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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7822 OF 2015

Suresh Dhirajlal Marthak and others .. Petitioners

Vs.

Nalini Manojkumar Asara and others .. Respondents

Mr.Bhavin Gada a/w Ms.Virali Shah i/b M/s.Harakhchand & Co.,
Advocate for the Petitioners.

Mr.Chetan Yadav, Advocate for Respondent No.1.

CORAM : R.G.KETKAR, J.
DATED : 14th DECEMBER, 2015

P.C. :

. Not on board. At the request of Mr.Gada, taken up in the Production Board.

2. Heard Mr.Bhavin Gada, learned Counsel for the petitioners and Mr.Chetan Yadav, learned Counsel for respondent No.1.

3. Mr.Gada orally applies for leave to delete respondents No. 2 & 3 as respondent No.1 being original plaintiff is the only contesting respondent. On the motion made by Mr.Gada, leave to delete respondents No. 2 & 3 is granted. Amendment shall be carried out forthwith. Rule. Mr.Yadav waives service. At the request and by consent of the parties, rule is made returnable forthwith and the Petition is taken up for final hearing.

4. By this Petition under Article 227 of the Constitution of India, original defendants No. 1 to 4 have challenged the judgment and order dated 26/03/2015 passed by the learned Judge, Bombay City Civil Court Greater Bombay in Notice of Motion No. 589 of 2015 in Suit No. 722 of 2014. By that order, the learned trial Judge rejected the Motion taken out by the defendants No. 1 to 4 under Section 9A of Code of Civil Procedure, 1908 for framing issue of limitation and trying it as a preliminary issue. The learned trial Judge relied upon the decision of the Apex Court in the case of *Kamlakar Eknath Salunkhe Vs. Baburav Vishnu Javalkar*, **2015(7) SCC 321** and held that issue of limitation cannot be issue of jurisdiction of the Court and the same can not be framed as a preliminary issue by invoking powers under Section 9A of C.P.C.

5. Mr.Gada submitted that the decision in the case of **Kamlakar Eknath Salunkhe** (*supra*) was rendered by two learned Judges of the Apex Court. The said decision was considered by two learned Judges of the Apex Court in *Foreshore Co-operative Housing Society Limited Vs. Praveen D.Desai (Dead) thru Lrs.*, **(2015) 6 SCC 412**. After considering the earlier decisions, the Apex Court held that decision in **Kamlakar Eknath Salunkhe's** case is contrary to the law settled by the Constitution Bench and 3 Judges Bench held that the decision in **Kamlakar Eknath Salunkhe's** case is per incurrium. In other words, he submitted that in view of decision of the Apex

Court in the case of **Foreshore Co-operative Housing Society Limited** (*supra*) issue of limitation can be framed as a preliminary issue in proceedings taken out under section 9A of the C.P.C. He, therefore, submitted that the impugned order deserves to be set aside.

6. On the other hand, Mr.Yadav supported the impugned order. He submitted that the impugned order is passed on 26/03/2015 and decision in the case of **Foreshore Co-operative Housing Society Limited** (*supra*) was rendered on 08/04/2015. He further submitted that the said decision will apply prospectively i.e. to say on or after 08/04/2015 and not to the proceedings which are already decided.

7. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, by the impugned order dated 26/03/2015, the learned trial Judge has rejected the motion mainly on the ground that in view of decision in the case of **Kamlakar Eknath Salunkhe** (*supra*), issue of limitation cannot be framed as a preliminary issue by invoking powers under section 9A of the C.P.C.

8. In the case of **Foreshore Co-operative Housing Society Limited** (*supra*), the Apex Court held that the decision in **Kamlakar Eknath Salunkhe's** case is per incurrium and is contrary to the law settled by the Constitution Bench and the 3 Judges Bench. The

decisions in the cases of **Kamlakar Eknath Salunkhe** (*supra*) and **Foreshore Co-operative Housing Society Limited** (*supra*) were considered by the Apex Court in **Jagdish Shyamrao Thorve Vs. Shri Mohan Sitaram Dravid and ors.** By order dated 17/08/2015, 2 learned Judges of the Apex Court referred the issue to the larger Bench. Mr.Yadav, therefore, submitted that even otherwise as the reference is pending, the issue whether issue of limitation can be framed as a preliminary issue in proceedings taken out under Section 9-A of C.P.C. may be kept in abeyance.

9. In the case of *Ashok Sadarangani Vs. Union of India*, (2012) 11 Supreme Court Cases, 321, the Apex Court has held that pendency of a reference to a larger Bench does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. Till such time, as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field. In view thereof, Court has to proceed on the basis of law as it stands today and merely because reference is made to a larger Bench, the Court cannot stay on its proceeding raising identical issue and must proceed on the basis of law as it stands. In view thereof, the impugned order, is liable to be set aside and Notice of Motion is restored for deciding it afresh. All the contentions of the parties including plaintiff's contention that decision of **Foreshore Co-operative Housing Society Limited**

(*supra*) is prospective are kept open. Hence, following order is passed.

i) The impugned order dated 26/03/2015 is set aside and Notice of Motion No. 589 of 2015 is restored to the file of the learned trial Judge.

ii) All the contentions of the parties on merits are kept open.

10. The learned Counsel appearing for the parties state that next date of hearing before the trial Court is 19/12/2015. In view thereof, the learned trial Judge is requested to decide the Notice of Motion No. 589 of 2015 within 4 weeks from 19/12/2015. Rule is made absolute in the aforesaid terms with no order as to costs. Order accordingly.

(R.G.KETKAR, J.)