

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4339 OF 2017

1. Hon'ble Chairman, Vice Chairman,
and All Board of Directors
Karmayogi Murlidhar Khatod
Janlaxmi Gramin Bigar Sheti Sahakari
Patsanstha Maryadit, Belapur BK.
Tq.Shrirampur, Dist.Ahmednagar
R/o Belapur BK, Tq.Shrirampur,
Dist.Ahmednagar,
 2. Karmayogi Murlidhar Khatod
Janlaxmi Gramin Bigar Sheti Sahakari
Patsanstha Maryadit, Belapur BK.
Tq.Shrirampur, Dist.Ahmednagar
R/o Belapur BK, Tq.Shrirampur,
Dist.Ahmednagar,
 3. Sanjay Sakharam Nagale,
Age-47 years, Occu-Manager,
Karmayogi Murlidhar Khatod
Janlaxmi Gramin Bigar Sheti Sahakari
Patsanstha Maryadit, Belapur BK.
Tq.Shrirampur, Dist.Ahmednagar
R/o Belapur BK, Tq.Shrirampur,
Dist.Ahmednagar,
 4. Anil Keru Jagtap,
Age-48 years, Occu-Service,
Special Recovery Officer and
Vikri Adhikari
Karmayogi Murlidhar Khatod
Janlaxmi Gramin Bigar Sheti Sahakari
Patsanstha Maryadit, Belapur BK.
Tq.Shrirampur, Dist.Ahmednagar
R/o Belapur BK, Tq.Shrirampur,
Dist.Ahmednagar,
- PETITIONERS**

VERSUS

Dr.Rameshchandra Biharilal Gangwal,
Age-71 years, Occu-Medical Officer,
R/o within the limits of Gram Panchayat,
Property No.1138/7, House of
Dr.Prashant Gangawal,
Behind Jeevan Clinic, Belapur (BK.)
Tq.Shrirampur, Dist.Ahmednagar

– **RESPONDENT**

Mr.V.D.Sapkal, Advocate for the petitioners.
Mr.Sanket S.Kulkarni, Advocate for the respondent.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 13/09/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioners are aggrieved by the order dated 30/11/2016 by which the Trial Court has rejected applications Exh.27 and 28 filed by the petitioners/defendant Nos. 1 to 3 praying for framing a preliminary issue about the maintainability of Spl.C.S.No.36/2015.
3. I have considered the submissions of the learned Advocates for the respective sides and I have gone through the petition paper book with their assistance.

4. Learned Advocate for the petitioners relies upon the following judgments :-

[a] Mohan Meakin Limited, Bombay Vs. Pravara Sahakari Sakhar Karkhana Ltd., [1987 Mh.L.J. 503],

[b] Sahara India Commercial Corporation Ltd., Vs. B.Jeejeebhoy Vakharia and Associates and others [2008 BCI 158].

5. Learned Advocate for the respondent relies upon the following judgment :

[a] Satpuda Tapi Parisar Sahakari Sakhar Karkhana Ltd., Vs. Jagruti Industries and another {2008(5) Bom.C.R. 284.}

6. Considering the order that I intend to pass, I am not required to advert to the entire submissions of the learned Advocates who have argued at length. Suffice it to say, the issue raised is as to whether the suit preferred by the respondent/plaintiff is tenable on account of failure of the plaintiff in complying with Section 164 of the Maharashtra Co-operative Societies Act, 1960.

7. Section 164 reads as under :-

“164. Notice necessary in suits.- No suit shall be instituted against a society, or any of its officers, in respect of any act

touching the business of the society, until the expiration of two months next after notice in writing has been delivered to the Registrar or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left.”

8. With the assistance of the learned Advocates for the respective sides, I have gone through the plaint filed by the plaintiff which runs into 15 pages. The prayer made in paragraph No.38 of the plaint is that the petitioners comprising of the Co-operative Society (Financial Institution) and its office bearers have connived with each other and prepared false documents to be used for causing defamation of the plaintiff by publishing in the news paper that an amount of money is recoverable from the plaintiff owing to a loan taken by his son. In the entire plaint, 12 out of the 15 pages have been devoted to the landed property which is said to be a subject matter for recovery of unpaid loan amounts. The loan is said to be taken by the son of the plaintiff. Contention of the plaintiff is that he is neither a guarantor nor is his immovable property hypothecated or mortgaged to the petitioner/society.

