-A of Civil Procedure Code, 1908 (for short “the said Code”), there is no choice but to frame the issue and decide it. He submitted that the Apex Court has held that Section 9-A of the said Code is mandatory. He submitted that the Apex Court for the purposes of Section 9-A, expanded the meaning of the term jurisdiction by holding that the term jurisdiction cannot be confined to its conventional narrow meaning and essentially jurisdiction

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is an authority to decide a given case. He submitted that only on the basis of certain statements made across the Bar by the original Plaintiff, the learned Judge could not have declined to decide the preliminary issues which were already framed under Section 9-A.

7 The learned Senior Counsel appearing for the first Respondent relied upon the decision of a Division Bench of this Court dated 19th July, 2012 in Appeal No.817 of 2010 (Ferani Hotels Private Limited Vs. Nusli Neville Wadia and others). He submitted that if the issue of jurisdiction did not arise at all, the learned Single Judge could have always held that the issue of jurisdiction did not arise. He submitted that the trial Court can always consider and decide whether an objection to the jurisdiction is bonafide or whether it is wholly frivolous. Inviting our attention to the findings recorded by the learned Single Judge, he urged that the learned Judge was justified in exercising the power of deleting the issues which are already framed. He would urge that no interference is called for.

8 We have given careful consideration to the submissions. Notice of Motion No.133 of 2015 was taken out in the concerned Suit (Suit No.103 of 2015) by the Plaintiff. The prayer in the said Notice of Motion is for appointment of Court Receiver and other interim reliefs.

In the reply of the Appellant to the Notice of Motion, specific contentions regarding bar of limitation and bar under the provisions of the Benami Transactions Act have been raised. On 12th February, 2015 preliminary issues which we have quoted above were framed. 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 a preliminary issue. -

(1) Notwithstanding anything 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 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. 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.”

Firstly, the point is whether the issues raised were the questions of jurisdiction. The said issue was dealt with by the Apex Court in the case of Foreshore Co-operative Housing Society wherein a contention of the Appellant before the Apex Court as noted in paragraph 21 was that the issue of bar of limitation will not be an issue of jurisdiction contemplated by Section 9-A of the said Code. In the said decision, the Apex Court considered the scope of Section 9-A of the said Code. In paragraph 44 the Apex Court held thus :-

“44. From the reading of the aims and object of the Bill whereby Section 9-A was inserted, the term “jurisdiction” is used in a wider sense and is not restricted to the conventional definition either pecuniary jurisdiction or territorial jurisdiction as submitted by Mr. Nariman, learned Senior Counsel appearing for the appellant.”

(emphasis added)

9 In paragraph 45, the Apex Court held that the term jurisdiction under Section 9-A cannot be confined to its conventional and narrow meaning as it will be contrary to the well settled interpretation. The Apex Court relied upon Halsbury's Laws of England. In paragraph 47 the Apex Court held thus :-

“47. **It is well settled that essentially jurisdiction is an authority to decide a given case one way or the other.** Further, even though no party has raised objection with regard to jurisdiction of the court, the court has power to determine its own jurisdiction. In other words, in a case where the court has no jurisdiction it cannot confer upon it by consent or waiver of the parties.”

10 The Apex Court referred to its earlier decisions on the question. The Apex Court rejected the contention that the bar of limitation will not be within the purview of the objection of jurisdiction contemplated under Sub-Section (1) of Section 9-A.

11 If a contention is raised of the bar of suit at the time of hearing of an application for interim relief based on provisions of a statute which prevents Civil Court from entertaining a suit or which

puts an embargo on the power of the Civil Court to entertain a suit, Sub-Section (1) of Section 9A will be squarely applicable. In the facts of the case, it is not urged before the Learned single Judge by the original Plaintiff that the issues framed are not the issues of Jurisdiction covered by Section 9A.

12 In paragraphs 62 and 63, the Apex Court held thus :-

“62. At the cost of repetition, we observe that Section 9-A provides a self- contained scheme with a non obstante clause which mandates the court to follow the provision. It is a complete departure from the provisions contained in Order 14 Rule 2 CPC. However, it is made clear that in other cases where the suits are governed by the provisions of Order 14 Rule 2, it is the discretion of the court to decide the issue based on law as preliminary issue.

