

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 11634 OF 2017

Nirmal Seeds Pvt. Limited

...Petitioner

versus

The Maharashtra State Seeds Corporation Ltd,
and others

...Respondents

.....
Mr. V.Y. Bhide, advocate for the petitioner
Mrs. Anjali Dubey, advocate for respondent Nos. 1 to 4
Mr. K.N. Shermale, advocate for respondent No.5
.....

CORAM : V. K. JADHAV, J.

**Date of Reserving
the Order : 23.01.2018**

**Date of pronouncing
the Order: 30.01.2018**

PER COURT :-

1. By consent of the parties, heard finally at admission stage.
2. Being aggrieved by the order dated 07.08.2017 passed by the learned District Judge-6, Jalgaon below Exh.26 in Regular Civil Suit No. 2 of 2017 the original plaintiff has preferred this writ petition.
 - a) The petitioner-plaintiff is a registered company, instituted suit for relief of declaration of infringement of the plaintiff's rights

recognized and established under the provisions of The Protection of Plant Varieties and Farmer's Rights Act 2001 (hereinafter for short referred to as "the Act of 2001") by the respondents-defendants jointly and severally and also for consequential reliefs like injunction and damages. It is further specific contention of the petitioner-plaintiff that by virtue of certificate of registration bearing No. 170 of 2015 dated 23.06.2015 issued under the provisions of the Act of 2001, the petitioner-plaintiff is the breeder of Green Gram Seeds Variety developed by it and it is registered with denomination 'Naval (NVL-1)' as an extent variety under the provisions of Section 24 of the Act of 2001. The said registration is in force and thereby the petitioner-plaintiff has acquired and perfected certain rights as a registered breeder of such variety. It is further case of the petitioner-plaintiff that the respondents-defendants have jointly and severally infringed the plaintiff's valuable personal and statutory rights in aforesaid reference and as such the petitioner-plaintiff constrained to institute the suit for relief, as detailed above.

b) Pending the suit, the respondents-defendant Nos. 1 to 4 filed an application Exh.26 under Section 9-A of Code of Civil Procedure raising objection to the territorial jurisdiction of the Court and thus, prayed in the said application to frame the issue regarding jurisdiction and it be treated as a preliminary issue and the said issue be decided

prior to deciding an application for interim relief in the form of temporary injunction.

c) The petitioner-plaintiff has strongly resisted the said application by filing its say. The learned District Judge, Jalgaon by the impugned order dated 7.8.2017, allowed the said application Exh.26 and framed preliminary issue with regard to the jurisdiction of the Court. Hence, this writ petition.

3. Learned counsel for the petitioner-plaintiff submits that the respondents-defendant Nos. 1 to 4, initially filed an application Exh.16 thereby raising objection to the maintainability of the suit under Order VII Rule 11 r.w. Section 80 of C.P.C. for rejection of plaint. The petitioner-plaintiff has strongly resisted the application Exh.16 and the trial court by order dated 12.07.2017 rejected the said application. Learned counsel submits that the respondents-defendant Nos. 1 to 4 could have challenged the maintainability of suit for want of territorial jurisdiction of the Court, at the time of filing of application Exh.16, however, after rejection of application Exh.16, preferred another application Exh.26 for framing preliminary issue of jurisdiction, which is hit by the principle of constructive *resjudicata*.

4. Learned counsel for the petitioner-original plaintiff submits

that the term “infringement” is defined under Section 64 of the Act of 2001 and in terms of the provisions of Section 65(1) and (2) of the Act of 2001, “District Court having jurisdiction” shall mean the District Court within the local limits of whose jurisdiction the cause of action arises. Learned counsel submits that there is specific pleading of the petitioner-plaintiff with regard to cause of action and jurisdiction in para 10 and 11 of the plaint, respectively, to the effect that the respondent-defendant No.5 is selling the seeds claimed to be produced and marketed by defendant No.1 company at its shop at Jalgaon, which amounts to infringement as defined under the provisions of Section 64 of the Act of 2001 and as such, as the part of cause of action has arisen within the jurisdiction of District Court, Jalgaon, and thus, in terms of provisions of sub-section (2) of Section 65 the District Court Jalgaon gets territorial jurisdiction to entertain the suit. Learned counsel submits that in terms of provisions of Section 65 r.w. Section 64 of the Act of 2001, as referred above, the application Exh.26 filed by the respondents-defendant Nos. 1 to 4 is misconceived and wholly irrelevant.