9. The grievance of the petitioners is that the public notice that

was published declaring recovery of money and by indicating the immovable property of the plaintiff in the newspaper, was in relation to the loan transaction between the society and the son of the plaintiff. The society as well as its Officers were performing their duty in relation to the business of the society. The public notice was also in connection with the business of the society.

10. Learned Advocate for the original plaintiff submits that his suit is instituted for claiming damages of Rs.7,30,000/- on account of the loss of prestige caused by the petitioners by publishing the notice in the news paper. The suit has not been filed in relation to the issue of defamation u/s 499/500 of the IPC. It is purely a civil suit for seeking damages for the defamation and loss of prestige caused to the plaintiff.

11. Exhibit 27 and 28 were applications filed by the defendants praying for trying the issue of jurisdiction and maintainability, peremptorily and framing new issues. By the impugned order, the Trial Court has concluded that the application filed for dismissing the suit on account of non-compliance of Section 164 is devoid of merit and the said issue need not be tried as a preliminary issue.

12. I find that the Trial Court has framed 15 issues on 16/12/2016. The suit has been instituted in 2015 which is relatively a fresh suit. Since after framing of issues, the suits have to be taken up for recording of oral evidence, I do not find any possibility that the Trial Court will take up the instant suit out of turn for recording of oral evidence pursuant to the issues cast.

13. In so far as the controversy in this case is concerned, it would be apposite to reproduce issue Nos.11 and 13 as under :-

11. Whether suit is bad for due to want of notice u/s 164 of Maharashtra Co-operative Societies Act

13. Whether the suit is tenable and maintainable ?

14. Learned Advocate for the petitioners strenuously submits that in the backdrop of 15 issues having been cast and since the suit is relatively new, it would take a considerable time for the Trial Court to decide the suit on all 15 issues. If the issue as to whether the suit is bad for want of a notice u/s 164, is decided peremptorily, the Trial Court would not be required to deal with all the 15 issues. Per contra, learned Advocate for the respondent submits that the petitioner is willing to take the efforts of leading evidence on all the 15 issues and would not mind if the Trial Court decides all the issues

together.

15. Both the learned Advocates have relied upon Order 14 Rule 1, 2 and 3 of the CPC, which read as under :-

“1. Framing of issues : (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

(4) Issues are of two kinds :

(a) issues of fact,

(b) issues of law.

(5) At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at variance, and shall thereupon proceed to frame and record and issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to—

(a) the jurisdiction of the court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

3. Materials from which issues may be framed – The Court may frame the issues from all or any of the following materials :-

(a) allegations made on oath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties ;

(b) allegations made in the pleadings or in answers to interrogatories delivered in the suit ;

(c) the contents of documents produced by either party.”

16. There can be no debate that after the framing of the issues, the Trial Court can dispose of the case on a preliminary issue. If it does not form an opinion that the suit needs to be tried on the preliminary issue, it can decide all the issues together while deciding the suit finally.

17. The learned Division Bench in the matter of Mohan Meakin Limited (supra), dealt with the issue of Section 164 and has observed in paragraph No.18 as under :-

“18. Mr.Mehta then sought to make a distinction between a contractual liability and tortuous liability. According to the learned counsel an action based on a contractual liability may require a notice under Section 164 of the Co-operative Societies Act but so far as the tortuous liability is concerned which is the foundation of the present suit against the defendant, the provisions of the Act and in particular Section 164 will have no application. We are unable to agree with this submission. In our opinion Section 164 of the Co-operative Societies Act must apply to every suit in respect of any Act touching the business of the society whether founded on contractual liability or in torts. This contention urged on behalf of the plaintiff has therefore no substance and must be rejected.”

18. It is thus apparent that in matters relating to Section 164, if the issue involved in the suit touches the business of the society, Section 164 would have its applicability.

