

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

WRIT PETITION NO. 12418 OF 2015

1] Shabbir Ibrahim Mestry
2] Jabbar Shabbir Mestry,
Both Aged Adult, Occ.
Agriculture, R/at behind
Old State Bank, A/P. Shirol,
Dist. Kolhapur

....Petitioners
(Orig. Defendants
No.1 and 2)

V/s.

1. Anjum Rahim Mestry,
Aged : Adult, Occ : Business.

2. Manjur Rahim Mestry,
Aged : Adult, Occ : Business.

3. Yusuf Rasulso Mestry,
Aged : 82 years, Occ. Business,
All R/at A/P. Shirol,
Dist. Kolhapur

....Respondents
(Orig. Plaintiffs)

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Mr. Prashant R. Suryawanshi i/by. Mr. Gajanan M. Savagave, Advocate for the petitioners.

Mr. S.S. Patwardhan, Amicus Curiae, for the petitioners.

Mr. Rahul S. Kulkarni, Advocate for respondents no.1 and 2.

ALONGWITH
WRIT PETITION NO. 8089 OF 2015

1. Premal Virendra Shah,
Aged : 49 years, Occ : Business
Address at : Om Shrusti Bungalow,
Kewshav Park, Occ. Datta Mandir,
Bhayander-Uttan Road, Bhayandar
(West), Tal & Dist. Thane-401 101.

2. Sandeep Mohan Patil,
Adult, Occ : Business, address at
C/o. Sai Ganesh Construction,

Murdhegaon Gaondevi Mandir Road,
Bhayandar (W), Tal.& Dist. Thane

3. Mr. Hitesh Subhash Mehata,
Adult, Occ : Business, address at
B/505, Shankheshwar Building,
Padmavati Nagar, Post. Bhayandar
(West), Tal.&Dist. Thane-401 101.

4. Hanuman K. Desai,
Adult, Occ : Business, address at
Shreusti Complex, Row House No.1
Mira Road East, Tal.&Dist. Thane.

5. Ramesh Manik Patil,
Adult, Occ : Business, address at
302, 303, Third Floor, Prabhat Nagar,
Raigaon, Bhayander Uttan Road,
Bhayander (West), Tal.&Dist.Thane.

6. Mavjibhai Kakubhai Patel,
Adult, Occ : Business, address at
C/o. Sai Ganesh Construction,
Murdhegaon, Gaondevi Mandir Road,
Bhayander (W), Tal.&Dist-ThanePetitioners
(Orig.Defendants)

Nos.8 to 13)

V/s.

1. Vidhyadhar Ganpat Patil,
Age : 45yrs, Occ: Business,
residing at 263, Anandiniwas,
Uttan Road, Raigaon, Bhayander
(West), Tal&Dist- Thane.
2. Narottam Daji Patil,
Adult, Occ : Agriculturist, residing
at Juchandra, Wakipada, Naigaon
(East), Tal. Vasai, Dist-Thane.
3. Vasant Daji Patil,
Adult, Occ: Agriculturist, residing
at House No.1097, Raigaon, Dapaka
Ali, Post : Bhayandar (West),
Tal & Dist-Thane, Pin-401 101.
4. Chandrakant Daji Patil,
Adult, Occ : Agriculturist, residing
at : House No.826, Taigaon, Dapaka
Ali, Post-Bhayandar (West),
Taluka & Dist.Thane, Pin-401 101.
5. Narendra Daji Patil,

Adult, Occ : Agriculturist, residing
at House No.253, Raigaon, Dapaka
Ali, Post-Bhayandar (W), Taluka
and Dist. Thane, PIN : 401 101.

6. Smt. Jankibai Jagannath Patil,
Adult, Occ : Retired Housewife,

7. Shri. Ravindra Jagannath Patil,
Adult, Occ : Business.

Nos.5 &6, residents of Room
No.1241, Suyog Niwas, Late
Yeshwant Master Road, Uttan
Road, at Village-Rai, Post-
Bhayadar (West), Taluka &
Dist-Thane-401 101.

