

Bombay High Court Meher Singh vs Deepak Sawhny & Another on 22 September, 1999 Equivalent citations: 1999 (1) BomCR 107, 1998 (3) MhLj 940 Author: M Shah Bench: M Shah, Y Jahagirdar ORDER M.B. Shah, C.J. 1. Heard the learned Counsel for the parties. 2. By judgment and order dated 24th April, 1998, the learned Single Judge has referred this matter to a larger Bench for determination of the following issue :– “Whether while deciding the preliminary issue of jurisdiction as contemplated under section 9-A the parties are required to be given opportunity to lead evidence?” 3. The Court has referred the matter because in the opinion of the Court, it was of considerable importance as it was generally raised on the Original Side of this Court as well as in the subordinate courts. Section 9-A, which is added to the Civil Procedure Code by an Act known as Code of Civil Procedure (Maharashtra Amendment) Act, 1977, reads as under :– “9-A. (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 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 sub-section (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”. 4. The aforesaid section specifically provides that 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; (b) Whether by way of stay; (c) Injunction; (d) Appointment of Receiver or otherwise, made in any suit, then if an objection to the jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit then there is a mandate to the effect that Court shall determine at the time of hearing of such application an issue as to the jurisdiction as a preliminary issue. There is also specific mandate that such an application with regard to objection of jurisdiction is required to be heard and disposed of by the Court as expeditiously as possible; there is further important direction that such application shall not in any case be adjourned till the hearing of the suit. Sub-rule (2) further empowers the Court to grant interim relief, pending determination of the preliminary issue as to the jurisdiction. 5. Before the learned Single Judge, it was contended that when the said issue is raised for determination, the Court is required to permit the parties to lead evidence. Before the learned Single Judge, decisions in the case of Kranti Mohan Guruprasad Mehra and another v. Fatechand Vasuram Behal, and in the case of Dinyar Behramji Irani v. Kshirsagar Construction Co. Pvt. Ltd., reported in Bombay were relied upon to contend that section 9-A is self-contained scheme with definite object of deciding objection with regard to jurisdiction of the Court to deal with the matter at the preliminary issue. 6.

The learned Single Judge arrived at the conclusion that it was well established legal position that averments made in the plaint determine the jurisdiction of the Court and not the subsequent defence set up by the defendant. He, therefore, disagreed with the ratio laid down in the aforesaid two cases and referred the matter, as stated above to a larger Bench. 7. For deciding the issue we would first refer to the Statement of Objects and Reasons for adding the said section 9-A to the Code of Civil Procedure by (Maharashtra Amendment) Act, 1969, reads as under :— “The effect of the judgment of the High Court in Institute Indo/Portuguese v. Borges, 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 under section 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.” 8. In the case of Institute Indo-Portuguese v. Dr. T. Borges, reported in 1958 Bom.L.R. 660, the Court appointed Receiver with regard to Trust property and a contention was raised whether the Court has jurisdiction to entertain the suit in the first instance and to appoint Receiver thereafter. In that case the Court has observed that the question whether the Court has jurisdiction to entertain the suit for the reliefs claimed therein would be an appropriate question in the suit itself, and may, if the defendants so choose, be made the subject matter of a separate issue that might be properly raised in the suit itself. To avoid the situation which is arising out of the said decision, section 9-A was added in December, 1969. After amendment of the Code of Civil Procedure in 1973, section 9-A in the present form is substituted in the year 1977. 9. The question, therefore is, when the Legislature directs that objection with regard to jurisdiction is to be decided as a preliminary issue at the time of hearing of the application for grant of interim relief or for vacating interim relief or for appointing Receiver, whether the parties should be permitted to lead evidence. In our view, this question is to be considered in the light of Order XIV, Rule 2 of Civil Procedure Code. Order XIV, Rule 2 of the Civil Procedure Code reads as under : “(1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-Rule (2), pronounce judgment on all issues. (2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force, and for that