19. In the matter of Sahara India Commercial Ltd.,(supra), the learned Single Judge of this Court has concluded that if a notice u/s 164 is not issued prior to the institution of the suit, the suit would be rendered untenable. Section 164 is held to be mandatory in nature

and the Court is expected to seek compliance of the said provision and cannot circumvent Section 164. Paragraph Nos. 1,2 and 3 of the Sahara India Commercial Ltd., judgment (supra), read as under :-

“1. By this Chamber Summons the plaintiff is seeking amendment of the plaint. The proposed amendment is very unusual inasmuch as what is prayed is deletion of the name of the defendant No. 4 and simultaneously a prayer is also made to permit addition of defendant No. 4 in the suit. The obvious purpose for seeking the said amendment which relate to deletion of defendant No. 4 in the first instance and then addition thereafter is aimed at circumventing the provisions of Section 164 of the Co-operative Societies Act which postulates a notice prior to the institution of the suit.

2. The defendant No. 4 is a society registered under the Maharashtra Cooperative Societies Act. Without issuing a notice as contemplated by Section 164, the suit came to be filed. In para 62 of the plaint, there is a categorical assertion made that notice under Section 164 of the Maharashtra Co-operative Societies Act is not necessary, so far as the defendant No. 4 is concerned. Thus it is obvious that the suit came to be filed under an assumption that no notice as required by Section 164 is necessary to be served before filing of the suit. At a later point of time, it is the submission of the learned Counsel for the plaintiff, by way of an abundant precaution, the present Chamber Summons has been taken out with a view to delete the defendant No. 4/Co-operative Society and a further prayer is made to permit addition of the said society. By this method, the

plaintiff seeks to avoid compliance of Section 164 of the Act to the detriment of the interest of the plaintiff.

3. It is not being disputed that this Court had held that Section 164 is mandatory and the non-compliance thereof would non-suit the plaintiff, provided the suit is covered by Section 164. The learned Counsel for the defendant has placed reliance on the judgment of this Court in the case of Gurudev Developers v. Kurla Konkan Niwas Co-operative Housing Society reported in 1999 (Supp.) Bom.C.R. (O.S.) 257 : 2000(3) Mh.L.J. 131 and a judgment in Suprabhat Co-operative Housing Society Ltd. and Anr. v. Span Builders and Anr. reported in 2002(6) Bom.C.R. 257 : 2002(3) Mh.L.J.837. Section 164 of the Act, provides that no suit can be instituted against a society or any of its officers in respect of any act touching the business of the society until the expiration of two months next after the notice in writing has been delivered to the Registrar stating the cause of action and other particulars. In the present case, the suit has been filed without issuing a prior notice as is contemplated by Section 164 and thus in the facts of the case, if notice under Section 164 had to be issued but had not in fact been so issued, the suit would not be maintainable. According to the plaintiff, at a latter point of time a notice came to be served on 8-2-2007 to the Registrar of the Co-operative Society, with a view to contend that the suit has been filed after a valid notice on the Registrar of the Co-operative Societies. Deletion of defendant No. 4 is asked for with simultaneous prayer for its addition as a party defendant thereafter. In view of the fact that Section 164 is mandatory in nature, the Court is expected to seek compliance of the said

provision, and the Court cannot have recourse to the inherent power, as suggested by the learned Counsel for the plaintiff for circumventing the Section 164. It is a settled position of law, that if a thing cannot be done directly, it cannot be permitted to be done indirectly. Thus as the suit cannot be instituted without prior issuing a notice under Section 164, by allowing the present Chamber Summons, the suit cannot be made tenable. The learned Counsel for the plaintiff has placed reliance on the judgment of the Apex Court in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal reported in 1961 DGLS (soft) 353 : AIR 1962 SC 527 to contend that as the situation emerging in the present suit is not regulated by any other provision of the Code of Civil Procedure, recourse need to be taken to Section 151 of Civil Procedure Code, so that the plaintiff does not suffer irreparable loss and hardship. Inherent powers can be resorted to in furtherance of cause of justice and there cannot be any doubt about that.”

20. Learned Advocate for the respondent/plaintiff strenuously submits that mere contention that the suit touches the business of the society would be an eye wash if it is not demonstrated that the suit indeed touches the business of the society. He vehemently submits that in the instant matter, compliance of Section 164 may not be necessary as the plaintiff has proceeded against the Officers of the society. He further submits that a notice dated 05/10/2015 has

been issued to defendant Nos. 1 to 4. He further states that the claim of the plaintiff is only for damages for the loss of prestige and has nothing to do with the business of the society.

