

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 448 OF 2017

Mrs. Swati Bhausahab Londhe
And Ors.

...Petitioners

Versus

Mr. Sadashiv Gajanan Londhe
And Ors.

...Respondents

....

Mr.Surel S. Shah, Advocate for the Petitioners.

Mr. I.M. Khairdi, Advocate for Respondent No.11.

....

CORAM : R. G. KETKAR, J.

DATE : 18th JANUARY, 2017

P.C.

1. Heard Mr.Surel Shah, learned Counsel for the petitioners and Mr. Khairdi, learned Counsel for respondent No.11, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs' have challenged the judgment and order dated 9.8.2016 passed by the learned 3rd Jt. Civil Judge, Senior Division, Kolhapur below Exhibits-96 and 98 in Special Civil Suit No.43/2015. By that order, the learned trial Judge allowed the application

Exhibit-96 made by defendant No.11 and application Exhibit-98 made by defendants No.13 to 16 under Section 9-A of C.P.C. and framed preliminary issue regarding jurisdiction of the Court. The learned trial Judge directed that the preliminary issue may be framed and determined before hearing of the application for temporary injunction and permitted the parties to adduce evidence on that issue.

3. In support of this Petition, Mr.Shah strenuously contended that earlier defendants No.13 to 16 had filed application Exhibit-29 and defendant No.11 filed application at Exhibit-35 under Order VII Rule 11 of C.P.C. *inter alia* contending that the plaintiffs have not paid the requisite stamp duty and, therefore, the plaint is liable to be rejected under Order VII Rule 11(b) of C.P.C. It was also contended that the plaintiffs have instituted suit for partition, declaration and injunction. However, all the joint family properties are not included in the suit as also all co-sharers are not impleaded in the suit. In short, it was contended that the suit for partial partition in the absence of other co-sharers is not maintainable. The suit for partition should include all the joint family properties and that all co-sharers be impleaded in the suit.

4. The learned trial Judge rejected the application. He submitted that after rejecting that application, present applications are filed under Section 9-A. He submitted that once the applications under Order VII Rule 11 of C.P.C. were dismissed, applications under Section 9-A of C.P.C. are not maintainable. He heavily relied upon the decision of this Court in the case of ***Dallah Albaraka Investment Co. Ltd. v. Zinnia Mehernoosh Khajotia and others, 2014(3) Mh.L.J. 683*** and in particular paragraph-31. In paragraph-31, the learned Single Judge of this Court has observed that the application under Order VII Rule 11(d) made after an application under Section 9-A is heard and decided, or even vice versa would stand barred under the principles of constructive res judicata as they relate to the same subject matter being a bar created under the law which is a jurisdictional issue. He further submitted that in any case as observed by the Division Bench of this Court in ***Nusli Neville Wadia v Ferani Hotels Private Limited and others, 2013 (3) BomCR 669***, the Court should not frame preliminary issue under Section 9-A of C.P.C. at the drop of hat. The Court has to hold minimal enquiry before framing the preliminary issue under Section 9-A of C.P.C. In any case, the learned trial

Judge has not considered these aspects while framing issue of limitation. Mr. Khairdi supported the impugned order.

5. I have considered the submissions advanced by Mr. Shah. I have also perused the material on record. It is no doubt true that the defendants had earlier filed applications under Order VII Rule 11 of C.P.C. and that applications were rejected. While rejecting the application, the learned trial Judge has observed in paragraph-27 that the defendants filed documents at Exhibits-88, 93 and 83 to contend that the properties are not included in the subject matter of the suit and all the co-sharers also were not made parties. The learned Single Judge relied upon the decision of Division Bench of this Court in **Shivrudra Shivling Pailwan v Prakash Maharudhra Pailwan, 2002(6) Bom. C.R. 546**. In that case this Court observed that a plaint can be rejected under Order VII Rule 11 only if the plaint on the face of it discloses the same to be barred by any law in force and, not by referring to the materials which are sought to be placed on record by the defendant in answer to the plaint. In case the defendant desirous to refer to any material other than the plaint, certainly such an exercise is permissible by way of

leading evidence, after framing issues and satisfying the Court about non-maintainability of the suit. But the same exercise cannot be done under Order VII, Rule 11(d) of C.P.C.

