

(2011) 02 BOM CK 0086

In the Bombay High Court

Case No : Appeal No. 1167 of 2010 in Notice of Motion No.557 of 2010 in Suit No. 516 of 2010

Mukund Ltd.

APPELLANT

Vs

Mumbai International Airport and Others

RESPONDENT

Date of Decision : 15-02-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, 80, 94, 9A, 9A(2)

Citation : (2011) 2 ALLMR 510 : (2011) 5 BomCR 456 : (2011) 113 BOMLR 1164 : (2011) 2 MhLj 936

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Aspi Chinoi and M.S. Oberai, instructed by N.V. Sanglikar, for the Appellant; Virag Tulzapurkar Farid Karachiwala and Abhijeet Mhatre., instructed by Wadia Ghandy and Co. for Respondent No. 1 and Pradeep Rajgopal., instructed by Rekha Rajgopal, for the Respondent

Final Decision : Dismissed

Judgement

D.Y. Chandrachud, J.—The First Respondent is the Plaintiff in a suit instituted against (i) the Appellant; (ii) the Airports Authority of India (the Second Respondent); and (iii) the State of Maharashtra (the Third Respondent). The First Respondent seeks a declaration that the Second Respondent is the owner of certain land and that it has been leased out to the First Respondent under a lease of 26 April 2006; that an order dated 22 June 1973 and an agreement dated 22 January 1991 executed between the Appellant and the State of Maharashtra are null and void; and an injunction restraining the Appellant from alienating the land.

2. An interlocutory motion was taken out by the First Respondent for seeking an injunction against the Appellant and the State of Maharashtra from acting upon their agreement and for restraining the Appellant from alienating the land. On behalf of the Appellant an affidavit was filed in reply to the motion inter alia

contending that the suit is not maintainable on the ground that "the suit and the prayers are barred by the law of limitation". A similar objection was raised to the maintainability of the suit in an affidavit filed on behalf of the State Government. The bar of limitation was thus raised in both the affidavits.

3. On 4 March 2010, a Learned Single Judge of this Court issued an ad interim direction to the effect that the statement that was recorded in a letter dated 25 February 2010 would continue until 22 March 2010. On 18 March 2010, the ad interim protection was continued pending the disposal of the motion. On 16 June 2010, a statement was made on behalf of the State of Maharashtra by Counsel that for the purpose of the Notice of Motion, the State was not pressing the issue that the suit is beyond limitation. The same statement was made on behalf of the Appellant. When the motion came up before the Learned Single Judge, the Court considered it appropriate to decide upon the legal position as to whether a Defendant can be permitted to give up its stand with regard to the question of jurisdiction of the Court at the hearing of the motion or whether, in view of the provisions of Section 9A of the Code of Civil Procedure, 1908, as applicable to the State of Maharashtra, a preliminary issue would have to be framed.

4. By a judgment dated 7 July 2010, the Learned Single Judge held that once a party to a suit raises a point of jurisdiction in the affidavit in reply, it is the duty of the Court to frame a preliminary issue u/s 9A. The Court cannot allow the party to drop its contention as regards the jurisdiction of the Court unless the Defendant desires to give up the contention that the Court has no jurisdiction for the purposes of the entire trial. In other words, the Learned Single Judge was of the view that it was not open to the Defendant to contend that it does not wish to raise the question of jurisdiction at the stage of the disposal of the Notice of Motion and would raise it subsequently at the stage of trial.

5. The correctness of the judgment of the Learned Single Judge is called into question in these proceedings.

6. On behalf of the Appellant it has been submitted that: (i) Section 9A is attracted if at the hearing of an application for interim relief, an objection to the jurisdiction of the Court to entertain the suit is taken by any of the parties to the suit. In such an eventuality, the issue of jurisdiction has to be decided as a preliminary issue at the hearing of the application before determining the grant of interim relief; (ii) Where a Defendant has raised an issue of jurisdiction in the affidavit filed in reply to the motion for interim relief, that does not preclude the Defendant from withdrawing the objection as to jurisdiction for the purpose of the Notice of Motion. Stating a point of jurisdiction on affidavit and informing the Court later that the point is not pressed for the purpose of the motion, stands on the same basis as a case where an objection has not been raised in the first instance; (iii) It is for the Defendant to decide as to whether the point of jurisdiction should be taken at the hearing. If despite having raised an issue of jurisdiction on affidavit, the Defendant seeks not to press it at the hearing of the motion, the application of Section 9A would not arise; and (iv) The further

question as to whether a Defendant in that position can again raise an objection to the jurisdiction at the trial is not germane and the issue is relevant only to the motion for interim relief.

