

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.11748 of 2014

1. Shatrugna s/o Balbhim Jadhav
Age – 72 years, Occu. Agriculture,
R/o. Wakadi (Isthal), Tq. Kallamb,
Dist. Osmanabad.
2. Ashok S/o Laxman Shinde,
Age- 71 years, Occu. Agriculture,
R/o Wakadi (Isthal), Tq. Kallamb,
Dist. Osmanabad.
3. Kamalbai W/o Ashok Shinde,
Age – 67 years, Occu. Household
R/o. Wadadi (Isthal), Tq. Kallamb,
Dist. Osmanabad.
4. Pushpawati W/o Shatrugna Jadhav
Age – 67 years, Occu. Household
R/o. Wadadi (Isthal), Tq. Kallamb,
Dist. Osmanabad.
5. Anirudha @ Anurath S/o Sahebrao Jadhav,
Age – 73 years, Occu.: Pensioner,
R/o. Khorli Galli, Mitra Nagar, Latur,
Tq. & Dist. Latur.

... Petitioners
(Orig. defendants)

Versus

1. Tatyaba S/o Baburao Bhise
(since deceased through L.Rs.)
- 1-A. Vishnu S/o Tatyaba Bhise,
Age – 57 years, Occu. Agriculture,
R/o Saundana (Kaij), Tq. Kaij,
Dist. Beed.
- 1-B. Brahmadeo S/o Tatyaba Bhise,
Age – 52 years, Occu. Agriculture
R/o Saundana (Kaij), Tq. Kaij,
Dist. Beed.

... Respondent
(Ori. Plaintiffs)

...

Mr.V.D. Salunke, Advocate for Petitioners;

Mr.P.R. Katneshwarkar, Advocate for Respondent
Nos. 1 and 2.

...

CORAM: P.R.BORA, J.

Date of reserving the judgment : 22nd June, 2016

Date of pronouncing the judgment : 15th July, 2016

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JUDGMENT :

1) Rule. Rule made returnable forthwith.

Heard finally, with consent of the parties.

2) In the present petition, the petitioner has challenged the order dated 31.08.2013 passed by the 2nd Jt. Civil Judge, Kallamb, District Osmanabad below application at Exhibit 53 in Regular Civil Suit No. 310/2007.

3) The aforesaid application at Exhibit 53 was filed by the present petitioners with a prayer that, the Court shall frame the preliminary issue as about the maintainability of the suit filed by the present respondent and whether the suit so filed was within

the limitation and to decide the said issue first. The application so filed was opposed by the present respondents. It was the contention of the respondent that, the Court had already framed the issues on the basis of the pleadings of the parties and the hearing of the suit had already begun. The respondents have denied the other allegations made in the application filed by the present petitioner. The learned Civil Judge, after having heard the learned Counsel appearing for the respective parties, rejected the said application at Exhibit 53 vide the impugned order.

4) Shri V.D.Salunke, the learned Counsel appearing for the petitioners submitted that, in view of the specific objections raised by the present petitioners who are Defendant Nos. 1 and 2 before the trial Court, in the written statement filed by them that, the subject properties were sold by the plaintiffs i.e. the present respondents to the petitioners by registered sale deeds executed on 7.8.1972, and as such the story putforth by the plaintiffs that the

subject properties were mortgaged to the petitioners was only with a view to bring the suit within the limitation since the suit was shown to have been filed for redemption of mortgage, the lower Court ought to have allowed the application filed by the petitioners and must have framed the preliminary issue as to whether the suit was maintainable and within the limitation.

5) Referring to and relying upon the Judgment of the Hon'ble Apex Court in the case of Foreshore Cooperative Housing Society Ltd. Vs. Pravin D. Desai, 2015 (3) MH.L.J., 315, the learned Counsel submitted that, an issue relating to a bar to the suit created by law of limitation can be tried as a preliminary issue under Section 9-A of the Code of Civil Procedure (hereinafter referred as to the Code). Learned Counsel therefore prayed for setting aside the impugned order and consequently to allow the application at Exhibit 53 filed by the Petitioners before the trial Court.

