

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

**CIVIL APPLICATION NO.208 OF 2018
IN
FAMILY COURT APPEAL NO.19 OF 2016**

Anupama Sharma : Applicant.

In the matter between

Ms. Anupama Sharma : Appellant.

Versus

Vikram Kamal Jagtiani : Respondent.

Mr. Shariq Nachan I/by Bhawe and Co. for the Applicant/Appellant.

Mr. Ranvir Shekhawat a/w Mr. Jagdish Choudhary I/by RAJ Legal for the Respondent.

**CORAM : R. M. SAVANT &
SANDEEP K SHINDE, JJ.**

DATE : 25th OCTOBER 2018

P.C. (In Chamber at 2.45 p.m.)

1 The above Civil Application has been filed seeking a relief by way of clarification that on account of the Ordinance dated 26/06/2018 (deleting Section 9A of the Code of Civil Procedure, 1908), the directions given in the order dated 19/12/2017 passed by this Court stand modified to the extent that the Family Court, Bandra should proceed with the trial of the said Petition No. A - 3118 of 2013 and hear and decide all the issues together.

2 In the context of the said relief a few facts are required to be

noted. The learned Judge of the Family Court by judgment and order dated 01/12/1015 allowed the Application (Exhibit 13) in Marriage Petition No. A-3118 of 2013 and, rejected the Application (Exhibit 43) filed in Marriage Petition No. D-97 of 2013. As a consequence of the Application (Exhibit 13) being allowed, the Marriage Petition No. A-3118 of 2013 filed by the Applicant came to be dismissed. The said order was the subject matter of a challenge in the said Family Court Appeal No.19 of 2016 filed by the Applicant herein. The said Family Court Appeal came to be disposed of in view of the statement made by the learned Senior Counsel appearing on behalf of the Appellant - wife (who is the Applicant herein) that the Appellant would have no objection to the preliminary issue of jurisdiction being considered de-novo. As a result, the order impugned in the said Family Court Appeal dated 01/12/2015 came to be set aside to the extent of Application (Exhibit 13) in Marriage Petition No. A-3118 of 2013 and the following directions came to be issued :-

- 1] Marriage Petition No.A-3118 of 2013 to stand restored to file.
- 2] The learned Senior Counsel for the Respondent – husband on instructions states that the Respondent – husband would file his written statement in the said Marriage Petition No.A-3118 of 2013 on or before 15/02/2018 raising such defences as he is entitled to and as are available to him in law.

- 3] If the issue of jurisdiction of the Family Court is raised, the learned Judge of the Family Court would frame the said issue.
- 4] The said issue of jurisdiction would be tried first in point of time than the other issues by permitting the parties to lead evidence. The learned Senior Counsel appearing for the Appellant – wife, Shri Mucchala is agreeable to the said course of action being followed.
- 5] The said issue of jurisdiction to be tried latest by 30/04/2018 if the written statement is filed by 15/02/2018 in terms of clause (2) as above.
- 6] All the contentions of the parties on merits are kept open for being urged before the Family Court.
- 7] Needless to state that the said issue of jurisdiction would be tried on its own merits and in accordance with law.
- 8] It would also be open for the Family Court to try the other issues after recording its findings on the issue of jurisdiction we do not

express any opinion in that regard.

9] With the aforesaid directions, the above Family Court Appeal is disposed of.

10] In view of the disposal of the Family Court Appeal, the Civil Application No.287 of 2017 does not survive and the same to accordingly stand disposed of as such.

The aforesaid directions came to be issued in the context of the fact that the Application filed by the Respondent – Husband herein is referable to Section 9A of the Code of Civil Procedure.

3 It seems that after this Court remanded the matter back to the Trial Court i.e. the Family Court, the adjudication of the preliminary issue as regards jurisdiction of the Family Court was proceeded with and was at the stage when the cross-examination of the Applicant herein was to be carried out at which stage an Ordinance issued came to be issued by the Hon'ble Governor of the State of Maharashtra thereby deleting Section 9A of the Code of Civil Procedure in so far as the State of Maharashtra is concerned. The said Ordinance has as many as 3 Clauses. In the context of the present Civil Application Clause 3 of the said Ordinance is material and is reproduced herein

under :-

3. Notwithstanding the deletion of section 9A of the principal Act,—

(1) where consideration of a preliminary issue framed under section 9A is pending on the date of commencement of the Code of Civil Procedure (Maharashtra Amendment) Ordinance, 2018 (hereinafter, in this section, referred to as “the Amendment Ordinance”), the said issue shall be deemed to be an issue framed under Order XIV of the principal Act and shall be decided by the Court, as it deems fit, along with all other issues, at the time of final disposal of the suit itself :

Provided that, the evidence, if any, led by any party or parties to the suit, on the preliminary issue so framed under section 9A, shall be considered by the Court along with evidence, if any, led on other issues in the suit, at the time of final disposal of the suit itself ;

(2) in all the cases, where a preliminary issue framed under section 9A has been decided, holding that the court has jurisdiction to entertain the suit, and a challenge to such decision is pending before a revisional Court, on the date of commencement of the Amendment Ordinance, such revisional proceedings shall stand abated :

Provided that, where a decree in such suit is appealed from any error, defect or irregularity in the order upholding jurisdiction shall be treated as one of the ground of objection in the memorandum of appeal as if it had been included in such memorandum ;

