

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.4754 OF 2018
(Rajarampant s/o Sawalarampant Kulkarni and another Vs. Aarti
w/o Narayan Kaduskar and others)

Mr.P.M.Shah, Sr.Counsel h/f Mr.C.V.Korhalkar, learned Advocate for
the petitioners.

Mr.S.V.Natu, learned Advocate for respondent Nos. 1 and 9.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 18/02/2019

PER COURT :

1. I have heard the learned Sr.Advocate appearing on behalf of the
petitioners and the learned Advocate appearing on behalf of
respondent Nos.1 and 9.

2. The petitioners are aggrieved by the order dated 03/10/2017
by which application Exh.33 in Spl.Civil Suit No.195/2016, praying
for framing of a preliminary issue u/s 9A of the Code of Civil
Procedure, has been rejected.

3. It is pointed out that the State of Maharashtra has introduced
an amendment to the CPC in the form of Code of Civil Procedure
(Maharashtra Amendment) (Amendment) Act, 2018 (Maharashtra Act
No.LXXII of 2018) published on 15/12/2018 concerning the deletion

of Section 9A (Maharashtra Amendment). By the said Act, it is provided that Section 9A stands deleted w.e.f. 27/06/2018, the following clause shall be substituted and shall be deemed to have been substituted for clause 1 u/s 2 w.e.f. 27/06/2018, being the date of commencement of the said Act, namely,

“(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) Act, 2018 (hereinafter, in this section, referred to as “the Amendment Act”), the said issue shall be decided and disposed of by the Court under section 9A, as if the said section 9A has not been deleted.”

4. After having heard the learned Advocates for the respective sides and having considered the judgments cited in the matters of Kishore Morarji Bhojraj and another Vs. Jaya Hiranchand Karani and others [2017(3) Mh.L.J. 909] (Bombay High Court) and Mangammal alias Thulasi and another Vs. T.B. Raju and others [(2018) 15 SCC 662] and upon perusing the specific prayer made in application Exh.33 seeking the framing of an issue u/s 9A, I expressed my view to the litigating sides that I find that Exh.33 deserves to be rejected as Section 9A deals with the issue of jurisdiction of the Court and whether the Court would have

jurisdiction to consider the suit. So also, as an issue u/s 9A has not been framed, the amendment dated 15/12/2018, would be of no assistance to the petitioners.

5. Learned Sr.Advocate for the petitioners and the learned Advocate for the appearing sides contend that if an issue as to "Whether defendant Nos. 1 and 4 prove that the plaintiff is not a co-parcener and would not be entitled to the share in the ancestral property", could be framed ? I expressed my view that the said issue being a mixed question of facts and law, can be decided alongwith all other issues. Learned Advocate for the appearing respondents is agreeable. The learned Sr.Advocate also agrees, but with a reservation that their right to prefer an application under Order VII Rule 11 of the CPC may not be under an embargo by the conclusions of this order.

6. In view of the above, this petition is disposed of by directing the Trial Court to frame the following issue as and when it casts all other issues and deal with all the issues together :-

"Whether defendant Nos. 1 and 4 prove that the plaintiff is not a co-parcener and would not be entitled to the share in the ancestral property",

7. In so far as the request of the learned Sr.Advocate is concerned, I find that this petition is being dealt with, only with reference to application Exh.33 and if the litigating sides have any rights or remedies permissible under the CPC, this order would not come in their way.

(Ravindra V.Ghuge, J.)