

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION***

***APPEAL FROM ORDER NO.226 OF 2014  
WITH  
CIVIL APPLICATION NO.264 OF 2014  
IN  
APPEAL FROM ORDER NO.226 OF 2014  
WITH  
WRIT PETITION NO.3740 OF 2014***

Smt. Lata wd/o Dr. Sitaldas Balani ..Appellant  
Vs.  
Smt. Devkibai Vasudev Gurnani & Ors. ..Respondents

***WITH  
APPEAL FROM ORDER NO.346 OF 2014  
WITH  
CIVIL APPLICATION NO.399 OF 2014  
IN  
APPEAL FROM ORDER NO.346 OF 2014***

Sandeep S. Balani ..Appellant  
Vs.  
Smt. Devkibai Vasudev Gurnani & Ors. ..Respondents

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Mr.Navin Parekh a/w Mr. Darshit Jain i/b Mr. V.D. Upadhyay and Ms. Abha Gupta for the appellant in AO No.226/2014 and WP No.3740/2014 and for respondent No.3 in AO No.346/2014.

Mr. Chandraprakash i/b. Mr. R. R. Chile for respondent Nos.1 and 2 in AO No.226/2014, WP No.3740/2014 and AO No.346/2014.

Mr.Kishor Jain i/b Mr. Mehul Shah for respondent No.3 in AO 226/2014 and WP No.3740/2014 and appellant in AO No.346/2014 and applicant in CAA 399/2014.

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**CORAM : N.M. JAMDAR, J.**  
**DATED : 14 MARCH 2016**

**P.C.:**

. Rule. Returnable forthwith. Respondents waive service. By consent, the Appeals and the Writ Petition are taken up for final disposal.

2. This group, of writ petition and two appeals arises from the order dated 7/12/2013 / 9/12/2013 passed by the learned City Civil Court, Mumbai in Notice of Motion No.3292/2013 and Notice of Motion No.1605/2013 in SC Suit No.224/2013.

3. The City Civil Court has passed the following impugned order:

1. *Notice of Motion Nos.3292 of 2013 and 1605/2013 are partly made absolute in terms of prayer clause(a) of both motions and preliminary issue is framed as follow:-*

*Whether suit is barred by limitation ?*

2. *The ad-interim relief in terms of prayer clause (a) and (b) in Notice of Motion No.287 of 2013 which reads as follow:-*

*(a) that pending the hearing and final disposal of the suit this Hon'ble Court be pleased to issue an order and injunction of this Hon'ble Court whereby restraining defendant from dealing in the plaintiffs share of the suit property contained in Deeds of Release, duly registered with Sub*

*Registrar of Assurances at Mumbai being no.3808 dated 10/5/2004 and no.4461 dated 27/5/2004 Registered before the Registrar of assurances at Mumbai, BDR3 situated at village, Mohili, Taluka-Kurla District Mumbai suburban, bearing Plot no.6 survey no.23, Hissa No.1, CTS 4A, 5/3, admeasuring 1847 sq. mtrs structure area 2249 sq. mtrs., plot no.11 area 1846 sq. mtrs, survey no.23 Hissa No.1 Total 8/42(P) in any manner or creating any third party interest whatsoever or encumbering it in any manner.*

*(b) that pending the hearing and final disposal of the suit this Hon'ble Court be pleased to pass a temporary injunction restraining the defendant and every other persons acting on their behalf including their agents, attorneys and servants from dealing from selling, alienating, transferring, creating third party interests or dealing in any manner with the rights of the aforementioned property, is granted till decision of the preliminary issue.*

3. *Hearing of preliminary issue is expedited.*

4. As regards framing of the preliminary issue whether the suit is barred by limitation, the plaintiff filed a Writ Petition bearing No.3500/2014 which was disposed of by this Court on 4 April 2014 stating that interference in the impugned order for framing preliminary issue is not warranted and as regards argument of the plaintiff regarding fraud and misrepresentation, it would be consequent upon the decision that would be rendered in deciding the preliminary issue. This decision was challenged by the plaintiff

in the Hon'ble Apex Court by way of SLP No.15580/2014 and the Hon'ble Apex Court had disposed of the above SLP by passing the following order:

*“ Limitation being a mixed question of fact and law, if, is decided as preliminary issue, we are of the view that the court can do so only after allowing the parties to lead evidence. Learned counsel for the respondents submit that the respondents have no objection to the same. In view of the aforesaid facts, we dispose of the special leave petition allowing the parties to lead evidence.”*

5. In the appeals before the Apex Court, it was pointed out by the learned counsel for the appellants that their appeal challenging the impugned order where prayer for framing preliminary issue is pending in the High Court i.e. Writ Petition No.3500/2014.

