

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 1932 OF 2014

Anand Dinkar Wagh

..Petitioner.

Vs

Roma Anand Wagh

.. Respondent

Ms.Seema Sarnaik a/w Ameya Tamhane, Advocate for Petitioner.
Mr. Ashok K Goel a/w S Usgaonkar, Advocate for Respondent.

**CORAM : R.G.KETKAR,J.
DATE : 26/04/2017**

PC:

1. Heard Ms.Seema Sarnaik, learned counsel for the petitioner and Mr.Ashok Goel, learned counsel for the respondent at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner-husband has challenged the Judgment and order dated 9.1.2014 passed by the learned Judge, 4th Family Court, Mumbai, below Exhibit-1 in Petition No. A-2718 of 2011 and Petition No. B-93 of 2012. By that order, the learned trial Judge rejected the application made by the petitioner under Section 9A of the Code of civil Procedure, 1908 (for short, C.P.C.) for framing preliminary issue regarding the maintainability of the counter claim set up by the respondent and for dismissing the counter claim with exemplary costs.
3. In support of this petition, Ms. Sarnaik submitted that the petitioner has instituted M.J.Petition No. B-93 of 2012 in the

Family Court at Bandra, Mumbai under Section 7(1)(d) of the Family Courts Act, 1984 (for short, 'Act'), inter-alia, praying for declaration that the petitioner is the sole legal owner having 100% right, title and interest in Flat no.22 at Kalpitam Co-operative Society Ltd, plot no.370, 16th floor, Bandra (W), Mumbai (for short, 'said flat'); for perpetual injunction restraining the respondent from disturbing the peaceful use, possession and occupation of the petitioner of the said flat; for perpetual injunction restraining the respondent from gifting, transferring, alienating in any manner and creating any third party interest with reference to her share in the said flat; for perpetual injunction restraining the respondent from entering into and remaining upon the said flat, for directing the respondent to vacate the said flat, among other prayers.

4. Ms Sarnaik submitted that the respondent filed her written statement as also counter claim in or about May, 2013. She invited my attention to the prayers made in the counter claim. In the counter claim the respondent sought declaration that she is entitled to 50% share in all movable and immovable properties and investments of the petitioner, 50% in 50% share of the petitioner in the said flat, Andheri Flat: flat no. C-11, Lachmi Gobind Apts, J.P.Road, Four Bungalows, Andheri West, Mumbai; Pune flat, Santacruz (W) Flat: Flat no.10, Surakshita, Linking Road Extension, Santacruz (W), Mumbai 400054; among other prayers.

5. Ms. Sarnaik submitted that as far as flat at Andheri is concerned, S.C.Suit No. 171 of 2013 is instituted by brother of the petitioner against the petitioner in the City Civil Court at Dindoshi, Goregaon (Borivali Division), By order dated 22.1.2013, the learned trial Judge issued ad-interim injunction restraining the petitioner from alienating or creating third party interest. In short, she submitted that flat at Andhri is subjudice before a competent civil court.

6. Ms.Sarnaik submitted that as far as flat at Santacruz is concerned, she submitted that MOU was executed on 24.1.2005 and the said flat stands transferred in the name of the petitioner's brother Vinayak Dinkar Wagh on 21.6.2009. She submitted that Vinayak Wagh is not party to the marriage and, therefore, the flat standing in the name of Vinayak cannot be subject matter of proceedings between the parties herein.

7. As far as flat at Pune is concerned, Ms Sarnaik submitted that vague allegations are made without disclosing particulars of the property in Pune. The petitioner does not own any property in Pune. That apart, the Family Court will have no territorial jurisdiction in respect of the property situate in Pune being beyond the territorial jurisdiction.

8. Ms Sarnaik submitted that once the application under section 9A is made, the Court has to frame preliminary issue and permit the parties to lead evidence. Without following this

procedure the learned trial Judge proceeded to reject the application by holding that the counter claim set up by the respondent is maintainable. For all these reasons, she submitted that petition requires consideration.

9. On the other hand, Mr.Goel submitted that the application under section 9A itself is misconceived and is not maintainable. He submitted that when any application for interim relief is made and at the time of hearing of such application for interim relief, objection to jurisdiction is raised, the court has to decide the issue of jurisdiction as a preliminary issue. In the present case, admittedly no application for interim relief is made and, therefore the application under section 9A itself is not maintainable.

10. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Section 9-A of C.P.C. 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, on objection to jurisdiction of the court to entertain such 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 for 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”.

A perusal of Section 9-A extracted herein above shows that if any application for granting any interim relief by way of stay, injunction, appointment of receiver otherwise is made in any suit and objection to jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the court has to determine at the hearing of such application, namely application for interim relief, the issue as to jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief. It is not disputed that in the present case no application for interim relief is made. In view thereof the application under section 9-A is misconceived and is not maintainable.

11. That apart, a perusal of the impugned order shows that the learned trial Judge has observed that the issues raised between the parties require evidence to be led. The parties are permitted to raise issue regarding entitlement of those properties in dispute thereby meaning that at a full-fledged trial the parties are permitted to lead evidence establishing their entitlement.

12. Ms Sarniak submitted that a flat at Santacruz stands in the name of Vinayak, brother of the petitioner and therefore the said flat cannot be subject matter of the proceedings between the

parties as he is not a party to the marriage. In my opinion, the said issue can be gone into at the full-fledged trial. At the threshold, the said issue cannot be decided.

13. As far as the flat at Andheri is concerned, it is no doubt true that it is sub-judice before a competent court. However, that cannot be ground for excluding that property from the counter claim.

14. As far as the property at Pune is concerned, Section 17 of C.P.C provides for filing of a suit for immovable properties situate within the jurisdiction of different courts and lays down that suit may be instituted in any court within the local limits of whose jurisdiction any portion of the property is situate. Admittedly the properties at Andheri and Santacruz are situate within the territorial jurisdiction of the Family Court. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. Hence, Petition fails and the same is dismissed. It is needless to observe that while framing the issues under Order XIV, the Court will consider these aspects. Interim order stands vacated. Order accordingly.

(R.G.KETKAR, J.)