

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

**APPEAL FROM ORDER NO.35 OF 2017
WITH
CIVIL APPLICATION NO.46 OF 2017
IN
APPEAL FROM ORDER NO.35 OF 2017**

Mr.Dilipbhai B. Bhagat & Anr. ..Appellants/Applicants
V/s.
Mr.Yogesh M. Kundalia & Anr. ..Respondents

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Mr.Dilipbhai B. Bhagat & Anr. ..Appellants/Applicants
V/s.
Mr.Asit M. Kundalia & Anr. ..Respondents

Mr.Sandesh Shukla a/w Mr.Amit Singh and Ms.Prerana Patil i/by
Mr.Santosh Sawant for the Appellants/Applicants.

Mr.J.S. Kini i/b Mr.Suresh Dubey for Respondent No.1.

Ms.M.M. More for the Respondent No.2-MCGM.

CORAM : M. S. SONAK, J.

DATE : 22 MARCH 2017

P.C.

1. Heard Mr.Sandesh Shukla for the appellant, Mr.J.S. Kini
for respondent No.1 and Ms.Madhuri More for respondent No.2

Municipal Corporation of Greater Mumbai (MCGM).

2. With the consent and at the request of the learned counsel for the parties, these appeals are disposed of finally at the stage of admission itself.

3. Mr.Shukla, learned counsel for the appellants submits that in this case, the appellants who are defendant Nos.2 and 3 in the suits before the learned Trial Judge had raised an issue of the maintainability of the suits. He submits that even the MCGM, which has been impleaded as defendant in the suit has raised the issue of maintainability of the suit. Mr.Shukla submits that in terms of Section 9A of C.P.C., the learned Trial Judge was bound to frame a preliminary issue and dispose of the same as expeditiously as possible. In this case, no such preliminary issue has been framed and instead, interim relief has been granted to the plaintiffs. Mr.Shukla submits that on this ground itself, the impugned order is liable to be set aside. He submits that even on merits, since the building is in a dilapidated condition, there is no case made out by the plaintiff, for grant of any interim relief.

4. Mr.Kini, learned counsel for the original plaintiffs in

both the suits submit that the appellants, in their written statement, have not raised any objection to the jurisdiction of the learned Trial Judge. Such objection, may have been raised by the MCGM, but the MCGM, has not appealed against the impugned order. That apart, Mr.Kini submits that, the learned Trial Judge has taken into consideration the material on record and has exercised discretion fairly and reasonably in protecting the plaintiffs with an order for interim relief. On this ground, Mr.Kini submits that this Court may not interfere with the impugned order.

5. Ms.More, the learned counsel for the MCGM submits that the MCGM has clearly raised an issue of jurisdiction by invoking the provisions of Section 515A of the Mumbai Municipal Corporation Act, 1888 (said Act). She submits that the learned Trial Judge, was required to comply with the provisions contained in Section 9A of the C.P.C. Ms.More, accordingly supports the contentions raised by Mr.Shukla in these appeals.

6. Although, Mr.Kini, the learned counsel for the plaintiffs in the suit is right that the appellant herein may not have raised the issue of jurisdiction, nevertheless, upon perusal of the impugned order, it does appear that such an issue was raised in the course of

arguments. Raising of such issue in the course of the arguments may or may not be sufficient. However, it is not necessary to decide such issue at this stage since, admittedly, the MCGM, in its written statement has specifically raised the issue of jurisdiction by invoking provisions of Section 515A of the said Act.

7. At this stage, it is not necessary to go into the issue as to whether there is any merit in the preliminary issue raised by any of the parties. However, in a case where at the stage of hearing of an application in relation to the suit, objection to the jurisdiction is raised, then, in Section 9A of the C.P.C. such issue is required to be framed and decided by the Court as a preliminary issue. No doubt, in terms of Section 9A(2) of the C.P.C., the Trial Judge, at the hearing of any such application seeking interim relief, may grant such interim relief as it may consider necessary, pending the determination by it of the preliminary issue as to the jurisdiction. Therefore, the submissions of Mr.Shukla, that the impugned orders are without jurisdiction cannot be accepted at this stage.

8. The proper course of action to be adopted in this case will therefore, be that the Trial Judge be directed to frame preliminary issue of jurisdiction in terms of Section 9A and dispose

of the same on its own merits and in accordance with law, as expeditiously as possible. In the meanwhile, the orders which are impugned in this appeal, will have to be regarded as an order made in exercise of the powers conferred upon the Court under Section 9A(2) of the C.P.C.

9. Accordingly, these appeals are disposed of with the following directions:-

- (a) The Trial Court is directed to frame preliminary issue in terms of Section 9A(1) of the C.P.C. on the basis of the objection raised by MCGM in its written statement;
- (b) The Trial Court shall hear and decide the preliminary issue in accordance with law and on its own merits as expeditiously as possible;
- (c) The orders impugned in this appeal shall be treated as orders made by the Trial Judge under Section 9A(2) of C.P.C;
- (d) All contentions of all parties are left open to be determined by the learned Trial Judge in each of the suits.

10. It is made clear that this Court has not expressed any opinion on the merits of the matter.

11. The Appeals stand disposed of in the aforesaid terms. In view of the disposal of the Appeal, the Civil Application does not survive and the same is also disposed of.

(M. S. SONAK, J.)