

Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 3351 OF 2009
IN
SUIT NO. 2359 OF 2009

Khatau Makanji Spinning & Weaving Co Ltd & Anr ...Plaintiffs

Versus

State of Maharashtra & Ors ...Defendants

Ms Kashmira Bharucha, i/b VBA Legal, for the Plaintiff.

Ms Geeta Shastri, AGP, for the State.

Ms Kiran Bagadia, i/b Chitra Phadke, for Defendant No. 4.

An Advocate, I/b Wadia Ghandy & Co., for Defendant No. 9.

CORAM: G.S. PATEL, J

DATED: 31st July 2018

PC:-

1. This Notice of Motion was heard and finally decided by an elaborate and detailed judgment running into some 57 pages by SC Dharmadhikari J on 5th February 2010. Judgment had been reserved on the Motion, and it is at once apparent from the judgment itself that the matter was argued before the learned Single Judge at quite considerable length. SC Dharmadhikari J dismissed the Motion finding that there was no *prima facie* case made out for the grant of interim relief. He *inter alia* returned a specific finding,

albeit *prima facie*, that the Plaintiffs had been unable to demonstrate that they continued in possession of the lands in question.

2. The matter was carried in Appeal. A Division Bench passed an order on 5th April 2010. The appeal was admitted and taken up immediately by consent for hearing and final disposal. The only point canvassed before the Appeal Court was that the learned Single Judge ought to have framed a preliminary issue under Section 9A, as it then stood, of the Code of Civil Procedure 1908 (“CPC”). There was no discussion on merits at all, and perhaps none was thought necessary. There is no manner of doubt that entire order was set aside or that the Motion was remitted for a fresh decision in accordance with the law — meaning that the preliminary issue of jurisdiction was required to be first framed and decided.

3. That statutory regime has now changed. By Maharashtra Ordinance XVIII of 2018 effective 27th June 2018, Section 9A has been deleted from the CPC. None of the provisos to sub-section 1 or sub-section 3 will apply, since it appears that other than framing the preliminary issue nothing further was done at all. No evidence was led. No documents were filed. No arguments were made. The preliminary issue remained as it was. It was never taken to judgment.

4. The result is that we have, on the one hand, a careful and detailed judgment of the learned Single Judge, one that addresses the merits of the Motion, and *prima facie* concludes that there is no case made out by the Plaintiffs. This was set aside and the matter

was remitted *only* because a statutory provision, then on the statute book, intervened and it was thought essential to have that preliminary issue decided. That statutory bar itself has being taken off the statute book. I see no discussion anywhere of the merits of the decision by SC Dharmadhikari J. It may be true, both technically and theoretically, that once the decision is been set aside it must be set aside for all purposes and should be heard again. I am not inclined to do so. Absent the statutory bar, the order remitting the matter is itself without any continued basis. There is, therefore nothing that falls for 'a *de novo* decision in accordance with the law' as directed by the Appeal Court order, simply because the basis for those observations or directions has now gone. It seems to me entirely unjust that, where a decision has been reversed on some other ground, but not on merits, a plaintiff should quite literally be given a second innings and attempt to get a wholly different judgment on merits. There should be no such uncertainty or taking of chances. In my view, the decision of SC Dharmadhikari J of 5th February 2010 must therefore be held to have finally disposed of the Motion.

5. The Motion is disposed of with these terms. No order as to costs.

(G. S. PATEL, J)