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

WRIT PETITION NO. 10303 OF 2016

New Prakash Co-operative Housing
Society Ltd. through its Chairman/
Secretary & Anr.

...Petitioners.

V/s.

Jani Niwas CHS through its Secretary
Mr. Kedarnath Lallu Yadav and Ors.

... Respondents.

Mr. Sandesh Patil i/b. Ms. Anusha Amin for the Petitioners.
Mr. Sandeep Mishra a/w. Prakash Mishra for Respondent 1.

CORAM : N.M. Jamdar, J.

14 September, 2016.

Oral Order :-

Heard learned Counsel for the parties. The learned Counsel appears for Respondent No.1 – Plaintiff. The learned Counsel for the Petitioners states that for disposal of this Petition, Respondent Nos. 2 to 13 who are Defendants are not necessary parties and seeks leave to delete these Respondents. Leave sought for granted. Amendment to be carried out forthwith.

2. By this Petition, the Petitioners challenge the order dated 5 August 2016 whereby the application filed by the Petitioners for framing an issue of limitation under Section 9-A of the Code of Civil Procedure has been rejected.

3. Suit has been filed by the Respondent No.1-Plaintiff in which the Respondent has sought for declaration that deed of conveyance executed on 11 October 2012 is illegal, null and void and for further relief. An application was taken out by the Petitioner for framing an issue below Section 9-A. The learned Civil Judge in the impugned order, which runs into eight paragraphs reproduces rival contentions upto paragraph 6, then refers to the scope of Section 9-A and in one paragraph, rather in one line has stated that the decision of the Apex Court in the case of *Kamalakar Eknath Salunkhe v/s. Baburav Vishnu Javalkar & Ors.* reported in (2015) 7 SCC 321 is per incuriam and has observed that since the issue is referred to larger Bench in the Apex Court, the law is not clear and has post-poned the decision on the issue of limitation.

4. The learned Counsel for the parties have sought to place on record various decisions of the Apex Court in support of their rival contentions as to the mandatory nature of Section 9-A. The power of superintendence under Article 227 of the Constitution is vested to correct and guide the subordinate Courts in performance of their judicial functions. The approach adopted by the learned Civil

Judge has to be corrected. Firstly, merely because an issue has referred to larger Bench, the binding precedent which holds the field, is not deferred. Secondly, the decision of the Apex Court on the point, cannot be in one line brushed aside as *per incuriam*. Gravity of such one line observation has not been fully appreciated by the learned Civil Judge. It is not that the Civil Judge can not distinguish the decision of the Apex Court, but a greater scrutiny is required before making such sweeping observations. A decision can be taken in this Writ Petition after hearing the parties on question of law, but the matter needs to be restored to the learned Civil Judge to impress the need to have a detailed reasoning when various decisions of the Apex Court are cited and the correct position of law is to be culled out. Since the learned Civil Judge has not undertaking this task at all, this failure needs to be corrected.

5. The impugned order dated 5 August 2016 is quashed and set aside. The Application filed by the Petitioner below Exhibit 29 stands restored to the file of the learned Civil Judge. The learned Civil Judge will consider the rival contentions and the case laws cited in light of what is observed above and decide the same on its own merits.

6. The Writ Petition is accordingly disposed of in the above terms.

(N.M. Jamdar, J.)