

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 10151 OF 2014

Shravan L. Joshi .. Petitioner
vs.
Mahendra L. Joshi and ors. .. Respondents

Mr. J. S. Chandnani for the Petitioner
Mr. Mehul Shah h/f. Mr. Bharat Joshi for Respondent Nos.1,2,4 & 5.

CORAM : M. S. SONAK, J.
DATE : 1 April, 2015.

P.C. :-

1] The learned counsel for the petitioner files an affidavit of service indicating, *inter alia*, that service is complete upon all the respondents including respondent No.3.

2] Mr. Mehul Shah, learned counsel appears for respondent Nos.1,2,4 and 5 waives service.

3] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.

4] Upon motion of respondent Nos.1,2,4 and 5, the learned City Civil Judge, by the impugned order dated 7 August 2014 has framed the following preliminary issues under Section 9A of the CPC.

1] *Whether this court has jurisdiction to entertain and try the suit?*

2] *Whether the suit is barred by principles of res-judicata?*

3] *Whether suit is barred by Law of Limitation ?*

5] There is no clarity as to what the first preliminary issue with regard to jurisdiction means. There cannot be any general or *omni bus* issue as to whether or not the Court has jurisdiction to entertain and try the suit.

6] In so far as the issue of limitation is concerned, recently, the Hon'ble Apex Court in case of *Kamalakar E. Salunkhe Vs. Baburav V. Javalakar & ors.*¹, has observed thus:

21. *A perusal of the Statement of Object and Reasons of the Amendment Act would clarify that Section 9A talks of maintainability only on the question of inherent jurisdiction and does not contemplate issues of limitation. Section 9A has been inserted in the Code to prevent the abuse of the Court process where a plaintiff drags a defendant to the trial of the suit on merits when the jurisdiction of the Court itself is doubtful.*

22. *In the instant case, the preliminary issue framed by the Trial Court is with regard to the question of limitation. Such issue would not be an issue on the jurisdiction of the Court and, therefore, in our considered opinion, the Trial Court was not justified in framing the issue of limitation as a preliminary issue by invoking its power under Section 9A of the Code. The High Court has erred in not considering the statutory ambit of Section 9A while approving the*

1 Civil Appeal No. 1085 of 2015 decided on 12 January 2015

preliminary issue framed by the Trial Court and thus, rejecting the writ petition filed by the appellant.”.

7] In view of the aforesaid, there was no question of framing the preliminary issue under Section 9A of the CPC with regard to the suit being barred by Law of limitation. In so far as, the preliminary issue as to whether the suit is barred by principles of *res-judicata* is concerned, there is no discussion whatsoever in the impugned order as to whether or not such issue indeed arises in the matter. The learned City Civil Judge, by reference to certain decided cases has merely held that the issue of *res-judicata* and the issue of limitation are preliminary issues and accordingly, proceeded to frame the same. As noted earlier, the issue of limitation could not have been framed as a preliminary issue in the light of decision in case of *Kamalakar Salunkhe (supra)*. On the aspect of *res-judicata*, there is no discussion whatsoever as to whether such issue arises and consequently could be framed as a preliminary issue.

8] Accordingly, the impugned order, in so far as it frames the issue of limitation as a preliminary issue, is set aside. In so far as the issue of *res-judicata* is concerned, the matter is remanded to the learned City Civil Judge for fresh decision as to whether or not such

issue indeed arises in the matter and further the same should be framed as a preliminary issue. All contentions in this regard are kept open for decision by the learned City Civil Judge.

9] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.

(M. S. SONAK, J.)

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