63. We, therefore, after giving our anxious consideration to the provisions of the Code of Civil Procedure together with the amendments introduced by the State Legislature, hold that the provision of Section 9-A as introduced by the Maharashtra Amendment Act is mandatory in

nature. It is a complete departure from the provisions of Order 14 Rule 2 CPC. Hence, the reasons given by the High Court in the impugned orders are fully justified. We affirm the impugned orders passed by the High Court.”

(emphasis added)

13 The Apex Court, therefore, held that Section 9-A makes a complete departure from Rule 2 of Order XIV of the said Code in view of the non obstante clause. However, the Apex Court observed that if the case is governed by Rule 2 of Order XIV of the said Code, the Court has discretion to decide an issue based on jurisdiction as a preliminary issue. Thus, in paragraph 62, the Apex Court has made a clear distinction between Section 9-A and Rule 2 of Order XIV. What is held by the Apex Court is that Section 9-A is mandatory and once the issue of jurisdiction is raised in the reply to the application for interim injunction or for appointment of Court Receiver, the Court has no choice but to frame the issue of jurisdiction and to decide it in accordance with law. The Apex Court distinguished Rule 2 of Order XIV of the said Code by observing that under the said provision, there is a discretion to decide whether the issue based on law can be decided as a preliminary issue. Thus, there is no discretion left to the Court as far as Section 9-A is concerned.

14 We have perused the affidavit in reply to the Notice of Motion filed by the present Appellant. In paragraph 13 a specific contention has been taken regarding the bar of limitation. In paragraph 14 a specific contention is raised that the suit is barred by the Benami Transactions Act. Thus, the objections to the jurisdiction within meaning of Sub-Section (1) of Section 9-A have been raised by the Appellant. The learned Senior Counsel appearing for the original Plaintiff relied upon certain observations made by this Court in the case of *Ferani Hotels Private Limited*. The observations are to the effect that the Court can make minimal enquiry to ascertain whether the issue of jurisdiction as pleaded really arises. We must note here that if we peruse the decision in the case of *Foreshore Co-operative Housing Society*, the Apex Court has not left any such discretion to the Trial Court.

15 Even assuming that the said discretion is left to the Court, the said discretion is to be exercised at the time of framing of preliminary issues which in the present case were framed on 12th February, 2015. The finding of the learned Single Judge in paragraph No. 16 of the impugned order is that the preliminary issues which are already framed do not arise. The learned Single Judge has relied upon the statement of the learned Senior Counsel appearing for the Plaintiff recorded in paragraph 7 of the impugned order.

16 In view of mandate of Sub-Section (1) of Section 9-A and in the light of the law laid down by the Apex Court in the case of *Foreshore Co-operative Housing Society*, once an objection to the jurisdiction of the Court is raised by Defendant at the time of hearing of an application for interim injunction or appointment of Court Receiver, the Court has no choice but to frame the preliminary issue on the basis of the said objection and to decide the same in accordance with law after giving an opportunity to the parties to adduce evidence. In the present impugned order, the conclusion of the learned Single Judge is that the issues do not arise. In our view, the said conclusion cannot be upheld in the light of mandatory nature of the provision of Sub-Section (1) of Section 9-A. In the present case the objection to jurisdiction was specifically raised in the reply to the Notice of Motion for interim relief. After having framed the preliminary issues, it is not open for the Court now to say that the preliminary issues do not arise. This approach is contrary to the Mandatory provision of Sub-Section (1) of Section 9A. Therefore, in our view, the impugned order will have to be set aside and a direction will have to be issued to decide the preliminary issues in accordance with law. Accordingly, we pass the following order :-

ORDER

- (i) The impugned order dated 15th October, 2015 is hereby set aside;

- (ii) The preliminary issues framed by the learned Single Judge shall be decided in accordance with law;
- (iii) We make it clear that we have made no adjudication on the merits of the Suit and the merits of the preliminary issues.

(P.D.NAIK, J)

(A.S. OKA, J)