

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CIVIL APPLICATION (CAW) NO.1214 OF 2019
IN
WRIT PETITION NO.2612 of 2017 (D)

(Late P.K. Salve Academy of Fine Arts & Music, Nagpur and others Vs. Pratul s/o
Bhagwati Prasad Daga and others)

*Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's Orders.*

Court's or Judge's orders.

Shri Manish Shukla, Advocate h/f Shri S.P. Bhandarkar, Advocate for
Petitioners.
Shri Yash Maheshwari, Advocate h/f Shri S.V. Bhutada, Advocate for
Respondent 1.

CORAM: ROHIT B. DEO, J.

DATE: 9th SEPTEMBER, 2019.

1] This application is taken out for modification of order dated 14.09.2018 to the limited extent of granting liberty to the petitioners to approach the learned trial Court under Order 14 Rule 2 sub-rule (2) of the Code of Civil Procedure.

2] It would be necessary to note the factual backdrop in which the order dated 14.09.2018 is rendered.

3] The petitioners who are arrayed as defendants in Special Civil Suit 471 of 2010 preferred an application under Order VII Rule 11 of the Code of Civil Procedure seeking dismissal of the suit on the premise that the suit is barred, in view of the provisions of Section 50 and 80 of the

Maharashtra Public Trust Act. The trial Court rejected this application holding that the preliminary issue on the point of jurisdiction will have to be drawn and the parties were directed to address the Court on the application pending Section 9A. The application under Section 9A came to be rejected vide order dated 24.10.2016.

In view of the deletion of Section 9A from the statute book, this Court held as follows :-

5. In view of certain developments, I do not consider it appropriate to make any decisive observation on the correctness of the view taken by the learned trial Court. By Ordinance promulgated by the Hon'ble Governor in exercise of power under Article 348(3) of the Constitution of India, section 9A stands deleted from the Code in its applicability to the State of Maharashtra. Clause 3 of the Ordinance reads thus:

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

(1) where consideration of the preliminary issue framed under section 9A is pending on the dates 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, alongwith all other issues, at the time of final disposal of the suit:

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 and order is made, either confirm or vacate or modify such order.”

It is obvious, that if the petitioners were to prefer a revision challenging the order impugned, in view of the legislative mandate, the revision would have to be disposed of as abated and the issue would have to be determined by the trial Court alongwith other issues at the time of the final disposal of the suit. In view of the letter and spirit of the Ordinance, it would not be appropriate to entertain the challenge to the order impugned, only because the order impugned is challenged in writ jurisdiction. I am therefore, inclined to set aside the order impugned and to direct the learned trial Court to decide the issue alongwith the other issues which arise in the suit at the stage of final disposal of the suit.

6. It is needless to record that every contention of the parties is left expressly open. In fairness to the learned counsels, I must record that several contentions were raised inter-alia a contention that even if it is assumed arguendo, that civil suit is maintainable, the maintainability would not extend to the grant of relief of specific performance and in the best possible scenario the civil suit may lie for the relief of refund of consideration. However, in view of the letter and spirit of the Ordinance, I have not deemed it appropriate to consider the rival submissions on merits.

7. The order impugned is set aside and the

learned trial Court is directed to decide all issues at the stage of final disposal including the issue of jurisdiction of the civil Court and maintainability of the suit. The petition is disposed of in the afore stated terms.

4] The application for modification is predicated on the submission that the Order 14 Rule 2 sub-rule 2 is an independent provision and that the power available to the trial Court under the said provision cannot be fettered by the observations of this Court that all the issues be decided simultaneously at the stage of final hearing.

5] In all fairness, Shri Maheshwari learned counsel is not disputing the position of law that the power, which power is certainly discretionary, under Order 14 sub-rule (2) of Rule-2 to try any issue relating to the jurisdiction of the Court or bar to the suit, is available, independently de hors Section 9A which is since deleted. However, the submissions of Shri Maheshwari, is that the trial Court having rendered a finding in exercise of jurisdiction under Section 9A, which jurisdiction was then available to the trial Court, the original defendants cannot be permitted to re-agitate the same issue under Order 14 Rule 2 sub-rule (2). Shri Maheshwari, learned counsel submits that in any event, it would be for the trial Court to decide not only the tenability of the application under Order 14 Rule 2 sub-rule (2), but also whether in view of the earlier finding, the Court is precluded from taking any other view.

6] The limited modification sought is that the petitioners/original defendants be permitted to approach the Court under Order 14 sub-rule 2 Rule 2 of the Code of Civil Procedure. The modification is necessitated in view of the observations of this Court that all issues be decided together at the stage of final hearing. Be that as it may, Shri Maheshwari, learned counsel is right in the submission that ultimately it would be for the trial Court to decide the merits of the application, the effect of the earlier finding, and the tenability thereof or such other objection as may be raised by the plaintiff. I do not see any impediment in allowing the application for modification, in as much as if the order is not modified the discretion of the Court to even consider the application under sub-rule(2) Rule 2 of Order 14 shall be curtailed if not obliterated. If such an application is made by the original defendants, the trial Court shall be at liberty to decide the same strictly on merits, uninfluenced by any observation made in this order or in the judgment dated 14.09.2018. Needless to say, every objection and contention raised by the plaintiffs to such an application is kept expressly open and the trial Court shall decide not only the tenability of the same but also shall decide.

- i] Whether it ought to exercise the discretion and decide any issue first ?
- ii] Whether the effect of the earlier finding rendered while rejecting the application under Section 9A would have any bearing on the

exercise of discretion ?

iii] Any other objection which may be taken by plaintiffs to the tenability of the application which may be preferred ?

Civil application is allowed and the judgment dated 14.09.2018 is modified/clarified in the aforesaid terms.

JUDGE

NSN