

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

WRIT PETITION NO. 3454 OF 2018

Smt.Vrishali Vikas Kanvinde ... Petitioner

Versus

Smt. Priyanka Prashant Potdar and anr. ... Respondents

Mr.Kishor K. Malpathak for the petitioner.

Mr.Harshad Inamdar for respondent no.2.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 26th AUGUST 2019

P.C. :

The petitioner is the defendant in Regular Civil Suit No.973 of 2015, filed by the respondents-plaintiffs. In that suit, the defendant raised a question of maintainability. According to him, the suit was not maintainable under Maharashtra Rent Control Act. The defendant has also contended that the suit was barred by limitation. Therefore, she applied Section 9A of the Civil Procedure Code, since deleted.

2. The trial Court, in order below Exhibit 26, dated 24th March 2017, considered these two points: (i) should the issue of limitation be framed as a preliminary issue, and (ii) should the issue about the tenability of the suit under the Maharashtra Rent Control Act also be framed as a preliminary issue. On the question of limitation, the trial

Court has found *prima facie* substance in the defendant's contention. So it has framed the preliminary issue.

3. But about the tenability of the suit in the face of the Maharashtra Rent Control Act, the trial Court has observed that the plaintiff is not claiming any tenancy right and, therefore, the Maharashtra Rent Control Act has no relevance to the cause the plaintiff pleaded. So it has refused to frame any preliminary issue. Aggrieved to that extent, the defendant has filed this writ petition.

4. The learned counsel for the petitioner has pointed out that pending this writ petition, the Legislature has repealed Section 9A of CPC. So he wants this Court to close this writ petition, giving liberty to the petitioner on two counts: (a) to continue with the issue of limitation before the trial Court; (b) to question, in due course, the suit maintainability in the face of Maharashtra Rent Control Act.

5. The respondents' counsel, however, submits that now the issue about the maintainability of the suit already stands rejected. So this Court, according to him, need not observe anything more. And the issue of limitation, he agrees, is pending before the trial Court; the parties have already led partial evidence on that aspect. Thus, he wants this Court to observe that the rights of the parties on agitating the issue

of limitation remain unaffected.

6. Heard Mr.Kishor Malpathak for the petitioner and Mr.Harshad Inamdar for respondent no.2.

7. True, pending this writ petition, the Legislature deleted Section 9A of CPC, through Ordinance No.XVIII of 2018, dated 27th June 2018. Later, through Government Gazette, dated 15th December 2018, the State amended the earlier Act of deletion. As a result, the impact of deleted provisions is stated to be as follows:

“(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;*

(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.”

(Italics supplied)

8. First, we will see what Section 9A is. It is particular to the State of Maharashtra. The Legislature brought it on to the statute book through Code of Civil Procedure (Maharashtra Amendment) Act, 1970. As the CPC falls under Entry 13 of the Concurrent List in the Seventh Schedule of the Constitution of India, the State Legislature engrafted Section 9A into the Code. But in 1976, through a Parliamentary Amendment—that is, the Code of Civil Procedure (Amendment) Act, 1976—the CPC stood extensively amended. Then, because of Section 97 of CPC, all Statement Amendments including Section 9A, stood repealed to the extent of their inconsistency with the 1976 Amendment Act.

9. Then, again the State Legislature re-enacted Section 9A through the Code of Civil Procedure (Maharashtra Amendment) Act, 1977. It received the Presidential assent under Article 254(2) of the Constitution of India, too.

10. But the judicial experience has showed that the provision is more abused than used. It has become a dilatory device in the hands of litigants. So the Legislature has put paid to this provision. It was repealed as I have already noted.

11. Repealed the provision has been, but its rippling or crippling effect is still felt. So the Legislature in the repeal has provided for how the aftermath of this amendment must be dealt with.

12. Three contingencies have been provided for and they all concern the proceedings under Section 9A pending at various stages. Broadly they concern (1) the application pending before the trial Court; (2) the challenge pending before the revisional Court on the trial Court's order under Section 9A of CPC.

13. By the date of repeal if the application is pending before the trial Court, it must decide the application as if Section 9A were not deleted. By legal fiction, the provision is kept alive. If the trial Court has decided the application and if a challenge is pending before the revisional Court, the challenge may be : (a) against the trial Court's rejecting the objection, or (b) against the trial Court's accepting the objection.

14. That is, if the trial Court has ruled that it has jurisdiction, that ruling stays. And the challenge against that decision before the revisional Court will abate. Yet, in an appeal against the decree to be passed in that suit, one of the grounds may relate to the trial Court's affirming its jurisdiction. But the ground of challenge must confine itself to any error, defect, or irregularity in the order upholding the trial Court's jurisdiction under Section 9A.

15. On the converse, the trial Court may have accepted the objection and held that it has no jurisdiction. Then, the plaintiff may have carried the challenge to “an appellate or revisional Court”. Then, that challenge will continue as if the Amendment Ordinance were not enacted and section 9A not deleted.

16. The proviso to sub-section (3) of the Ordinance envisages and provides for another contingency. By the time of repeal, the appellate or revisional Court may have partly allowed the appeal or revision. As a result, it may have remanded “the matter to the trial Court for reconsideration of the preliminary issue so framed under section 9A.” In that event, too, the trial Court should adjudicate the issue on remand as if “all the provisions of the principal Act [would] apply.” That means, Section 9A applies.

17. Here the petitioner has raised two preliminary issues. One found favour with the Trial Court, but not the other. First, we will deal with the objection the trial Court upheld: the limitation. It has framed a preliminary issue, and the parties have been agitating that issue. So it calls for no interference; it may reach its logical end.

18. About the second objection, I may note it concerns the maintainability of the suit in the face of the Maharashtra Rent Control Act. The trial Court rejected this objection. That is, it has held that the suit is maintainable. So sub-section (2) of the repealed provision applies.

19. The trial Court’s ruling stays. And the petitioner’s present challenge in this writ petition abates. If petitioner suffers a decree in future and challenges that decree in an appeal, then the lack of

jurisdiction will become one of the grounds if pleaded. Of course, the ground of challenge must confine itself to any error, defect, or irregularity in the order upholding the trial Court's jurisdiction.

I accordingly close the writ petition for it has abated by the operation of law.

Vina A.
Khadpe

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[DAMA SESHADRI NAIDU, J.]