7. On the other hand, it has been urged on behalf of the First Respondent that: (i) When an issue of jurisdiction is raised, it is relevant to the trial of the suit and not merely to the hearing of the motion; (ii) Once an objection to the jurisdiction of the Court to entertain the suit is raised at the hearing of an application for interim relief, it is imperative for and a mandatory duty of the Court to decide that issue as a preliminary issue. The application of Section 9A arises where the issue of jurisdiction is raised at the hearing of an application for interim relief. Once raised, however, the question goes to the root of the jurisdiction of the Court to entertain the suit. The issue of jurisdiction is thus germane to the entire suit and not merely to the application for interim relief; (iii) Once the Defendant has raised an objection to the jurisdiction of the Court in an affidavit filed in reply to the motion, stating that the objection is not pressed for the purpose of the motion, is meaningless since an issue would have to be raised and decided.

8. The rival submissions now fall for consideration.

9. Section 9A was inserted into the Code of Civil Procedure, 1908 in relation to the State of Maharashtra by Amending Act 65 of 1977. Section 9A reads as follows:

9A. Where at the hearing of application relating to interim relief in a suit, objection to jurisdiction is taken, such issue to be decided by the Court as a preliminary issue.

(1) Notwithstanding anything contained in this Code or any other law for the time being in force, if, at the hearing of any application for granting or setting aside an order granting any interim relief, whether by way of stay, injunction, appointment of a receiver or otherwise, made in any suit, an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties to the suit, the Court shall proceed to determine at the hearing of such application the issue as to the jurisdiction as a preliminary issue before granting or setting aside the order granting the interim relief. Any such application shall be heard and disposed of by the Court as expeditiously as possible and shall not in any case be adjourned to the hearing of the suit.

(2) Notwithstanding anything contained in subsection (1), at the hearing of any such application, the Court may grant such interim relief as it may consider necessary, pending determination by it of the preliminary issue as to the jurisdiction.

10. The Statement of Objects and Reasons for the introduction of the Bill explains the rationale for the amendment as follows:

The effect of the judgment of the High Court in *Institute Indo/Portuguese v. Borges* (1958) 60 BLR 660 is that the Bombay City Civil Court for the purposes of

granting interim relief cannot or need not go into the question of jurisdiction. Sometimes declaratory suits are filed in the City Court without a valid notice u/s 80 of the Code of Civil Procedure, 1908. Relying upon another judgment of the High Court recorded on the 7th September, 1961 in Appeal No.191 of 1960, it has been the practice of the City Court to adjourn a notice of motion for injunction in a suit filed without such valid notice, which gives time to the Plaintiff to give the notice. After expiry of the period of notice, the plaintiff is allowed to withdraw the suit with liberty to file a fresh one. In the intervening period, the Court grants an ad interim injunction and continues the same. This practice of granting injunctions, without going into the question of jurisdiction even though raised, has led to grave abuse. It is therefore proposed to provide that if a question of jurisdiction is raised at the hearing of any application for granting or setting aside an order granting an interim relief, the Court shall determine that question first.

11. While explaining the rationale for the amendment, a Division Bench of this Court presided over by Chief Justice M.B. Shah (as His Lordship then was) in Meher Singh Vs. Deepak Sawhny and Another, observed that Section 9A is a departure from the procedure established for deciding a preliminary issue under Order 14 Rule 2 of the Code. The Division Bench noted that Section 9A was added with the specific object of ensuring that an objection with regard to the jurisdiction of the Court is decided as a preliminary issue. The State Legislature had taken cognizance of the fact that the practice of granting injunction without going into the question of jurisdiction even though raised, had led to grave abuse. Hence, once the issue is to be decided by raising it as a preliminary issue, it has to be determined after a proper adjudication. An adjudication would postulate furnishing parties an opportunity to lead evidence if required. The judgment of the Division Bench also enunciates that the determination of the issue of jurisdiction is not only for the purpose of granting interim relief or vacating interim relief. A decision of the Court on the issue of jurisdiction governs the maintainability of the suit.