21. In the Satpuda Tapi case (supra), relied upon by the respondent plaintiff, the learned Division Bench of this Court has observed in paragraph Nos.34 to 36 as under :-

“34. No statute can provide for all situations when legislature enacts a law. It may neither be feasible nor comprehensible to legislate a law which could operate as a straight-jacket formula for all classes, situations and stage of proceedings. It is also neither permissible nor proper for the Court to provide a strait-jacket formula regulating exercise of statutory powers. The provisions of Section 9A of the Code are prefaced with a non-obstate clause. These provisions, as applicable in the State of Maharashtra, are required to be enforced in preference to any other provisions contained in the Code and even any other law for the time being in force. When the provisions of Section 9A can be invoked is reflected in the language of the Section itself. In consonance with the law aforesaid in different judgments of this Court, it is essential that an application for injunction or for vacating injunction or grant of such other relief or even an application for setting-aside the orders as spelt out under these provisions, should be pending before the Court. In the proceeding, an objection in regard to the jurisdiction of the Court ought to be taken by the parties who desire to have such issue

determined at the initial stage itself. In that event, the Court is expected to deal with the application by framing a preliminary issue of jurisdiction and after granting the parties an opportunity even to lead evidence to decide such an issue at the first instance and not to defer it for determination along with the suit. Thus, it is obvious that once an application for the relief of injunction, appointment of Court receiver, stay, etc; has been finally decided by the Court in accordance with law, the rigours of Section 9A would lose their significance and statutory application. Thereafter, the test applicable would be that of Order 14, Rule 2 of the Code, where the Court is to form an opinion as to whether along with other issues, the issue relating to the jurisdiction or bar to the maintainability of the suit under any other law should or should not be treated as preliminary issue. Whether it should be decided preferably at the initial stage or along with all issues relating to the merits of the case, is in judicial discretion of the Court. This judicial discretion of the Court is then in no way controlled by the provisions of Section 9A of the Code as the stage indicated by the legislative mandate under Section 9A is over. Similar power obviously could be exercised by the Appellate Court as well. We have already noticed that the consistent view of this Court has been that there is no conflict between the provisions of Section 9A and Order 14, Rule 2 of the Code. On their correct and harmonious interpretation, the said provisions are intended to achieve the same object i.e. expeditious disposal of the preliminary issue relating to the jurisdiction of the Court.

35. The expression "jurisdiction of the Court", in addition to

territorial or pecuniary jurisdiction, will also take in its ambit and scope the cases relating to lack of inherent jurisdiction of the Court. For example, if filing of the suit before the Civil Court is barred by any law for the time being in force and such an objection is taken by the defendant under the provisions of Order 7, Rule 11(d), it will be a question which goes to the very root of Courts jurisdiction to entertain and try the suit and, therefore, it should be decided at the threshold. Such a matter could be determined from the averments made in the plaint and the suit, therefore, would be liable to be dismissed at the very initial stage itself. This, besides being a question of law, goes to the very root of the matter relating to the jurisdiction of the Court. For such a purpose, the Court has to examine the plaint and the documents filed in support of the suit claim. Unlike the provisions of law of procedure, which are normally directory, the provisions of Section 9A are mandatory while the provisions of Order 14, Rule 2 are to be exercised in the judicial discretion of the Court. Thus, Section 9A operates at a particular stage of the proceedings of the suit while the provisions of Order 14, Rule 2 are attracted at any stage of the suit. Such a view would be in fact in conformity with the view taken by the earlier Benches of this Court by applying the principle of harmonious construction to both these provisions.

36. In view of the above discussion, we answer the questions as follows:

- (i) An application for framing of issue relating to jurisdiction of the Court can be filed at any stage of the proceedings in the suit.*

The provisions of Section 9-A of the Code are attracted only when the conditions stated in that provision are satisfied at the time when question of jurisdiction is raised before the Court. Once the stage contemplated under Section 9-A of the Code is over (i.e. the application for interim orders has been decided), then these provisions lose their mandatory character and significance. Whereafter the application for framing an issue relating to jurisdiction and its determination in accordance with law would be controlled by the provisions of Order 14, Rule 2 of the Code.

