

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

REVIEW PETITION (STAMP) NO. 19633 OF 2015
IN
WRIT PETITION NO. 1185 OF 2015

Mr. Arjun Janu Gaikar & Ors. ..Petitioners
VS.
Mr. Dashrath Bhau Gaikar & Ors. .. Respondents

Mr. R. P. Lote for Petitioners.
Mr. Madhav Jamdar for Respondent Nos. 1 and 2.
Mr. A. R. Metkari for Respondent Nos. 5 to 7.

CORAM : M. S. SONAK, J.
DATE : 27 AUGUST 2015

P.C. :-

1] This petition seeks review of the order dated 31 March 2015 made in writ petition no. 1185 of 2015.

2] By order dated 18 December 2014, the Civil Judge, Senior Division, Kalyan, had framed a preliminary issue under Section 9A of the CPC as to whether the suit as instituted, is within the prescribed period of limitation. Relying upon the decision of the Apex Court, in the case of *Kamlakar Eknath Salunkhe vs. Baburav Vishnu Javalkar & Ors.*¹, the writ petition was allowed and the order dated 18 December 2014 was set aside. However, it was made clear that the party shall be at liberty to raise the issue of limitation and the same shall be considered along with all other issues that would eventually be framed in the suit.

¹ 2015 (2) Mh.L.J. 886

3] The Hon'ble Apex Court in the case of *Kamlakar* (supra) has held that the perusal of the Statement of Objections and Reasons of the Amendment Act by which Section 9A came to be introduced, would clarify that Section 9A deals with issue of maintainability on the question of inherent jurisdiction and does not contemplate issue of limitation. In the said decision, the issue of limitation, which had been framed as a preliminary issue under Section 9A of the CPC, was in fact struck out.

4] Later on, i.e. on 8 April 2015, the Hon'ble Apex Court in the case of *Foreshore Co-operative Housing Society Limited vs. Praveen D. Desai (Dead) thr. LRs. & Ors.*² has taken the view that the issue of limitation is a proper issue which can be framed under Section 9A of the CPC. In this case, the Apex Court held that its earlier decision in the case of *Kamlakar* (supra) is *per incuriam*. Relying upon this later decision, this Court, in the case of *Smt. Radhabai Kashinath Sutar & Ors. vs. M/s. Laddam Homes Ltd., through its Director Shri B. B. Agrawal & Ors.*³, upheld the framing of preliminary issue of limitation under Section 9A of the CPC.

5] Mr. Lote, the learned counsel for the review petitioners

² 2015 (3) Mh. L. J. 315

³ Writ Petition No. 4748 of 2015 decided on 08.05.2015

submits that there is conflict between the order dated 31 March 2015 in writ petition no. 1185 of 2015 and the order dated 8 May 2015 in writ petition no. 4748 of 2015. Mr. Lote submits that the decision in writ petition no. 4748 of 2015 is correct, particularly since the Apex Court, in the case of *Foreshore CHSL* (supra) has held that its earlier decision in *Kamlakar* (supra) is *per incuriam*. Accordingly, Mr. Lote submits that there is sufficient cause to seek review.

6] Submission of Mr. Lote cannot be accepted in view of the subsequent development. The Apex Court in the case of *Jagdish Shyamrao Thorve vs. Shri Mohan Sitaram Dravid & Ors.*⁴, has made an order, which reads thus :

“ ORDER

Heard Mr. Arvind S. Avhad, learned counsel appearing for the petitioner.