6. As regards Writ Petition No.3740/2014 filed by the petitioner, who is defendant No.2 in the suit, it challenges the order dated 9/12/2013 wherein the Notice of Motion taken out by the petitioner for framing the preliminary issues was rejected. In the notice of motion, the petitioner proposed the preliminary issue as under:

*“2. That, the plaintiffs are claiming cancellation of duly registered Deed of Release dated 10/5/2004 and 27/5/2004 executed by plaintiff nos.1 and 2 and in fact under the Deed of Release they have received consideration of over Rs.1,00,000/- but the suit is not valued properly and Court fees is not paid accordingly*

*therefore plaint is liable to be rejected on said ground.*

3. *That, the plaintiffs have filed one Civil Suit No.1456 of 2011 in Delhi High Court and all the prayers which they have made in present suit could have been made in the said Court in Delhi High Court and hence as per the provisions of law suit is barred by res-judicata, constructive res-judicata or the provisions of akin or analogous law.*

4. *It is also their stand that, they have prayed for relief which they were required to pray in the suit before Hon'ble Delhi High Court and therefore suit is barred by provisions of Order II, Rule 2 of Code of Civil Procedure and Order XIII of Code of Civil Procedure.*

5. *It is their further stand that, the suit do not disclose cause of action as it is filed by making false, incorrect and misleading statements and attempt is made to create the illusory cause of action and therefore plaint deserves to be rejected.*

6. *The defendants claim that, the other members of HUF are also shareholder in the suit property and they are not made a party to the present suit, therefore suit is barred for non rejoinder of necessary parties. As such plaint deserves to be rejected.”*

7. Learned counsel for the petitioner made a serious grievance that in the impugned order the learned City Civil Court Judge has given no reasons as to why these issues should not be considered as preliminary issues. Learned counsel for the plaintiff supported the findings of the learned City Civil Judge stating that they are correct on merits.

8. The petitioner had taken out the Notice of Motion praying that certain points should be framed as preliminary issues. While disposing of the notice of motion, it was obligatory on the learned City Civil Court to give reasons, atleast briefly, as to why the notice of motion was being rejected. The only discussion as regards this prayer is found in paragraph 19 of the impugned order which reads thus:

*“19. Insofar as other objections such an objection as to valuation of the suit, and improper verification of the plaint are concerned, learned advocate for plaintiff rightly submitted that, at the most they can be considered as irregularity and on the said ground plaint cannot be summarily rejected.”*

Having considered the rival contentions, I am of the opinion that the order passed by the City Civil Court rejecting the prayer for framing the above preliminary issues, does not disclose any reason. It is not possible in writ jurisdiction therefore to decide the issue at first instance acting as a Trial Court. For lack of any reasoning in the impugned order on this issue, the impugned order as regards this aspect, the impugned order as regards this rejection cannot be sustained.

9. Learned counsel for the plaintiff submitted that the petitioner had given consent in the Apex Court where order dated 20 February 2015 was passed. He submitted that in view of this position there is no question of framing any other issue. It is the contention of the petitioner that the petition pending was part of

the proceedings before the Apex Court. *Prima facie*, the order passed by the Hon'ble Apex Court does not state that all other points stand foreclosed. But, since I am not entering into the merits of notice of Motion, which is disposed of by the impugned order, I leave that issue open to be decided by the learned City Civil Court. It will be open to the plaintiff to urge this aspect relying upon the proceeding filed before the Apex Court and it will be open to the other parties to counter the same.