(ii) However, if an application for grant or vacation of reliefs specified under Section 9-A of the Code has already been decided by the Court of competent jurisdiction, in that event, the proceedings in the suit would be controlled by the provisions of Order 14, Rule 2 of the Code. The formation of opinion and exercise of discretion by the Court cannot be regulated by any strait-jacket formula and essentially it must be left in the discretion of the Court, depending on the facts and circumstances of a given case. The Court will obviously exercise such jurisdiction applying the well accepted canons of civil jurisprudence. In other words and construed objectively, the provisions of Section 9-A are not mandatory and subject to what has been stated above, it may not be necessary for the Court to decide the issue at the threshold. If the application for interim relief is pending, Section 9-A of the Code will operate with - all its rigour and irrespective of the stage of such application.”

22. Mr.Kulkarni, therefore, submits that firstly, if an application for interim orders / relief is pending, Section 9-A would operate with all its rigour, irrespective of the stage in the matter. The plaintiff has not filed an application for interim relief and hence the law laid down in Satpuda Tapi case (supra) would not apply. It is the discretion of the Trial Court, whether to exercise discretion to decide an issue as a preliminary issue or not. Such exercise of discretion cannot be a subject matter of judicial scrutiny by this Court in its supervisory jurisdiction.

23. I find that in the Mohan Meakin case (supra), the learned Division Bench of this Court has concluded that, whether the cause of action touches the business of the society or not is to be considered on the perusal of the contentions and pleadings set out in the plaint. Ex-facie, I do find from the pleadings in the plaint that about 11 to 12 pages are devoted to the immovable property of the plaintiff and the conduct of the society in relation to the loan taken by the son of the plaintiff. I am however refraining from making any observation as to whether the bare reading of the pleadings in the plaint would amount to raising a cause of action touching the business of the society, since it would amount to pre-judging the case and would cause prejudice to the respondent/plaintiff. However,

keeping in view the observations of the learned Division Bench on Section 164 in the Mohan Meakin case (supra) and the conclusion of the learned Single Judge in the Sahara India case (supra), the law is settled that the applicability of Section 164 is mandatory in nature as long as the cause of action touches the business of the society.

24. In the above backdrop, it therefore needs to be considered as to whether the parties should be subjected to the rigours of litigation in leading evidence on 15 issues before the Trial Court or whether both the litigating sides would be benefited, by directing the Trial Court to decide issue Nos.11 and 13 as a preliminary issues. It requires no debate that recording of oral and documentary evidence on all the 15 issues would consume a lot of time of the litigating sides and more importantly of the Trial Court, keeping in view the situation/fact that the Courts of Law are being flooded with litigations. As the applicability of Section 164 is held to be mandatory, a quick decision on the said issue would be indicative of the fact as to whether the suit is tenable or not. If it is held to be untenable, the plaintiff can resort to the available remedies including the compliance of Section 164. In the event the suit is held to be tenable, the litigating sides can then lead evidence on the remaining issues so as to enable the Trial Court to deliver a verdict on the claim made by the plaintiff.

25. In so far as order 14 Rule 2 is concerned, no doubt, it would be the discretion of the Trial Court to decide whether an issue could be advantageously decided peremptorily so that the time of the litigating sides as well as the Court could be saved in the event the suit is held untenable. In the impugned order, I do not find that the Trial Court has adverted to the pleadings of the plaintiff and the factors that have led the plaintiff to file a suit and demand damages. I also do not find whether the Trial Court has considered that Section 164 is a mandatory provision and considering the law laid down in Sahara India case (supra), the Trial Court is expected to seek compliance of the said provision.

26. Considering the above factors in their totality, I find that it would be advantageous to both the litigating sides to have issue Nos.11 and 13 to be tried peremptorily. This would have its own effect of the Trial Court concluding whether the suit is maintainable or not and then can proceed for recording the evidence on the remaining issues.

27. As such, this petition is allowed. The impugned orders dated 30/11/2016 are quashed and set aside and application Exh.27 and

28 are partly allowed. The Trial Court is directed to decide issue Nos. 11 and 13 peremptorily and allow the litigating sides to lead evidence on the said issues. Needless to state, the Trial Court shall decide the said issues on their own merits keeping in view the settled position of law. It be noted that all the contentions of the litigating sides are kept open and the Trial Court shall not be influenced by any observations made by this Court in this judgment.

(Ravindra V.Ghuge, J.)