

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.12607 OF 2017

NIRMAL SEEDS PVT LTD THROUGH ITS POWER OF ATTORNEY
HALAKUDE
VERSUS
YASHODA HYBRID SEEDS PVT LTD WARDHA AND OTHERS

WITH
WRIT PETITION NO.14076 OF 2017

WITH
CIVIL APPLICATION NO.9809 OF 2018
IN
WRIT PETITION NO.14076 OF 2017

YASHODA HYBRID SEEDS PVT LTD WARDHA AND OTHERS
VERSUS
NIRMAL SEEDS PVT LTD THROUGH ITS POWER OF ATTORNEY

...

Advocate for the Petitioner in WP No.12607/2017 and for the Respondent
in WP No.14076/2017 : Shri Bhide Vinod Y.

Advocate for the Petitioner in WP No.14076/2017 and for the Respondent
in WP 12607/2017 : Shri Ramesh R. Mantri.

...

CORAM: RAVINDRA V. GHUGE, J.

DATE :- 12th December, 2018

Per Court:

1 Both these writ petitions are between the same litigating sides
and pertaining to the same Regular Civil Suit No.3/2017.

2 In the first Writ Petition No.12607/2017 filed by the original

Plaintiff, the grievance is against the order dated 18.09.2017 by which, the Trial Court has allowed the application Exhibit 38 filed by the Defendant praying for framing of an issue under Section 9A (Maharashtra Amendment) of the Code of Civil Procedure so as to include whether, the court would have territorial jurisdiction to try and decide the suit.

3 In the second Writ Petition No.14076/2017 filed by the original Defendant, the grievance is that the application for appointment of a court commissioner and for directing the Plaintiff to lead evidence on the point of territorial jurisdiction, has been allowed. The Plaintiff is given an opportunity to lead evidence on the issue framed under Section 9A. The grievance of the Defendant is that the application Exhibit 8, which was filed by the Plaintiff praying for referring the seeds sample to an expert, was posted for hearing, independent of the evidence to be led on the section 9A issue. It is stated that Exhibit 8 was filed by the Plaintiff for putting forth a request of collecting sample of seeds from the shopkeeper/ agency and referring it to the expert. The shopkeeper had entered the written statement showing his willingness to handover the sample. It was also stated that the said sample would be protected.

4 Both these petitions could have been considered on their merit, but for the introduction of the Maharashtra Ordinance No.XVIII of 2018 on 27.06.2018 by which, Section 9A (Maharashtra Amendment) was deleted and all issues framed under Section 9A were deemed to be treated

as issues under Order 14 Rule 2 of the Code of Civil Procedure to be considered along with all other issues.

5 The original Defendant has entered Civil Application No.9809/2018 in the second writ petition filed by him, seeking leave to amend the prayers in the writ petition and add the prayers for posing a challenge to the said Maharashtra Ordinance. It was prayed that clause 3(1) of the said Ordinance be declared as unconstitutional and be struck down. An oral prayer is made that, if the Civil Application is allowed, the second petition would lie before the learned Division Bench of this Court so as to entertain the challenge to the constitutional validity of clause 3(1) of the said Ordinance.

6 The contention on the Civil Application is that clause 3(1) of the said Ordinance curtails the jurisdiction of the trial court or the appellate court, which is empowered to entertain the objections under Section 9A. The competent court can deal with the objections under Section 9A at a preliminary stage and without taking up the said issue along with the other issues. As such, the power vested in the Civil Court under Order 14 Rule 2 has been practically taken away and a mandate is created by the said Ordinance that the said power would be curtailed into entertaining of all issues together under Order 14 Rule 2. No ordinance can take away the powers of the court as are enshrined under the original enactment.

7 In view of the above, I find that the Civil Application needs to be dealt with first since the conclusion on the Civil Application would have an impact on the pending writ petitions.

8 The statement of reasons for introducing the Ordinance of 2018 is available for assistance. The said statement reads thus :-

"STATEMENT.