5. Learned counsel for the petitioner in order to substantiate his submissions, placed reliance on the following cases:-

i) Shekhar Harchand Indra vs. Sangeeta Shekhar Indra,

reported in 2012 (4) Mh.L.J. 461,

- ii) Rajendra Singh Airen vs. Mahendra Singh Airen and others, reported in 2005 (Suppl.1) Bom.C.R. 860,
- iii) Manoj s/o Ishwarlal Sharma vs. Riti @ Archana w/o Manoj Sharma, reported in 2017 (1) All MR 508,
- iv) Rite Choice Trading Company vs. Vikram Govind Rao and Ors. reported in 2013 (6) All MR 251,
- v) Dallah Albaraka Investment Co. Ltd. vs. Zinnia Mehernoosh Khajotia and others, reported in 2014 (3) ALL MR 85.

6. Learned counsel for the respondents-defendant Nos. 1 to 4 submits that the respondent-defendant No.1 is Government undertaking Corporation having 49% shares of the Government and started its research and development being "Mahabeej" in the year 1992 with an object to develop and provide the quality seeds of best genotypes in the economically important crops to the farming community at an affordable rates and admittedly the said Research and Development is being established at Akola which is the Head Office of the defendant-Corporation. The respondents-defendants Corporation has developed the variety "Utkarsha" through pure line breeding process at Akola. The variety "Utkarsha" is also registered with the Central Government Institute i.e. National Bureau of Plant Genetic Resources, New Delhi vide IC 599680 on 26.4.2014 and this

variety is in Mahabeej distribution chain since 2005. Learned counsel submits that therefore, Jalgaon District is having no concern with the development of variety "Utkarsha" and said variety "Utkarsha" developed solely at Akola, Tq. and District Akola in Maharashtra State and only the district Court at Akola is having jurisdiction to entertain this type of dispute regarding variety "Utkarsha". The District Court, Jalgaon is having no jurisdiction to entertain and try the dispute. The learned counsel submits that once the issue of jurisdiction is raised under the provisions of Section 9-A of C.P.C. the Court is under obligation to decide that issue before deciding the application seeking interim relief.

7. Learned counsel for the respondents submits that the application Exh.16 came to be filed under the provisions of Order VII Rule 11 of C.P.C. for rejection of plaint on the sole ground of non-serving of notice on defendant Nos. 1 and 2 under Section 80 of C.P.C. before institution of suit. The application Exh.26 came to be filed under Section 9-A of the C.P.C. for framing of preliminary issue about jurisdiction of the Court and as such, the principle of constructive resjudicata does not arise for consideration.

Learned counsel for the respondents-defendant Nos. 1 to 4 in order to substantiate her submissions, placed reliance on the

following cases.

- i) Meher Singh vs. Deepak Sawhny and another, reported in 1998 (3) Mh.L.J. 940,
- ii) Foreshore Co-operative Housing Society Ltd. vs. Praveen D. Desai (Dead) through L.Rs. and others, reported in 2015 AIR (SC) 2006
- iii) Mukud Ltd. vs. Mumbai International Airport and Ors. reported in 2011 (2) ALL MR 510
- iv) Prakash Manohar Senad and others vs. Varsha Sharad Parwekar and Anr. reported in 2016 (1) Mh.L.J. 635
- v) Chandra Prem Shah and others vs. R. Reheja Universal Pvt. Ltd. and Anr. reported in 2015 (5) Mh.L.J. 714
- vi) ICICI Limited, Mumbai vs. Sri Durga Bansal Fertilizers Ltd. and others, reported in 1999 (3) Mh.L.J. 20,

8. I have also heard the learned counsel for respondent No.5.

9. I have carefully considered the submissions of learned counsel for respective parties and with their able assistance, I have perused the grounds taken in the petition and annexures thereto. I find no substance in the submission made on behalf of the petitioner

that application Exh.26 is hit by the principles of constructive resjudicata. The application Exh.16 came to be filed for non-compliance of the provisions of Section 80 of C.P.C. and in consequence thereto for rejection of plaint on that sole ground whereas application Exh.26 was filed for framing preliminary issue of jurisdiction under Section 9-A of C.P.C.

10. In the case of ***Dallah Albaraka Investment Co. Ltd. (supra)*** relied upon by learned counsel of the petitioner, the application under Order VII Rule 11 (d) made after an application under Section 9-A is heard and decided, this court has observed that in such eventuality or even vice versa, the later application would stand barred under the principles of constructive resjudicata as they relate to the same subject matter being a bar created under law which is a jurisdictional issue. In the instant case, I do not find that the subject matter of both the applications is same so as to attract the bar of constructive resjudicata.

