

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

WRIT PETITION STAMP NO.26733 OF 2014

**Smt. Mangal Jaykumar Phade : Petitioner
versus
Baban Machindra Nimbalkar : Respondent.**

**Mr. Surel S Shah for the Petitioner.
Mr. Desai Dhananjay Raghunath for the Respondent.**

**CORAM : R. M. SAVANT, J.
DATE : 12th January 2015**

P.C.

1 Though the above Petition has been shown for orders, the learned counsel appearing on behalf of the Respondent-original Plaintiff Shri Desai is agreeable to the Petition being heard for admission as he has come down from Solapur to argue the matter. Hence by consent, the above Petition is taken up for admission.

2 The writ jurisdiction of this Court is invoked against the order dated 16/09/2014 passed by the learned Civil Judge, Junior Division, Karmala, Dist. Solapur by which order the learned Judge has directed the parties to lead evidence in so far as the issue of limitation is concerned as according to the learned Judge the said issue is a mixed question of law and fact in so far as the present case is concerned.

3 It is required to be noted that the Respondent has filed the suit in question and the substantive relief sought is of declaration that he is a deemed purchaser meaning thereby that the declaration sought is one which is available under Section 32G of the Bombay Tenancy and Agricultural Lands Act, 1948 . In view of the relief sought in the suit, the Petitioner herein who is the original Defendant filed an Application (Exhibit 12) objecting to the maintainability of the suit inter-alia on two grounds, firstly the bar under Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948 having regard to the relief which is sought in the suit, and the bar of limitation having regard to the relief sought in the suit at the said point of time.

4 The Trial Court accordingly framed the following two issues by order dated 7/2/2014 :-

- 1] Whether this Court has jurisdiction to try the present suit?
- 2] Whether the suit is barred by limitation?

It seems that none of the parties applied for permission to lead evidence in respect of the said two issues. The said issues were thereafter heard from time to time and the Roznama of the date 25/8/2014 of the suit discloses that the said Application (Exhibit 12) was kept for orders. However, thereafter on 16/9/2014 the impugned order came to be passed. However, the said order directs the parties to lead evidence in so far as the issue of limitation is

concerned, and is silent about the issue of bar of Section 85. The bar of Section 85 is raised by the Defendant obviously on the basis of the substantive relief which is sought in the suit i.e. the declaration of the deemed purchaser and therefore there is no need to lead evidence on the said issue as the said issue can be said to be purely a question of law. However, what the Trial Court has done is without deciding the said issue of bar of Section 85 to the maintainability of the suit has directed the parties to lead evidence in so far as issue of limitation is concerned.

5 In my view, the Trial Court ought to have decided the first preliminary issue as regards jurisdiction of the Civil Court to try the suit as the said issue would not entail leading of any evidence. The Trial Court thereafter contingent upon its decision on the said first issue could have directed the parties to follow the course of action as directed by the impugned order. In my view, therefore, without setting aside the impugned order, the above Writ Petition can be disposed of by issuing the following directions :-

- 1] The Trial Court to decide the first issue which is revolving around the bar as contained in Section 85 of the Bombay Tenancy and Agricultural Lands Act, 1948. It would be contingent upon the decision that would be rendered by the Trial Court on the said issue that the occasion would arise for determining the second

issue of limitation and if the occasion so arises, the Trial Court may permit the parties to lead evidence on the second issue i.e. the issue of limitation.

2] Since I am informed that the Trial Court had heard the parties and in fact the matter was kept for passing of orders on the Application (Exhibit 12) as recorded in the roznama dated 25/8/2014, the Trial Court may adjudicate upon the said 1st issue of jurisdiction of the Court within two weeks of the parties appearing before it. The parties to appear before the Trial Court on 19/01/2015 and the period of two weeks would start to run from then.

3 It is clarified that contingent upon the decision that would be rendered on the said issue i.e. the issue of jurisdiction, the implementation of the impugned order would arise. With the aforesaid directions, the above Writ Petition is disposed of.

4] All the concerned parties to act upon an ordinary copy of the instant order duly authenticated by the Court Sheristedar.

[R.M.SAVANT, J]