purpose may, if it thinks fit, postpone the settlement of the other issues until after the issue has been determined, and may deal with the suit in accordance with the decision on that issue.” Sub-Rule (1) of Rule 2 specifically provides that Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues. The man-date of Order XIV, Rule 2 is to decide, as far as possible, all the issues and pronounce judgment on all issues. However, it is subject to sub-rule (2), which gives discretion that if the Court is of the opinion that the case or any part thereof can be disposed of on the issue of law only, it may “try” that issue first, if that issue relates to the jurisdiction of the Court or bar to the suit. As against this, section 9-A specifically gives a mandate that notwithstanding anything contained in the Code or in any other law for the time being in force, if the objection to jurisdiction of the Court to entertain such suit is taken by any of the parties to the suit, the Court is required to determine the issue as to jurisdiction as a preliminary issue before granting or setting aside the order of interim relief. 10. Section 9-A is a departure from the procedure established for deciding the preliminary issue as prescribed under Order XIV, Rule 2 of Civil Procedure Code. On many occasions, it is not always proper to pass an order of hearing the preliminary issue with regard to maintainability of a suit at the time of final hearing of the suit. If such issue is decided at an earlier stage, rights of the parties can be crystallized. As stated earlier, section 9-A is a departure from the procedure prescribed under Order XIV, Rule 2 of the Code of Civil Procedure for achieving that object. For determination of the preliminary issue, which may be mixed question of law and facts, the parties are required to lead evidence. Without permitting the parties to lead evidence the issue of jurisdiction cannot be finally determined. If it was to be decided only for prima facie purpose for granting interim relief, then there was no necessity of adding section 9-A in the Civil Procedure Code. Secondly, on the basis of prima facie determination without proper adjudication, in our view, suit cannot be disposed of. The plaintiff cannot be non-suited on the basis of the averments made in the plaint or in the Written Statement, If the issue is a pure question of law, then it may be decided without recording evidence, but if it is a mixed question of law and fact, then parties should be permitted to lead evidence on the facts of the case. Question of jurisdiction, even if it is a mixed question of law and fact, it is required to be decided first. For deciding the said issue, the parties are entitled to lead evidence, oral as well as documentary, as that issue is required to be tried and adjudicated finally by the Court. The determination of the said issue is not only for the limited purpose of granting interim relief or vacating interim relief. It is true that this procedure requires piecemeal determination of the suit, but that cannot be avoided because of the mandate of section 9-A. 11. In this view of the matter, the ratio laid down in the case of *Dattatraya Jangam v. Jairam Gore*, reported in 1961(66) Bom. L.R. 645, that “the jurisdiction of the Court should ordinarily be determined at the time of institution of a suit when the plaint is filed, that the plea of the defendant will not determine or change the forum” or that “in order to determine which Court has jurisdiction to try a suit, the Court should read the plaint as a whole and ascertain the real nature of

the suit and what in substance the plaintiff has asked for," is not required to be applied in a case where issue with regard to jurisdiction is required to be raised and determined. Raising and determination of the issue would certainly require adjudication as per the procedure prescribed in the Civil Procedure Code that is, after giving an opportunity of leading evidence to both parties. In this view of the matter we are not referring to various other judgments, which lay down that to determine the nature of the suit what is to be looked into is the real substance of the suit and not legal ingenuity in drafting the plaint or that the question of jurisdiction of the prima facie purpose is to be decided by examining the substance of the case in the plaint. The said judgments are only for the purpose of determining whether the Court has jurisdiction at the prima facie stage to try the suit. But if the issue of jurisdiction is required to be raised and finally determined, then it would require giving an opportunity of leading evidence and hearing to both the parties. 12. We would, at this stage, refer to the precise principle laid down by this Court in the case of *Fazlehussein v. Yusufally*, wherein the Court has, after observing that the averments made in the plaint would be sufficient to decide the question of jurisdiction, held as under :— "In considering the preliminary issue, the Court must look into the averments in the plaint and consider any objections which the defendant may choose to raise against the maintainability of the action on those averments. The question of jurisdiction which is raised by way of a demurer has always to be decided on the allegations made in the plaint and not on the contentions that the defendant may raise. It is true that if the jurisdiction of the Court depends upon the proof of a fact and the question as to the existence or otherwise of that fact is canvassed, the parties may lead evidence in support of their respective cases before the preliminary issue as to jurisdiction of the Court is decided." In this view of the matter, we agree with the decision in the case of *Kranti Mohan Guruprasad Mehra and another v. Fatechand Vasuram Behal*, and in the case of *Dinyar Behramji Irani v. Kshirsagar Construction Co. Pvt. Ltd. Bombay*, reported . 13. In the result we hold that if section 9-A is not added, then at interim stage, the Court is not required to decide the issue of jurisdiction finally and the Court by referring to the averments made in the plaint, would ordinarily determine whether or not the Court has jurisdiction to try the suit. However, it is apparent that section 9-A is added with a specific object to see that objection with regard to jurisdiction of the Court is decided as a preliminary issue. According to the Legislature, the practice of granting injunctions without going into the question of jurisdiction even though raised, has led to grave abuse. Hence the said section is added to see that issue of jurisdiction is decided as a preliminary issue notwithstanding anything contained in the Civil Procedure Code, including Order XIV, Rule 2. Once the issue is to be decided by raising it as a preliminary issue, it is required to be determined after proper adjudication. Adjudication would require giving of opportunity to the parties to lead evidence, if required. 14. Reference stands disposed of accordingly. 15. Issuance of certified copy of this order is expedited.