10. Turning now to the appeals filed by defendant Nos.1 and 2, petitioner No.2 has filed Appeal No.226/2014 and Defendant No.1 has filed appeal No.346/2014. In these appeals, the main grievance made by the learned counsel for the appellants is that they have not been given adequate opportunity to put-forth their case while granting ad-interim relief by the learned City Civil Court Judge. The learned counsel submitted that the plaint was affirmed on 8/11/2012 and the suit was filed on 21/1/2013 challenging the Relinquishment Deed of 2004 and there was no ad-interim order till it was granted on 8/9/2013. The learned Counsel submitted that the learned City Civil Judge suo moto, without reference to any other factual situation, has granted ad-interim order merely observing that it is necessary to pass such order.

11. Learned counsel for the plaintiff submitted that the Notice of Motion was being adjourned from time to time and the

appellants were fully aware of the same. He submitted that in the facts of the suit, it is necessary to pass a protective order. He relied upon the decision of a Division Bench of this Court in ***Ferani Hotels Private Limited vs. Nusli Neville Wadia and others.***

12. As regards the grant of ad-interim relief, the learned City Civil Court Judge has dealt with the same in two paragraphs as under:

“22. Before taking out present proceedings by the defendants, plaintiff had filed Notice of Motion No.287 of 2013 by which plaintiff had prayed to restrain defendants from dealing with their share of suit property as contended in the Deeds of Release dtd. 10/5/2004 and 27/5/2004 and further to restrain them from creating any third party interest with their shares in the property. The apprehension of the plaintiff appears to be reasonable.

23. Section 9A(2) of CPC provides that, if during the pendency of application for interim injunction an objection as to jurisdiction is raised, then Court may grant ad-interim reliefs. In the light of facts and circumstances as stated herein before, no loss will be caused to the defendants, if during the pendency of hearing of the preliminary issue ad-interim relief in said Notice of Motion is granted. On the contrary, granting such relief will grant opportunity to both parties for hearing of preliminary issue and will also take care of the apprehension of plaintiff.”

Paragraph 22 only narrates that the Notice of Motion has been taken out and it states that apprehension is reasonable and paragraph 23 refers to the powers of the Court. There is no

reference to the time period lapsed and other contentions which are sought to be advanced by the appellants. The learned counsel for the parties sought to address various contentions on merits. Learned counsel for the plaintiff sought to support the order on the ground that it is necessary, while it is the contention of the appellant that it is beyond the pleadings and granted without being sought for.

13. Though the order impugned seeks to protect the rights and contentions of the plaintiff, it does affect the rights of the appellants. The learned City Civil Court Judge ought to have referred to the parameters which are necessary for grant of the interim relief. There is absence of any discussion. Furthermore, it does appear from the title of the impugned order that Notice of Motion No.287/2013 was not listed on board on that date. Therefore, the grievance made by the appellants cannot lightly be brushed aside. That a fair hearing is given by the Court, it is necessary that Notices of Motions filed by the appellants i.e. Notice of Motion No.3292/2013, 1605/2013 and 287/2013, are restored to the file of City Civil Court, Mumbai to be considered on its own merits.

14. As regards Notice of Motion No.3292/2013, it is made clear that the City Civil Court Judge will consider only the aspects enumerated in clauses 2, 3, 4, 5 and 6 of paragraph 2 of the

impugned order and not the issue as regards limitation. Contentions of all the parties, including the contentions of the plaintiff regarding the effect of the order of the Apex Court are kept open in that regard. The Notice of Motion filed by the plaintiff, though disposed of by the impugned order, stands restored for consideration on merits on the above limited aspect. The learned City Civil Judge will take up Notice of Motion 287/2013 for consideration and decide the same within a period of 8 weeks from the date the order reaches the court, on its own merits and without being influenced by the earlier orders.

15. As regards the hearing of Notice of Motion No.3292/2013, 1605/2013, the learned City Civil Court will fix appropriate early date for disposal of the Notice of Motions.

16. With the above directions and suitable modifications in the impugned order dated 7/12/2013-9/12/2013, both the Appeals from Order, and the Writ petition are accordingly disposed of in above terms.

17. Learned counsel for the plaintiff, at this stage expresses an apprehension that his grievance as regards the above referred issues will not be considered by the City Civil Court. His apprehension is completely unwarranted, as I have kept all the issues open to be agitated by the parties and to be decided on its

own merits. Writ of this order be sent by the Registry forthwith, considering the time bound direction.

*(N.M. JAMDAR, J.)*