(3) in all cases, where a preliminary issue framed under section 9A has been decided, holding that the Court has no jurisdiction to entertain the suit, and a challenge to such decision is pending before an appellate or revisional Court, on the date of commencement of the Amendment Ordinance, such appellate or revisional proceedings shall continue as if the Amendment Ordinance has not been enacted and

section 9A has not been deleted :

Provided that, in case the appellate or revisional Court, while partly allowing such appeal or revision, remands the matter to the trial Court for reconsideration of the preliminary issue so framed under section 9A, upon receipt of these proceedings by the trial Court, all the provisions of the principal Act shall apply ;

(4) in all cases, where an order granting an ad-interim relief has been passed under sub-section (2) of section 9A prior to its deletion, such order shall be deemed to be an ad-interim order made under Order XXXIX of the principal Act and the Court shall, at the time of deciding the application in which such an order is made, either confirm or vacate or modify such order.”

4 The learned counsel appearing on behalf of the Applicant, it seems, moved an Application before the learned Judge of the Family Court that in view of the Ordinance issued by the Hon'ble Governor of State of Maharashtra, the adjudication of the preliminary issue may not be proceeded with and that the said preliminary issue of jurisdiction be tried along with the other issues as postulated in Order XIV of the Code of Civil Procedure. The learned Judge of the Family Court had not countenanced the said Application filed by the Applicant on the ground that this Court by the order passed in the Family Court Appeal has directed the Family Court to decide the said preliminary issue of jurisdiction. This is how the Applicant has once again approached this Court for the relief which we have adverted to in the earlier part of this Order.

5 The learned counsel appearing for the Applicant - wife Shri Shariq Nachan would contend that the legal position has changed in view of the Ordinance issued by the Hon'ble Governor of the State of Maharashtra thereby deleting Section 9A of the Code of Civil Procedure in so far as its applicability to the State of Maharashtra is concerned. The learned counsel would contend that in terms of Clause 3(1) of the said Ordinance, the said issue of preliminary jurisdiction shall be an issue framed under Order XIV of the Code of Civil Procedure and would therefore have to be tried along with other issues.

6 Per contra, the learned counsel appearing for the Respondent – Husband Shri Ranvir Shekhawat i.e. the proponent of the Application for framing preliminary issue as regards jurisdiction would contend that in view of the fact that there was already adjudication of the preliminary issue by order dated 01/12/2015 and since the said order has been set aside and the matter has been remanded back to the Family Court for de-novo consideration, it is sub-clause (3) of Clause 3 of the said Ordinance which would apply.

7 We have heard the learned counsel appearing for the respective parties. The question that arises for consideration is whether Clause 3(1) or Clause 3(3) of the said Ordinance would apply in the facts and circumstances of the present case. There can be no dispute about the fact that there has already been an adjudication of the preliminary issue vide order dated

01/12/2015 which was passed by the Family Court and which was the subject matter of the challenge in the Family Court Appeal No.19 of 2016. It is on setting aside the said order and on remand that the issue is once again being tried by the Family Court. It is also required to be noted that thereafter the matter had proceeded with and was pending for cross examination of the Applicant who is the Petitioner in the said Marriage Petition No.3118 of 2013 at which stage the said Ordinance came to be issued by the State Government.

8 In our view, the aforesaid facts would impinge upon whether Clause 3(1) or Clause 3(3) of the said Ordinance applies. A reading of Clause 3(1) indicates that where consideration of a preliminary issue is pending on the date of commencement of the Ordinance, the said issue is deemed to be an issue framed under Order XIV of the Code of Civil Procedure. In so far as Clause 3(3) of the said Ordinance is concerned, it postulates that where a preliminary issue framed under Section 9A has been decided holding that the Court has no jurisdiction to entertain the suit, and a challenge to such decision is pending before an appellate or revisional Court, on the date of commencement of the Amendment Ordinance, such appellate or revisional proceedings shall continue. The Proviso to Section 3 (3) carves out an exception inasmuch as that in case the appellate or revisional Court, while partly allowing such appeal or revision, remands the matter to the Trial Court for reconsideration of the preliminary issue so framed under Section 9A and all

the principal Act shall apply. The provisions of the Ordinance would have to be given an harmonious construction so as to further the cause of substantial justice as it is well settled that the procedure which is laid down by the Code of Civil Procedure is only an handmaid of justice which is to be used to further the cause of justice rather than to oppress it.

9 In our view, therefore in the peculiar facts and circumstances of the case where the Family Court had decided the issue and this Court had set aside and remanded the matter to the Family Court for a de-novo consideration and thereafter the Family Court proceeded with the adjudication of the jurisdictional issue and the matter had proceeded with and was at the stage where the Applicant was to be cross-examined. In our view, it would be the Clause 3(3) of the said Ordinance that would apply.

10 In that view of the matter it is not possible for us to accept the request of the Applicant for grant of the relief which we have adverted to herein above.

11 Since the matter has proceeded up to the stage where the Applicant was to be cross-examined, we expect the parties to co-operate so that the said jurisdictional issue is adjudicated upon and the parties know where they stand.

12 The learned counsel appearing for the Applicant Shri Nachan states that this Court may fix a time frame within which the said preliminary issue be decided.

13 In the facts and circumstances of the case, we are of the view that interest of justice would be served if the Family Court is directed to decide the said issue latest by 31/01/2019.

14 With the directions as aforesaid the Civil Application is disposed of.

[SANDEEP K SHINDE, J]

[R. M. SAVANT, J]