*He has referred us to the impugned order passed by the High Court on 27th April, 2015, whereby the High Court has placed reliance on *Foreshore Cooperative Housing Society Limited vs. Praveen D. Desai (Dead) Through Lrs. and others* (2015) 6 SCC 412 and dismissed the writ petition.*

The aforesaid decision, as we perceive, interpret Section 9A of the Code of Civil Procedure, as amended by the Maharashtra Amendment Act, 1977. The two-Judge Bench, after referring to the provision and relying on certain earlier decisions, has opined thus:

⁴ Special Leave to Appeal (C) No. 22438 of 2015 decided on 17.08.2015

“With great respect, we are of the view that the decision rendered by the Division Bench in Kamlakar Eknath Salunkhe v. Baburav Vishnu Javalkar is contrary to the law settled by the Constitution Bench and three-Judge Benches of this Court, in Pandurang Dhondi Chougule v. Maruti Hari Jadhav (five-Judge Bench), followed by other Division Benches in Manick Chandra Nandy v. Debdas Nandy, NTPC Ltd. v. Siemens Atkeingesellschaft, Official Trustee v. Sachindera Nath Chatterjee, ITW Signode India Ltd. v. CCE and Kamlesh Babu v. Lajpat Rai Sharma. The Constitution Bench decision and other decisions given by the larger Bench are binding on us. It appears that those decisions have not been brought to the notice of the Division Bench taking a contrary view.”

It is pertinent to mention here that the pronouncement in Kamlakar Eknath Salunkhe vs. Baburav Vishnu Javalkar (2015) 3 SCALE 34, was directly on the interpretation of Section 9A of the Code of Civil Procedure, where the decisions which have been relied upon in Foreshore Cooperative Housing Society Limited (supra) are not on Section 9A of the Maharashtra Amendment Act in the Code of Civil Procedure. Therefore, we are inclined to think that the authority in Kamlakar Eknath Salunkhe (supra) was a binding precedent on the later Bench and, therefore, it should have been referred to a larger Bench.

In view of the aforesaid, we think that a larger Bench should hear the matter.

Mr. Harish N. Salve, learned senior counsel, is appointed as Amicus Curiae to assist the Court.

Issue notice, returnable within eight weeks.

The Registry is directed to place the papers before Hon'ble the Chief Justice of India for constituting a larger Bench."

[Emphasis supplied]

7] The Hon'ble Apex Court, has observed that the authority in *Kamlakar* (supra) was a binding precedent and therefore the later Bench should have referred the matter to a larger Bench.

8] Besides, the conflict in the order dated 31 March 2015 and 8 May 2015 is explicable. On the date when writ petition no. 1185 of 2015 was disposed of by order dated 31 March 2015, the decision of the Apex Court in the case of *Kamlakar* (supra) held the field. On the date when writ petition no. 4748 of 2015 was disposed of on 8 May 2015, the decision of the Hon'ble Apex Court in the case of *Foreshore CHSL* (supra) held the field. In the case of *Foreshore CHSL* (supra), the Hon'ble Apex Court had observed that its earlier decision in the case of *Kamlakar* (supra) was *per incuriam*. Accordingly, on 8 May 2015, reliance was *inter alia* placed upon the decision in the case of *Foreshore CHSL* (supra).

9] From the aforesaid, it is clear that on the date when the order dated 31 March 2015 was made, the decision of the Apex Court in the case of *Kamlakar* (supra) held the field. Therefore, even if we

are to proceed on the basis that the precedential value of *Kamlakar* (supra) stands denuded by *Foreshore CHSL* (supra), which is a decision taken on 8 April 2015 i.e. after the order dated 31 March 2015 was made, that by itself, is not a ground for exercise of review jurisdiction. In fact the explanation to Order XLVII Rule 1 of CPC provides that the fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of the superior Court in any other case, shall not be a ground for review of said judgment.

10] That apart, there is no serious prejudice as such to the review petitioners on account of the order dated 31 March 2015. This is not a case where the issue of limitation has been foreclosed. In fact, in view of the provisions contained in Section 3 of the Limitation Act, such foreclosure was not even possible. All that this Court has held is that the issue of limitation is to be decided along with all other issues which will arise in the suit. For all the aforesaid reasons, no case is made out to exercise the review jurisdiction. Review petition is dismissed. There shall be no order as to costs.

(M. S. SONAK, J.)