6. In the present case, the defendants have filed application under Section 9-A of C.P.C. for framing preliminary issue on the ground that the plaintiffs have instituted suit on 23.2.2015 challenging the sale deed executed in the year 2008 and other two sale deeds executed in the year 2013. The subsequent sale deeds were executed on the basis of the sale deed of 2008. The defendants, therefore, contended that basically challenge to the first sale deed of 2008 in a Suit filed in 2015 was barred by limitation. In other words, the subject matter of the applications under Order VII Rule 11 and the subject matter of the present applications was entirely different. That apart, the learned trial Judge referred to the decision of Apex Court in ***Foreshore Co-operative Housing Society Ltd. v. Pravin Desai, (2015) 6 SCC 412*** where the Apex Court has held that the issue of limitation would be an issue of jurisdiction of the Court.

7. The learned trial Judge also referred to paragraphs-28

and 29 of the trial Court's order dated 5.5.2016 rejecting application under Order VII Rule 11 and observed that earlier issue of limitation was not concluded. In fact it was observed that the issue of limitation will be decided at later stage. That does not mean that it should be decided only at the stage of final hearing. The learned trial Judge also considered the distinction between Order VII Rule 11 and Section 9-A in paragraph-17 and held that application under Section 9-A is not barred by principles of resjudicata. In paragraph-21 the learned trial Judge gave reasons for framing preliminary issue under Section 9-A. In my opinion, the learned trial Judge, before framing issue has held minimal enquiry as held by Division Bench of this Court in **Nusli Wadia** (supra).

8. Mr. Shah relied upon the decision of this Court in **Dallah Albaraka Investment Co. Ltd.** (supra) and in particular paragraph-31 which reads thus :

“31. The application under Order 7 Rule 11(d) made after an application under Section is heard and decided, or even vice versa would stand barred under the principles of constructive of res-judicata as they relate to the same subject matter being a bar created under the law which is a jurisdictional issue.”

9. In that case, the defendants took out application under Order VII Rule 11 of C.P.C. for rejecting the plaint as being barred under Section 31 of C.P.C. The major controversy centered around the judgment of the English Court dated 11.12.2009 was given on merits of the case or not. The learned Single Judge of this Court in paragraph-24 held that the said decision was on merits of the plaintiff's claim for want of any defence thereto raised by the defendants and upon the specific express admission of liability and acknowledgment of debt of the deceased which, unchallengeable as it is, was not challenged by the defendants.

10. In paragraph-28 it was observed thus :

“28. It is contended that the claim of the plaintiff is barred by the law of limitation and hence again the application lies under Order 7 Rule 11(d) of the CPC. This contention is frivolous and misconceived. The claim has been considered as a preliminary issue under Section 9-A of the CPC. The suit is seen not to be barred by the law of limitation. That issue cannot be adjudicated in and by way of application under Order 7 Rule 11(d) of the CPC. It is again argued that the cause of action raised in favour of the plaintiff as the creditor upon the death of the deceased and the suit is filed outside the three year period of

limitation therefrom. This issue cannot be re-decided.”

11. Perusal of paragraph-28, extracted hereinabove, shows that earlier preliminary issue under Section 9-A of C.P.C. on the ground of limitation appears to have been framed and it was held that the suit is not barred by limitation. The defendants again filed application under Order VII Rule 11(d) of C.P.C. on the ground that the suit is barred by law of limitation. It is in that context the learned Single Judge observed that the application under Order VII Rule 11(d) of C.P.C. made after an application under Section 9-A is heard and decided, or even vice versa would stand barred under the principles of constructive res judicata ***as they relate to the same subject-matter being a bar created under the law which is a jurisdictional issue.***

12. In the present case, I have already recorded a finding that the applications Exhibits-29 and 35 made earlier were under Order VII Rule 11(b) for rejection of the plaint on the ground that the plaintiffs did not pay requisite stamp duty and that the plaintiffs have not included all the joint family properties in the suit as also did not implead all the co-sharers

in a suit for partition. As against this, by the present application under Section 9-A, the defendants have contended that the suit is barred by law of limitation. In other words, the subject matter of the earlier applications and the present application were entirely different. In view thereof, reliance placed by Mr. Shah on the decision of ***Dallah Albaraka Investment Co. Ltd.*** (supra) does not advance the case of the plaintiff.

13. In view thereof, I do not find any reason to interfere with the impugned order. It is, however, necessary to consider clause (2) of the operative part of the order which reads thus :

“2. The preliminary issue regarding jurisdiction of the court vide Section 9-A be framed and determined before hearing of the application temporary injunction.”

14. 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 (sic) 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"

15. It is clarified that while hearing the application for interim relief, the learned trial Judge will also consider the jurisdiction. This will however not preclude the learned trial Judge to consider granting of relief in terms of Section 9-A of C.P.C.. Subject to this, petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Deshmane (PS)