12. For the purpose of this appeal, both the Learned Senior Counsel appearing on behalf of the Appellant and the First Respondent have proceeded on the basis that an issue of limitation does, in fact, raise a question of jurisdiction within the meaning of Section 9A. In Smithkline Beecham Consumer Healthcare GMBH and Others Vs. Hindustan Lever Limited and Another, a Division Bench of this Court held that the provisions of Section 9A are "mandatory and imperative and decision on the issues cannot be postponed or adjourned". Moreover, the Division Bench also held that jurisdiction for the purposes of Section 9A cannot be construed in a narrow sense confining its application to jurisdiction only as regards territorial limits, pecuniary limits or subject matter. The Division Bench held that the State Legislature has used the expression "jurisdiction" in a wider sense. Subsequently in Foreshore Co-operative Housing Society Limited Vs. Shri Praveen D. Desai, Indian Inhabitant of Bombay and Others, a Division Bench of this Court of which one of us (Anoop Mohta, J.) was a member, held as follows:

To put it in other words, if the suit is barred by Limitation, the Court has no jurisdiction to entertain it and the Court is duty bound to dismiss the same, and the parties cannot confer jurisdiction by consent.

It is explicitly clear that a plea of limitation is a plea which goes to the jurisdiction of the Court and it is a plea on law, and it is a settled position in law that when a suit is barred by limitation, the Court is precluded from proceeding on the merits of the contentions and in fact obliged to dismiss the suit.

13. The principle that emerges is that the provisions of Section 9A are of an imperative nature and are mandatory. Once an issue of jurisdiction is raised at the hearing of an application for the grant of interim relief or for setting aside an order granting interim relief, the Court is under an obligation to decide that issue as a preliminary issue before deciding the question of interim relief. Section 9A is prefaced by a non obstante provision. The first part of Section 9A refers to the stage at which the objection is taken; the stage being at the hearing of an application for granting or setting aside an order granting interim relief. The second part of the provision elucidates the nature of the objection; the objection being to the jurisdiction of the Court to entertain a suit. Once such an objection to the jurisdiction of the Court to entertain a suit is taken by a party to the suit, the Court has to proceed to determine the issue of jurisdiction at the hearing of the application as a preliminary issue. The determination of the issue cannot be postponed to the trial of the suit and the issue of jurisdiction has to be decided before granting or setting aside an order granting interim relief. The mandatory nature of the provision was emphasized in a judgment of a Division Bench of this Court in *Royal Palms (India) Pvt. Ltd. v. Bharat Shantilal Shah*. 2009 (2) Bom.C.R. 622 In that case, at the hearing of a motion for interim relief, the Defendant opposed the motion on the ground that the suit was barred by limitation. The Learned Single Judge despite the objection to the jurisdiction of the Court, ignored the provisions of Section 9A and proceeded to make an interim order without framing a preliminary issue. The Division Bench while holding that the procedure adopted by the Learned Single Judge was contrary to Section 9A held as follows:

Perusal of provisions of section 9A of C.P.C. quoted above makes it clear that whenever there is an application for grant of temporary injunction or appointment of Receiver is sought before any Court and an objection to the jurisdiction of the Court to entertain the suit in which the application for such interim relief has been made by any of the parties, then it becomes the duty of the Court to first frame the preliminary issue as to the jurisdiction of the Court to entertain the suit and decide that issue and thereafter take up for consideration the application for interim relief.

The Division Bench held that the question as to whether a suit is barred by limitation was an objection to the jurisdiction of the Court for the purpose of Section 9A and followed the earlier decision in *Foreshore Cooperative Society (supra)*. Elaborating on the provisions of Section 9A, the Division Bench observed

as follows:

When an objection to the jurisdiction of the Court to entertain the suits as the suits are barred by the law of limitation is raised, at the hearing of notices of motion wherein interim order is claimed, the Court is obliged by provisions of section 9A of C.P.C. to frame preliminary issue as to the ground raised to the jurisdiction of the Court to entertain the suits and proceed to decide that preliminary issue and it is only on decision of that preliminary issue, that the notices of motion can be taken up for final decision.

14. In *Shirish Finance and Investment P.Ltd. v. M.Sreenivasulu Reddy* (2002) 109 Comp Cas 913 Chief Justice B.P. Singh (as His Lordship then was) speaking for a Division Bench of this Court, elaborated on the provisions of Section 9A as follows:

The section insists that if any interim relief is asked for, and the question of jurisdiction is raised, then the issue of jurisdiction must be tried. It emphasises that fact that the issue must be determined at the commencement and not at the conclusion of the enquiry. ... Once the defendants raised this objection on the question of jurisdiction, in view of section 9A of the Code of Civil Procedure, as applicable to the State of Maharashtra, they had no option but to insist upon issues being framed and determined at the commencement of the enquiry, and could not claim any relief or object to any relief being granted to the Plaintiffs on the ground that the court had no jurisdiction to entertain the suit. Such an objection could be raised only if the question of jurisdiction were gone into by the court after framing of issues and decided in favour of the defendants.