11. The petitioner-plaintiff has specifically pleaded in para 2 of the plaint that respondent-defendant No.1 is a company registered under the provisions of Companies Act 1956, represents through its directors and the names and addresses of defendant No.1 and its directions are mentioned in the cause title of the suit as permitted by

the Registrar of Companies and respondents-defendant Nos. 2 to 4 jointly and severally looking after the day to day business of defendant No.1 company, not only but including all activities relating to development, production, storage, supply, import, export, marketing and sales of various varieties of Seeds all over India. In para 6 of the plaint, it has been stated that the petitioner company in the month of June, 2016 purchased the "Utkarsha" Seeds claimed to be produced and marketed by respondent-defendant No.1 company so as to carry out the scientific analysis of those seeds and to verify and establish as to whether it is genetically and phenotypically the same variety registered with denomination "'Naval" (NVL-1)' in its name under the provisions of the Act of 2001 as the breeder. According to the plaintiff, after conducting the DUS (Distinctness, Uniformity and Stability) test, it was revealed that all morphological and distinguishing character of Utkarsha variety of the defendants are exactly the same to that of 'Naval (NVL-1)' of the plaintiff company. On this backdrop of pleadings, it is further case of the petitioner-plaintiff that the respondent-defendant No.5, who is a dealer, selling of variety of Utkarsha Seeds at Jalgaon and thus, the district Court Jalgaon is having jurisdiction to entertain and decide the suit filed under the provisions of the Act of 2001.

12. In the backdrop of these pleadings, the respondents

defendants have filed an application Exh.26 for framing preliminary issue of jurisdiction and since the trial court has allowed the said application Exh.26, it is for the trial court to decide the said issue after giving due regard to the provisions of Sections 64 and 65 of the Act of 2001, respectively.

13. It is well settled that once the question about territorial jurisdiction is raised on an application under Section 9-A of C.P.C. the proper procedure is to follow to finally decide the said question by giving an opportunity to the parties and such course would avoid the multiplicity of the proceedings. The provisions of Section 9-A of C.P.C. are of imperative nature and are mandatory. Once the issue of jurisdiction is raised at the time of hearing of application for grant of interim relief, the court is under obligation to decide that issue as preliminary issue, before deciding the question of interim relief. It is also well settled that Section 9-A (Maharashtra amendment) provides self contained scheme and its non obstante clause must prevail.

14. In the case of ***Shekhar Harchand Indra (supra)*** relied upon by learned counsel for the petitioner, this Court has considered earlier four judgments rendered on the issue of territorial jurisdiction, raised as a preliminary issue under Section 9-A and also referred the ratio laid down in those four cases that in terms of provisions of

Section 9-A of C.P.C. then the court shall frame that issue and hear it as preliminary issue before proceeding the matter and essence of provisions of Section 9-A that it should be decided as a preliminary issue is to be decided at the threshold before the court proceeds with any other issue. In the above cited case, this court has accepted the findings given in those four judgments in respect of provisions of Section 9-A of C.P.C. However, in terms of the amendment in Section 31(1) (iii-a) of the Special Marriage Act 1954, it is held that four judgments referred above, do not help the petitioner husband in the said case. In the instant case, the issue is altogether different and the aforesaid case cannot be made applicable to the facts and circumstances of the present case. Further, this Court in the aforesaid cited case has not laid down any binding ratio and simply made observations in terms of amended provision of Special Marriage Act 1954, as detailed above.

15. In other cases, as referred by the learned counsel for the petitioner, this court had an occasion to consider the issue after deciding the application under Section 9-A of C.P.C. by the trial court.

16. In the case of **Meher Singh vs. Deepak Sawhny and another (supra)**, relied upon by learned counsel for respondent Nos. 1 to 4 though reference has been made to the Larger Bench for

determination whether while deciding the preliminary issue of jurisdiction as contemplated under Section 9-A of the of C.P.C. the parties are required to be given an opportunity to lead evidence, in para 13 of the judgment, the Larger Bench has made the following observations:-

“13. In the result we hold that if section 9-A is not added, then at interim stage, the Court is not required to decide the issue of jurisdiction finally and the Court by referring to the averments made in the plaint, would ordinarily determine whether or not the Court has jurisdiction to try the suit. However, it is apparent that section 9-A is added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. According to the Legislature, the practice of granting injunctions, without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication. Adjudication would require giving of opportunity to the parties to lead evidence, if required.”