Section 9A was inserted in the Code of Civil Procedure, 1908 (5 of 1908), in its application to the State of Maharashtra, by the Code of Civil Procedure (Maharashtra Amendment) Act, 1970 (Mah. XXV of 1970), with a view to undo the effect of a judgment of High Court delivered in the case of Institute Indo-Portuguese v. Borges [(1958) 60 Bom. L.R. 660].

At the time, when a suit was filed against the Government in the Bombay City Civil Court without a valid notice being issued under section 80 of the Code, the Court would, without going into the question of jurisdiction, grant an ad-interim injunction and an adjournment to the Plaintiff. This would enable the Plaintiff to issue a notice to the Government. After the expiry of the period of the notice, the Plaintiff would then withdraw the suit with liberty to file a fresh one and in the freshly filed suit seek continuation of the ad-interim injunction granted earlier.

It was, therefore, felt that the practice of granting injunctions, without going into the question of jurisdiction even though raised, was leading to grave abuse. It was against the backdrop that section 9A was introduced into the Code.

2. *In 1976, the said Code has been extensively amended by the Code of Civil Procedure (Amendment) Act, 1976 (CIV of 1976), enacted by the Parliament. Therefore, to leave no room for any doubt whether the State amendments continued to be in force or stood repealed, the Maharashtra Amendment Act of 1970 was repealed and again section 9A is re-enacted by the Code of Civil Procedure (Maharashtra Amendment) Act, 1977 (Mah.*

LXV of 1977).

3. However, today, section 9A has become a cumbersome and tedious provision which has contributed to judicial backlog and given rise to several complications. It has been held, in *Meher Sing vs. Deepak Sawhny* [(1998) 3 Mh.LJ. 940], that where an issue of jurisdiction involves a mixed question of fact and law, parties must be given an opportunity to lead evidence. It has been held, in *Foreshore Co-operative Housing Society vs. Praveen D. Desai* [(2015) 6 SCC 412] and *Sandeep Gopal Raheja vs. Sonali Nimisha Arora* [(2016) SCC On Line Bom. 9378], that section 9A is mandatory in nature, that where the defendant raises an objection to the jurisdiction of the Court, the court has no discretion and is bound to frame an issue and decide it. It has been held, in *Mukund Ltd. v. Mumbai International Airport* ((2011) 2 Mah. LJ 936), that even a defendant cannot, as a matter of litigation strategy, decide not to press its jurisdictional objection at the hearing of the interim application. The question of whether section 9A includes a plea by the defendant that the suit is barred by the law of limitation is a vexed one, which has been referred to a larger Bench of the Supreme Court in *Jagdish Shyamrao Thorve v. Shri Mohan Sitaram Dravid*, SLP (C) 22438/2015, by virtue of an order dated the 17th August 2015.

Consequently, section 9A of the said Code has given rise to at least two judicial bottlenecks which have stymied the speedy disposal of cases. Firstly, when an issue is raised under section 9A of the said Code, a court cannot dispose a motion until the trial into such an issue is concluded and the issue is finally decided. The motion consequently remains pending for several years, and ad-interim relief masquerades virtually as final relief. Secondly, when such an issue is raised, two trials have to be conducted, viz., one on the preliminary issue and the other on the remaining issues, each subject to its own round of appeals and Special Leave Petitions. All this needlessly burdens the Court with duplication and results in a waste of judicial time and resources. In fact, in *Madhuriben K. Mehta vs. Ashwin Rupsi Nandu* ((2012) 5 Bom. CR 27), the Bombay High Court took the view that section 9A has led to the “abuse of duplication of

work by repeated applications which has become an endemically circuitous practice.”.