In that case, two of the Defendants had raised an objection at the stage of the motion for interim relief to the jurisdiction of the Court (2002) 109 Comp Cas 913 to entertain and try the suit. On behalf of the Plaintiffs, a clarification was sought as to whether the Defendants were pressing the plea of jurisdiction and it was urged, if a plea of lack of jurisdiction was to be urged and decided, an issue had to be framed at that stage itself, in view of Section 9A. In view of the objection taken by the Plaintiffs, the two Defendants filed a joint affidavit stating that for the reasons contained therein, the submission was not being pressed. The judgment of the Learned Single Judge (Hon"ble Mr.Justice H.L. Gokhale, as His Lordship then was) in *M. Sreenivasulu Reddy v. Kishore R. Chhabria* (2002) 109 Comp Cas 18 which had been carried in appeal to the Division Bench, contains a record of the nature of the objection to jurisdiction and the affidavit that was filed on behalf of the two Defendants stating that the submissions contained in the affidavit raising the issue of jurisdiction were not pressed. The judgment of the Learned Single Judge was carried in appeal to the Division Bench in *Shirish Finance* (supra) to which a reference has been made earlier. The Division Bench followed the earlier decisions of this Court, including the decision in *Meher Singh* case (supra).

15. It has been urged on behalf of the Appellant that Section 9A is attracted

when "an objection to the jurisdiction of the Court to entertain such a suit is taken by any of the parties" at the hearing of an application for interim relief. It has been urged on behalf of the Appellant that if no such objection is raised, then the provisions of Section 9A are not attracted. Now, undoubtedly if an objection to the jurisdiction of the Court to entertain a suit is not taken at the hearing of an application for interim relief or for setting aside an order granting interim relief, then Section 9A has no application. This position is sought to be extended by the Appellant to a situation where an objection as to jurisdiction is raised while opposing the application for interim relief, but the Defendant subsequently takes a conscious decision to give up the objection for the purpose of the application for interim relief. Now, a Defendant who raises an objection to jurisdiction, may well be entitled to abandon the objection. But, in our view, it is not open to a Defendant, having raised an objection to the jurisdiction of the Court at the hearing of an application for interim relief, to obviate an adjudication by the Court upon that issue as a preliminary issue by merely postulating that the objection is not pressed for the purpose of the Notice of Motion. The objection to jurisdiction u/s 9A is required to be determined not only for the purpose of the motion for the interim relief, but the objection as to jurisdiction goes to the root of the jurisdiction of the Court to entertain the suit itself. Once raised, the objection has to be decided by the Court as a preliminary issue. The statement of the Defendant in the present case that the objection was not being pressed for the purpose of the motion for interim relief was meaningless because the objection relates not to the maintainability of the motion, but to the very jurisdiction of the Court to entertain and try the suit. In the present case, the statement made by the Appellant was clear and what was recorded in the order of the Learned Single Judge of 16 June 2010 was that the Appellant and the State had informed the Court that for the purpose of the motion, they were not pressing the issue that the suit was beyond limitation. The objection as to jurisdiction was, therefore, not given up. The provisions of Section 9A cannot be utilized as a matter of litigational strategy by the Defendant or, for that matter, by the Plaintiff depending upon whether an ad interim order has or has not been passed by the Court under Subsection (2) of Section 9A. The object and underlying purpose of Section 9A is that once an objection is raised, it must be decided as a preliminary issue before an application for interim relief is taken up. As the Division Bench observed in Meher Singh case, this ensures that the rights of the parties can be crystallised by a determination at the earliest stage. The provision was also intended to prevent abuse resulting in a situation where an injunction was granted without going into the question of jurisdiction even though it was raised. Having regard to the underlying purpose and object of the provision, and in view of the interpretation that we have placed on the provisions of Section 9A which is consistent with the line of decisions of this Court, we hold that the Learned Single Judge was not in error in coming to the conclusion that once a party has raised a point of jurisdiction in the affidavit in reply to a motion for interim relief, it becomes the duty of the Court to frame a preliminary issue u/s 9A. It is not open to the Defendant to obviate a decision on the issue as a

preliminary issue, before the application for interim relief is decided, by merely stating that the objection is not pressed for the purpose of the motion for interim relief. Once raised, the objection as to jurisdiction is germane to the maintainability of the suit itself and not merely to the motion for interim relief.

16. For these reasons, we are of the view that there is no merit in the appeal. The appeal shall stand dismissed. There shall be no order as to costs.