

Mr. Surel S. Shah a/w. Ms S. Surve and Mr. Nirav Shah i/b. Little & Co. for
Petitioner.
Mr. S. H. Joshi a/w. Mr. N. H. Torade for Respondent No.1.

ORDER :

4. In support of this Petition, Mr. Shah submitted that respondent No.1, hereinafter referred to as the plaintiff has instituted Suit for

declaration that the property A described in para 2 of the plaint is of the ownership of the plaintiff; property B described in para 3 of the plaint is of the ownership and in possession of the plaintiff; and for possession of the property described in para 2 from defendant No.1 among other prayers. Plaintiff has taken out application for injunction and the same is pending. He submitted that as the application for interim relief is pending, defendant No.1 took out application under Section 9-A C.P.C. on 16.07.2014 for framing issue of limitation and / or jurisdiction as a preliminary issue. By the impugned order, the learned trial Judge rejected the application by holding that the question of limitation, in the case in hand, is a mixed question of law and fact, and for that purpose, evidence is necessary. Hence, preliminary issue cannot be decided. Mr. Shah relied upon the decision of the Apex Court in the case of *Foreshore Co-op. Hsg. Society Vs. Parveen*, **2015 (3) Mh.L.J. 315**. He submitted that Section 9-A C.P.C. provides a self-contained scheme with a non obstante clause which mandates the Court to follow the provision. It is a complete departure from the provisions contained in Order XIV, Rule 2 C.P.C. In other words, the non obstante clause inserted by Maharashtra Amendment Act of 1977 in Section 9-A and the express mandate of the section, the intention of the law is to decide the issue relating to jurisdiction of the Court as a preliminary issue notwithstanding the provision contained in Order XIV, Rule C.P.C.

5. On the other hand, Mr. Joshi supported the impugned order and submitted that the learned trial Judge held that the issue of limitation is a mixed question of law and fact for which parties will have to lead evidence. He, therefore, submitted that defendant No.1 is at liberty to request the trial Court to frame the issue of limitation under Order XIV C.P.C. In support of this submission, he also relied upon the decision of the Apex Court in **Foreshore Co-op. Hsg. Society** (*supra*).

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. In the case of Foreshore Co-op. Hsg. Society (supra), the Apex Court has considered in detail provisions of Section 9-A as also Order XIV, Rule 2 C.P.C. Paragraphs 56 to 58 of that report read as under:

“56. Mr. Nariman, learned senior counsel appearing for the appellant put heavy reliance on the decision in the case of Ramesh B. Desai vs. Bipin Vadilal Mehta, (2006) 5 SCC 638, for the proposition that a plea of limitation cannot be decided as an abstract principle of law divorced from facts as in every case the starting point of limitation has to be ascertained which is entirely a question of fact. A plea of limitation is a mixed question of law and fact. In our considered opinion, in the aforesaid decision this Court was considering the provision of Order XIV Rule 2, CPC. While interpreting the provision of Order XIV Rule 2, this Court was of the view that the issue on limitation, being a mixed question of law and fact is to be decided along with other issues as contemplated under Order XIV, Rule 2, CPC. As discussed above, Section 9A of Maharashtra Amendment Act makes a complete departure from the procedure provided under Order 14, Rule 2, CPC. Section 9A mandates the Court to decide the jurisdiction of the Court before proceeding with the suit and granting interim relief by way of injunction.

57. At the cost of repetition, we observe that Section 9A provides a self-contained scheme with a non-obstante clause which mandates the court to follow the provision. It is a complete departure from the provisions contained in Order XIV Rule 2 CPC. In other words, the non-obstante clause inserted by Maharashtra Amendment Act of 1977 in Section 9A and the express mandate of the Section, the intention of the law is to decide the issue relating to jurisdiction of the court as a preliminary issue notwithstanding the provision contained in Order XIV Rule 2 CPC. However, it is made clear that in other cases where the suits are governed by the provisions of Order XIV Rule 2 CPC, it is the discretion of the court to decide the issue based on law as preliminary issue.

58. We, therefore, after giving our anxious consideration to the provisions of Code of Civil Procedure together with the amendments introduced by the State Legislature, hold that the provision of Section 9A as introduced by (Maharashtra Amendment) Act is mandatory in nature. It is a complete departure from the provisions of Order XIV, Rule 2, C.P.C. Hence, the reasons given by the High Court in the impugned orders are fully justified. We affirm the impugned orders passed by the High Court.”

2. In view thereof, in my opinion, the learned trial Judge was not justified in rejecting the application as it cannot be said that the present case is covered by Order XIV, Rule 2 C.P.C. Admittedly, the application for interim relief is pending in the trial Court. At that stage, defendant No.1 filed application under Section 9-A C.P.C. In view of the decision of **Foreshore Co-op. Hsg. Society** (*supra*), it was obligatory on the part of the learned trial Judge to frame the issue of limitation and / or jurisdiction as a preliminary issue and permit the parties to lead evidence in support of their respective case. In view thereof, impugned order deserves to be set aside and accordingly set aside. Application at exhibit-22 is allowed. The learned trial Judge will permit the parties to lead evidence only on the preliminary issue and decide the same on the basis of material on record. It is made clear that I have not expressed any opinion on the merits of application at exhibit-22. All the contentions on merits of the parties are expressly kept open. Rule is made absolute in the aforesaid terms, with no order as to costs.

(R. G. KETKAR, J.)

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