8. Dhanwanti Subhash Bhoir,
Adult, Occ : Housewife, residing
at : Juchndra, Post : Navgaon
Taluka : Vasai, Dist. Thane.

9. Mira Bhayander Municipal
Corporation, Chatrapati Shivaji
Maharaj Marg, Bhayandar (West),
Thane-401 101.

10. Mr. Ramesh M. Chheda,
Proprietor Shree Laxmi
Enterprises, Address at :
Shop No.1, Shree Laxmi Deep,
Kanakia Road, Mira Road,
East, Tal&Dist.Thane

....Respondents
(No.1-Orig. Plaintiff
Nos.2 to 10-Orig. Deft.
Nos.1 to 7, 14 and 15)

Mr. Chintan Shah h/f. Mr. Sandesh Patil, Advocate
for the petitioners.

Mr. Tushar N. Sonawane, Advocate for respondent
no.1.

Ms. Tanvi Kamat-Deosthale with Mr. M.S. Lagu,
Advocate for respondent no.9.

CORAM : SANDEEP K. SHINDE,

RESERVED ON:18TH JUNE, 2019.

PRONOUNCED ON : 7TH AUGUST, 2019.

JUDGMENT :

1. The State of Maharashtra on 27th June 2018, further to amend Section 9A of the Code of Civil Procedure, 1908 ("CPC" for short) in its application to the State of Maharashtra, promulgated Maharashtra Ordinance No. XVIII of 2018.

2. This Ordinance has been replaced by Code of Civil Procedure (Maharashtra Amendment Act), 2018 (Maharashtra Act No. LXI of 2018), enacted by the State legislature on 29th October, 2018 which has deemed to come into force on 27th June, 2018 (hereinafter called "First Amendment Act").

3. In Writ Petition No. 8089 of 2015, preliminary issue of jurisdiction framed and answered by the Learned 3rd Civil Judge Junior

Division, Thane on 6th August 2014, holding that the Court has jurisdiction to entertain the suit, is under challenge.

4. In Writ Petition No. 12418 of 2015, preliminary issue was framed and answered by the learned Civil Judge Senior Division, Jaysingpur holding that the Court has jurisdiction to entertain the suit, is under challenge.

5. The issue in both the petitions is;
“Whether the present proceedings stands abated in view of clause-2 of Section 3 of the Code of Civil Procedure (Maharashtra Amendment Act), 2018 ?”

6. The Counsels in both the petitions, submit

that, in view of the referral order of this Court, in the case of **Paresh Kapadia V/s. Sandeep Runwal and Ors. in the Suit no. 179 of 2017 with Notice of Motion No. 550 of 2017**, whether provision of clause (2) of Section 3 of the First Amendment Act can be applied to the facts of the case, when a conflict is arising between the First Amendment Act and Maharashtra Act No. LXXII of 2018 (hereinafter called "the Second Amendment Act" for short).

7. First Amendment Act, received the assent of the Petitioner and published in the Gazette on 29th October, 2018 but deemed to have come into force on 27th June, 2018. Second Amendment Act was first published in the Gazette on the 15th December, 2018, however, in terms of Section 2 thereof, it substituted clause (1) of Section 3 of the First

Amendment Act, with effect from 27th June 2018, being the date of commencement of the First Amendment Act.

8. In view of Section 2 of the First Amendment Act which deemed to have come into force on 27th June, 2018, Section 9A CPC in its application to the State of Maharashtra, has been deleted; however under Section 3, it saved, following proceedings :-

(i) where consideration of preliminary issue framed under Section 9A is pending on the date of commencement of the said First Amendment Act, the said issue by deeming fiction shall be an issue framed under Order 14 of the Civil Procedure Code, 1908 and shall be decided by the Court, as it deems fit with all other issues at the time of

final disposal of the suit itself, and if any evidence is led on the preliminary issue so framed, it shall be considered alongwith other evidence.

(ii) In all cases, where preliminary issue framed under Section 9A has been decided, holding that the Court has jurisdiction to entertain the suit, the challenge to such decision is pending before the revisional Court, on the date of commencement of the First Amendment Act, such revisional proceedings shall stand abated. Provided, where Court upholds the jurisdiction and Appeal against a decree in such suit is preferred, order upholding the jurisdiction shall be treated as one of the

ground of objection as if it had been included in the Memorandum of appeal.

(iii). where preliminary issue framed under section 9A CPC 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/Revisional Court, such appellate or revisional proceedings shall continue as if the Amendment Act has not been enacted and Section 9A CPC has not been deleted.

. Proviso to sub-section (3) provides, in case, the appellate / revisional Court partly allows the appeal and remands the matter to the trial court for

reconsideration of the preliminary issue, the trial court on such remand, shall decide the said issue alongwith the other issues at the time of final disposal of such suit.