6) Shri P.R.Katneshwarkar, the learned

Counsel appearing for the respondents opposed the submissions made on behalf of the petitioners. Learned Counsel submitted that, the respondents have raised the specific allegation in the suit plaint that, mutation of the names of the petitioners on 7/12 extract of the subject properties as owners of the said properties is a fraud played upon them. Learned Counsel further submitted that, the learned Trial Court had rightly held that, since the mixed issues of law and facts are involved, the Code does not confer jurisdiction on the Court to try such issue as a preliminary one. Learned Counsel further submitted that, the law laid down in the case of Foreshore Cooperative Housing Society Ltd. Vs. Pravin D. Desai (cited supra), would not apply to the facts of the present case. Learned Counsel, therefore, prayed for dismissal of the petition.

7) From the pleadings of the parties, it is evident that, the respondents are claiming the suit filed by them to be within the period of limitation since according to them, it's a suit for redemption of

mortgage for which the period of limitation as provided under article 61(a) of the Limitation Act is thirty years from the date when the right to redeem or to recover possession accrues in their favour. As against it, it is the assertion of the petitioner that, the respondents have subsequently sold the mortgaged properties to the petitioners by way of registered sale deeds executed in the year 1972 and since then the properties ceased to be the mortgaged properties. In the premise of the pleadings as aforesaid, it is the contention of the petitioners that, the suit filed by the respondents allegedly for redemption of mortgage is not maintainable and cannot be held to have been filed within the period of limitation.

8) For a moment, even if the contention of the petitioners is accepted that, the fate of the suit depends on the issue of limitation and hence the said issue requires to be framed as a preliminary issue and going ahead even if it is further presumed that such an issue is framed by the Court, unless the story put forth by the respondents that, the subject properties

were mortgaged to the petitioners and that though the period of mortgage has expired, the petitioners have illegally kept the properties in their possession, is falsified by the petitioners and unless it is established that, the subject properties are no more in possession of the petitioners by way of mortgage, but petitioners have become the absolute owners of the properties on the basis of sale deeds executed by the respondents in their favour, it may not be possible for the petitioners to substantiate their contention that, the suit filed by the respondents is beyond the period of limitation and that the Civil Court has, therefore no jurisdiction to entertain the same.

9) It is thus evident that, the issue of maintainability or limitation may not be possible to be decided isolatedly and the trial of the suit on all the issues appears unavoidable. Neither the petitioners, nor the respondents have placed on record the issues framed by the Trial Court. From the arguments advanced on behalf of the petitioners, it appears that, the Trial Court has not framed the specific issue as

regards limitation and the existence of cause of action. Since the issues framed by the Trial Court are not placed on record, it is not possible for this Court to make any comment whether the issues already framed by the Trial Court cover the issues of limitation and existence of cause of action. However, from the material on record, this Court is of the opinion that, the issues as aforesaid may not be independently and isolatedly decided and the findings on all the issues may be required for reaching to the conclusion even on the point of limitation or existence of cause of action.

10) In the case of Foreshore Cooperative Housing Society Ltd. Vs. Pravin D. Desai (cited supra), the question, which was for consideration before the Hon'ble Apex Court was as to whether the phrase "an objection to the jurisdiction of the Court to entertain such a suit" as used in Section 9-A of the Maharashtra Amendment would include an objection with regard to limitation. In other words, whether an issue relating

to a bar to the suit created by law of limitation can be tried as a preliminary issue under Section 9-A of the Code. There cannot be a dispute as regards the preposition of law as laid down by the Hon'ble Apex Court in the aforesaid judgment. However, while concluding the said judgment, the Hon'ble Apex Court has clarified that, in the said cases where the suits are governed by the provisions of Order 14 Rule 2 of the Code, it is the discretion of the Court to decide the issue based on law as preliminary issue. In the instant case, the Trial Court has opined that, since the mixed questions of facts and law are involved, the suit may not be disposed of on the issue of law alone. I, therefore, do not see any reason for causing interference in the impugned order. Hence, the following order:

ORDER

- (1) The Writ Petition is dismissed without any order as to the costs.
- (2) Rule Discharged.

(P.R.Bora)
Judge

SPR