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***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL No. 243 OF 2015
WITH
NOTICE OF MOTION No. 893 OF 2014
IN
SUIT No. 517 OF 2014***

Joseph Anthony Dcunha and Ors.

....Appellants

Vs.

Lydia Agnes Rodrigues and Ors.

....Respondents

Mr. Owen Menezes i/b. Johnson John for Appellants

Mr. Cyrus Ardeshir a/w. Mr. Ayaz Bilawala a/w. Neha Bhatt i/b. Bilawala & Co. for Respondents

***CORAM : V. M. KANADE &
M.S. SONAK, JJ.***

DATE : JULY 8, 2016

P.C. :

1. After the matter was heard for some time, a suggestion was made by this Court that without prejudice to the rights and contentions of both the parties, three flats of 1150 sq. ft. built up area along with three car parking spaces may not be sold or third party rights may not be created. This suggestion was accepted by both the parties and as such, therefore, the appeal can be conveniently disposed of on account of the said understanding

arrived at between the parties. However, there is one more issue of limitation which further needs to be decided.

2. After having heard Shri Menezes, learned counsel appearing on behalf of the Appellant on the issue of limitation, we are of the view that though the issue of limitation was raised by the Appellant, this issue was not considered by the Learned Single Judge. He submitted that as per the law laid down by the High Court and the Supreme Court, which exists so far, a preliminary issue ought to have been framed by the Learned Single Judge. The Full Bench of this Court as well as the Apex Court in few cases have taken the same view. However, it was being noted that in some of the cases, the Apex Court has also held that the question of limitation cannot be raised as a preliminary issue but this issue can be raised before the Learned Single Judge under Order 14 Rule 2 of the CPC. The Larger Bench of the Apex Court has not yet decided the said issue so far. The Apex Court, however, has not granted the stay to the judgment and order passed by this Court and, therefore, we are of the view that since this issue has been raised before the Apex Court, the Learned Single Judge has no other option but to frame this issue.

3. We, therefore, direct the Learned Single Judge to frame a preliminary

issue of limitation on the application made by the parties and decide the same expeditiously on merits and in accordance with law, after permitting both the parties to lead evidence, if required. The said exercise shall be completed, as far as possible within four months. The Appellants shall file an undertaking before the Learned Single Judge within two weeks that they have not created any third party rights and during the pendency of the suit, they will not create any third party rights or hand over the possession in respect of three flats admeasuring 1150 sq.ft. built up area along with three car parking spaces. The Appellants shall earmark these flats and submit a plan along with undertaking.

4. In view of the above, the stay order granted by the Learned Single Judge is vacated and the Appellants are permitted to carry out the construction as per the sanctioned plan. Appeal, therefore, is disposed of in the aforesaid terms. All contentions of all the parties are kept open.

M.S. SONAK, J.

V.M. KANADE, J.