(iv) In all cases where ad-interim relief is granted under sub-section (2) of Section 9A CPC prior to its deletion, such order shall be deemed to be an ad-interim order in the interim application made under Order 39 CPC which the Court may confirm or vacate at the time of deciding the said application.

9. The State of Maharashtra enacted the Second Amendment Act with effect from 27th June, 2018. Section 2 and Section 3 of the Second Amendment Act read as under :

“Section 2- In section 3 of the Code of Civil Procedure (Maharashtra Amendment) Act, 2018, for Clause (1), the following clause shall be substituted and shall be deemed to have been substituted with effect from the 27th June, 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.”

AND

Section 3- Nothing in this Act shall affect the decrees by a Civil Court during the period commencing from the

27th June, 2018 being the date of commencement of the Code of Civil Procedure (Maharashtra Amendment) Act, 2018 and ending on the date of publication of this Act in the Maharashtra Government Gazette."

10. Thus, by the Second Amendment Act, clause (1) of Section 3 of the First Amendment Act is substituted with re-application of Section 9A CPC, as if the said section has not been deleted only in an event, where preliminary issue of jurisdiction is framed and pending. Therefore, net effect is that; where the preliminary issue is framed under Section 9A CPC and is pending for consideration on the date of commencement of First Amendment Act, 2018 i.e. 27th June, 2018, the said preliminary issue shall be decided and disposed of by the Court under Section 9A CPC.

11. Thus, in a case where application for framing the preliminary issue is pending on 27th June, 2018 but preliminary issue has not been framed, then in that case, such application under Section 9A CPC shall be deemed to be an application filed under Order 14 CPC and shall be decided by the Court alongwith the other issues at the time of final disposal of the suit.

12. This Court in the case of *Paresh Kapadia* (supra) and other connected matters, upon consideration of the First and Second Amendment Acts, is of the view that, the Second Amendment Act results in four classes of litigants and for the reasons stated, the Second Amendment Act, is discriminatory and arbitrary as it treats one set of litigants differently from the others.

13. In terms of the referral order, the Second Amendment Act has resulted in four new classes of litigants which are carved out by the learned Single Judge of this Court which are :

"i. where the jurisdictional issue is framed by the Court, the parties must proceed under Section 9A (as if it has not been deleted);

ii. where the jurisdictional issue is raised but not framed by the Court, the issue will be decided under Order XIV of the CPC;

iii. Where the jurisdictional issue is to be raised and framed by the Court in new proceedings to be filed after 27th June 2018, the issue will be decided under Order XIV of the CPC;

iv. where a matter is remanded under Section 3(4) of the First Amendment Act, the provisions of Order XIV will apply. "

14. Thus, vide order dated 22nd February, 2019 in ***Pareesh Kapadia (supra)***, the learned Judge of this Court referred the matter to the Hon'ble the Chief Justice for referring the issue to the Bench of two or more judges for conclusively deciding the effect of the First and the Second Amendment Acts as a matter of public interest and if constitutional issue is involved with respect to these Acts, it would have to be heard by the Division Bench. Para-9 of the order reads as under :

"as there are many suits in which this order will have a bearing, the Registrar General to place these orders immediately before the Hon'ble Chief Justice for consideration and making such order thereon as he shall deem fit."

15. This Court has come across large number of revisions and writ petitions wherein decision, rejecting the preliminary objection to the jurisdiction of the Court or upholding such objection is under challenge. In all such cases, the petitioners or the respondents are relying on the referral order dated 22nd February, 2019 made by the learned Judge of this Court in the case of ***Paresh Kapadia (supra)*** to contend that, till the reference is answered, all such matters should not be heard and be kept in abeyance.

16. Considering the importance of issue, this Court requested Mr. Shriniwas Patwardhan, Learned Counsel to assist the Court as Amicus-Curiae. Mr. Patwardhan, readily agreed to assist the Court as Amicus.

17. In view of the facts and situation, following issues need to be answered :

“(i) Whether pendency of a reference to the larger Bench would impede this Court in deciding pending writ petitions and Civil Revision Applications preferred against the order passed by the trial Court either upholding or rejecting the jurisdiction/objection under Section 9A of CPC ?

(ii) Whether the Second Amendment Act which substitutes Clause (1) of Section 3 of First Amendment Act would have any bearing over Clauses (2), (3) and (4) of the First Amendment Act ?

