

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12036 OF 2015

Anita Venkatrao ... Petitioner
Vs.
Surendra Karsonal Dalal and others ... Respondents

Mr. Farhan Dubash i/b. Dastur Kalambi and Associates for Petitioner.
Ms R. C. Nichani for Respondent No.1.

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 05, 2015

P.C. :

Heard Mr. Dubash, learned Counsel for petitioner and
Ms Nichani, learned Counsel for respondent No.1 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the order dated 04.11.2015 passed by the learned trial Judge. By that order, the learned trial Judge rejected the application for adjourning the trial and hearing on the preliminary issue in Suit No.607 of 2010 till such time as the larger Bench of the Apex Court finally decides the question whether the issue of limitation can be framed and tried as a preliminary issue under Section 9-A Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. Mr. Dubash submitted that in the case of ***Kamlakar Eknath Salunkhe Vs. Baburav Vishnu Javalkar, (2015) 7 SCC 321***, the Apex Court, after considering the statement of objects and reasons of the Maharashtra (Amendment) Act in C.P.C., held that Section 9-A talks of maintainability only on the question of inherent jurisdiction and does not contemplate the issue of limitation. The said decision was rendered by the two learned Judges of the Apex Court. The said decision was

subsequently considered by the two learned Judges in the case of **Foreshore CHSL VS. Praveen D. Desai**, (2015) 6 SCC 412. In paragraph 56 of **Foreshore CHSL** (*supra*), it was observed that the decision rendered in **Kamlakar Salunkhe's case** (*supra*) is contrary to law settled by the Constitution Bench and three-Judge Bench of this Court.

4. Mr. Dubash submitted that the decisions referred to in paragraph 56 were not directly on Section 9-A of the Maharashtra (Amendment) Act of C.P.C. This fact was considered subsequently by the Apex Court on 17.08.2015 in the case of **Jagdish Shamrao Thorve Vs. Mohan Sitaram Dravid**. In that case, two learned Judges of the Apex Court observed that the decision in the case of **Kamlakar Salunkhe** (*supra*) was directly on interpretation of Section 9-A C.P.C. whereas the decisions which have been relied upon in **Foreshore CHSL** (*supra*) are not on Section 9-A of Maharashtra Amendment Act of C.P.C. The Apex Court was, therefore, inclined to think that the authority in **Kamlakar Salunkhe's case** (*supra*) was a binding precedent on the later Bench, and therefore, it should have been referred to a larger Bench.

5. Relying upon order dated 17.08.2015 passed in **Jagdish Shyamrao Thorve** (*supra*), Mr. Dubash submitted that in the first place, the decision in **Kamlakar Salunkhe** (*supra*) is a binding precedent and still holds the field, and therefore, the decision in **Foreshore CHSL** (*supra*) is not a binding precedent. Secondly, as the matter is referred to the larger Bench, the learned trial Judge ought to have adjourned the trial and hearing on preliminary issue till such time the larger Bench of the Supreme Court finally decides the question whether the issue of limitation can be framed and tried as a preliminary issue.

6. By the impugned order, the learned trial Judge rejected the application on the ground that on 15.09.2015, plaintiff's witness P.W.1 has filed affidavit of evidence and the matter was fixed for cross-examination. Merely because the matter has been referred to the larger Bench of the Supreme Court, is no ground to adjourn the matter, more particularly when the petitioner / plaintiff has chosen to proceed with the Suit without challenging the order dated 23.12.2014.

7. I do not find that the learned trial Judge has committed error in rejecting the application. In the case of ***Ashok Sadarangani Vs. Union of India***, (2012) 11 SCC 321, the Apex Court has observed in paragraph 29 thus,

“29. As was indicated in *Harbhajan Singh* case, the 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. The reference made in *Gian Singh* case need not, therefore, detain us. Till such time as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field.”

8. In view thereof, I do not find that any case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R. G. KETKAR, J.)

Minal Parab