17. Similarly, in the case of ***Foreshore Co-operative Housing Society Ltd. vs. Praveen D. Desai (Dead) through L.Rs. and others, (supra)***, relied upon by learned counsel for respondent Nos. 1 to 4, in para 57 and 58 the Division Bench of this Court has made the following observations:-

“57. At the cost of repetition, we observe that Section 9A provides a self-contained scheme with a non-obstante clause which mandates the court to follow the provision. It is a complete departure from the provisions contained in Order XIV Rule 2 CPC. In other words, the non-obstante clause inserted by Maharashtra Amendment Act of 1977 in Section 9A and the express mandate of the Section, the intention of the law is to decide the issue relating to jurisdiction of the court as a preliminary issue notwithstanding the provision contained in Order XIV Rule 2 CPC. However, it is made clear that in other cases where the suits are governed by the provisions of Order XIV Rule 2 CPC, it is the discretion of the court to decide the issue based on law as preliminary issue.

58. We, therefore, after giving our anxious consideration to the provisions of Code of Civil Procedure together with the amendments introduced by the State Legislature, hold that the provision of Section 9A as introduced by (Maharashtra Amendment) Act is mandatory in nature. It is a complete departure from the provisions of Order XIV, Rule 2, C.P.C. Hence, the reasons given by the High Court in the impugned orders are fully justified. We affirm the impugned orders passed by the High Court.”

18. In the case of **Mukud Ltd. vs. Mumbai International Airport and Ors. (supra)** relied upon by learned counsel for the respondent Nos. 1 to 4, the Division Bench of this Court in para 13 of the judgment made the following observations:-

“13. The principle that emerges is that the provisions of Section 9A are of an imperative nature and are mandatory. Once an issue of

jurisdiction is raised at the hearing of an application for the grant of interim relief or for setting aside an order granting interim relief, the Court is under an obligation to decide that issue as a preliminary issue before deciding the question of interim relief.

Section 9A is prefaced by a non obstante provision. The first part of Section 9A refers to the stage at which the objection is taken; the stage being at the hearing of an application for granting or setting aside an order granting interim relief. The second part of the provision elucidates the nature of the objection; the objection being to the jurisdiction of the Court to entertain a suit. Once such an objection to the jurisdiction of the Court to entertain a suit is taken by a party to the suit, the Court has to proceed to determine the issue of jurisdiction at the hearing of the application as a preliminary issue. The determination of the issue cannot be postponed to the trial of the suit and the issue of jurisdiction has to be decided before granting or setting aside an order granting interim relief. The mandatory nature of the provision was emphasized in a judgment of a Division Bench of this Court in Royal Palms (India) Pvt. Ltd. vs. Bharat Shantilal Shah, 2009 (2) Bom.C.R. 622. In that case, at the hearing of a motion for interim relief, the Defendant opposed the motion on the ground that the suit was barred by limitation. The Learned Single Judge despite the objection to the jurisdiction of the Court, ignored the provisions of Section 9A and proceeded to make an interim order without framing a preliminary issue. The Division Bench while holding that the procedure adopted by the Learned Single Judge was contrary to Section 9A held as follows:

"Perusal of provisions of section 9A of C.P.C. quoted above makes it clear that whenever there is an application for grant of temporary injunction or appointment of Receiver is sought before any Court and an objection to the jurisdiction of the Court to entertain the suit in which the application for such interim relief has been made by any of the parties, then it becomes the duty of the Court to first frame the preliminary issue as to the jurisdiction of the Court to entertain the suit and decide that

issue and thereafter take up for consideration the application for interim relief."

The Division Bench held that the question as to whether a suit is barred by limitation was an objection to the jurisdiction of the Court for the purpose of Section 9A and followed the earlier decision in Foreshore Co-operative Society 2008 (6) All MR 600. Elaborating on the provisions of Section 9A, the Division Bench observed as follows:

"When an objection to the jurisdiction of the Court to entertain the suits as the suits are barred by the law of limitation is raised, at the hearing of notices of motion wherein interim order is claimed, the Court is obliged by provisions of section 9-A of C.P.C. to frame preliminary issue as to the ground raised to the jurisdiction of the Court to entertain the suits and proceed to decide that preliminary issue and it is only on decision of that preliminary issue, that the notices of motion can be taken up for final decision."

19. In view of above discussion, I do not find any fault in the impugned order passed by the trial court. Hence, the following order:-

O R D E R

Writ petition is hereby dismissed. No costs.

(V. K. JADHAV, J.)