18. Mr. Patwardhan, learned Amicus Curiae has taken me through the Civil Procedure Code (Amendment) Act, 1970 whereby Section 9A CPC was introduced after Section 9 CPC in its application to the State of Maharashtra. He has also taken me through the Statement of Objects & Reasons of the First and the Second Amendment Acts. Mr. Patwardhan, submits that;

(i) the referral order passed in Paresh Kapadia (supra) would not impede the Court from deciding the cases which are falling under Clauses (2) and (3) of Section 3 of the First Amendment Act.

(ii) that, even otherwise, pendency of a reference to a larger Bench does not mean that all other proceedings involving the same issue would be stayed till the decision is rendered in the reference.

(iii) that, on plain reading of the Second Amendment Act, it is to be held that, the Second Amendment Act has substituted only clause (1) of Section 3 of the First Amendment Act and other clauses are not affected.

(iv) that, in cases where the jurisdictional issues are answered holding that the Court has jurisdiction to entertain the suit and challenge to such decisions are pending before a Revisional Court on 27th June, 2018, such proceedings before the Revisional Court shall stand abated.

(v) that, in all cases where jurisdictional issue framed under Section 9A CPC has been answered in affirmative holding that the Court has no jurisdiction to entertain the suit and challenge to such decision is pending before the Appellate or Revisional Court on the commencement of the First Amendment Act, such proceedings shall continue as if the First Amendment Act

has not been enacted and Section 9A CPC
has not been deleted.

19. Considering the submissions made by Mr. Patwardhan, the contention of the petitioners that since reference to a larger Bench is pending, proceedings in these petitions, be kept in abeyance, cannot be accepted in view of the law laid down in the case of **Ashok Sadarangani V/s. Union of India, reported in (2012) 11 SCC 321**, which reads as under :

“ . The pendency of a reference to a larger Bench, does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. ”

. The Point/Issue No.1 is answered in the

negative.

20. To appropriately deal with Issue no.2 at hand, due consideration is to be given to two aspects. Firstly, the Second Amendment Act exclusively and expressly substitutes only clause (1) of Section 3 of the First Amendment Act with original Section 9A in toto as if the said Section is not deleted. Secondly, in effect as well, the Second Amendment Act covers only an eventually where preliminary issue of jurisdiction is framed and pending unlike other clauses in Section 3 of the First Amendment Act where preliminary issue of jurisdiction is framed and decided. On these two counts itself, it would be absurd to imply that institution of Section 9A CPC through Second Amendment Act applies to all the provisions of the

First Amendment Act.

21. The Second Amendment Act does not refer to or deals with matters falling under clause (2) and clause (3) of Section 3 of the First Amendment Act, however, matter remanded in terms of the proviso to clause (3) of Section 3 of the First Amendment Act is subject matter of reference. Proviso to clause (3) of Section 3 of the First Amendment Act, reads as under :

3. Notwithstanding the deletion of section 9A of the principal Act.-

(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."

22. In my view,

(i) the four classes of litigants culled out in the referral order are the possible outcome of the Second Amendment Act.

(ii) The second Amendment Act substitutes only clause (1) of Section 3

of the First Amendment Act w.e.f. 27th June, 2018.

(iii) The Second Amendment Act has no bearing over clauses- (2), (3) and (4) of the First Amendment Act, except matters remanded in terms of proviso to clause (3) of Section 3 of the First Amendment Act.

(iv) The provisions contained in clauses (2), (3) and (4) of the First Amendment Act shall continue to apply to the matters falling under these Clauses, except those covered under proviso to Clause (3).

23. So far as the cases in hand are concerned, in both the cases, the learned Judge

overruled the jurisdictional objection in the year 2014-15 and revision petition challenging the decision of the trial Court were pending before this Court as on 27th June, 2018. Therefore in view of the First Amendment Act and the reasons stated above, these proceedings stand abated and would be governed by the provisions of clause (2) of Section 3 of the First Amendment Act.

Thus the following Order:

1. In terms of Section 3(2) of the First Amendment Act;-

(a) cases where preliminary issue has been decided holding that the court has jurisdiction to entertain the suit and challenge to such decision is pending before Appellate or Revisional Court, such proceedings before the Appellate or Revisional

Court shall stand abated.

(b) though challenge to such decision stands abated, in terms of proviso to clause (2) of Section 3 of the First Amendment Act, objection to jurisdiction of the Court shall be deemed to be one of the grounds in Memorandum of Appeal against the original decree.

(c) Petitions are accordingly dismissed.

(SANDEEP K. SHINDE, J)