4. It is, therefore, considered expedient to amend the Code of Civil Procedure, 1908, in its application to the State of Maharashtra, by deleting the said section 9A.
5. An opportunity is also being taken to provide for the effect and consequences of the deletion of section 9A on the proceedings pending in the Courts on the date of commencement of the proposed Ordinance. It is proposed to provide for,—
 - (a) the pending preliminary issue to be decided at the time of final decision of the suit itself, along with other issues framed under Order XIV of the Code of Civil Procedure, 1908, including consideration of evidence already led in that regard;
 - (b) abetment of the revisions pending before revisional forum against the decision of the Trial Court holding that it has jurisdiction to entertain the suit so as to ensure the speedy and final disposal of the suit itself, while keeping alive the right of the defendant to challenge the finding on the issue of jurisdiction at the appellate stage, in case if the suit is finally decreed;
 - (c) continuation of appeals pending before Appellate Court against the decision of the Trial Court holding that it has no jurisdiction to entertain the suit, as if section 9A has not been deleted, as in such cases the suit itself has been dismissed finally; and
 - (d) providing that an ad-interim relief granted under sub-section (2) of section 9A prior to its deletion to be treated as an ad-interim order in the interim application made under Order XXXIX of the Code of Civil Procedure, 1908, which may be confirmed or vacated at the final hearing of the interim application.
6. As both Houses of the State Legislature are not in session and the Governor of Maharashtra is satisfied that circumstances exist which render it necessary for him to take immediate action further to amend the Code of Civil Procedure, 1908 (V of 1908), in its application to the State of Maharashtra, for the purposes aforesaid, this Ordinance is promulgated. "

9 The statement would, therefore, indicate that Section 9A was utilized extensively to cause misuse rather than being in aid to the legal system. By the excessive misuse of Section 9A, the litigation became cumbersome and tedious and this contributed to increasing judicial backlog. Paragraph 3 of the statement would indicate that judicial pronouncements of the Honourable Supreme Court were taken into account wherein, the Honourable Supreme Court concluded that as Section 9A is practically mandatory in nature, an issue has to be cast the moment the defendant raises an objection under Section 9A. No discretion was left with the civil court to decide whether, the issue could be framed or not and as such, the defendants were more prone to misuse Section 9A. The matter was referred to the Larger Bench of the Honourable Supreme Court in *Jagdish Shyamrao Thorve vs. Mohan Sitaram Dravid, SLP (C) No.22438/2015* by order dated 17.08.2015. It was thus, concluded that Section 9A has created at least two judicial bottlenecks which stymied the progress of litigation, resulted in delaying the litigation and also resulted in multiplicity since several round of litigations emerged from the orders passed on Section 9A by treating the issue as a preliminary issue. It was in this backdrop that the Ordinance of 2018 was introduced.

10 Insofar as the jurisdiction of this Court is concerned, I do not find that the request made by the original Defendant could be entertained in these petitions while dealing with the legality of the impugned orders.

Even otherwise, the objections raised by the Defendant under Section 9A would now be constructed as objections under Order 14 Rule 2 and the said objections would be considered to assess whether, the trial court has territorial jurisdiction to entertain the suit.

11 In view of the above, Civil Application No.9809/2018 filed by the Defendant is rejected. Nevertheless, if the Defendant intends to approach the learned Division Bench by lodging the appropriate proceedings, the law would not create any impediment.

12 Considering the effect of the Ordinance of 2018, the first Writ Petition No.12607/2017 filed by the original Plaintiff deserves to be disposed of as the issue as regards the territorial jurisdiction framed by the Trial Court would now be considered as an issue under Order 14 Rule 2 and the parties can, therefore, lead evidence when the trial court deals with all the issues together. As such, Writ Petition No.12607/2017 is, accordingly, disposed of.

13 Consequently, the second Writ Petition No.14076/2017 filed by the original Defendant, need not be entertained as the Trial Court would now consider the issue of territorial jurisdiction along with other issues in view of the Ordinance of 2018. As such, Writ Petition No.14076/2017 is also disposed of.

14 As I find that an issue as regards the Protection of Plant Varieties and Farmers Rights Act, 2001 is involved in the pending suit,

which has been lodged in June, 2017, the litigating sides are at liberty to request the Trial Court to expedite the hearing of the suit so as to have the adjudication of the said suit expeditiously.

kps

(RAVINDRA V. GHUGE, J.)