

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.516 OF 2015
IN
NOTICE OF MOTION NO.372 OF 2015
IN
SUIT NO.201 OF 2015

Raivathari Madhupati Singhania and Others. .. Appellants
Vs
Madhupati Vijaypat Singhania and Others. .. Respondents

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Shri Iqbal Chhagla, Senior Counsel along with Shri Dhaval Agarwal and Ms. Rupali Dixit i/b Ms. Sharmila U. Deshmukh for the Appellants.

Shri Nirman Sharma i/b Desai & Dewanji for the Respondent Nos.1 and 2.

Shri Virag Tulzapurkar, Senior Counsel along with Shri Dhawal Mehta, Ms. Suraj Tunga and Ms. Sachi Udeshi i/b Wadia Ghandy & Co for the Respondent No.3.

Shri Janak Dwarkadas, Senior Counsel along with Shri Kunal Dwarkadas i/b Vigil Juris for the Respondent No.4.

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CORAM : A.S. OKA & A.A.SAYED, JJ
DATED : 1ST AUGUST 2016

ORAL JUDGMENT : (PER A.S.OKA, J)

1. Heard learned senior counsel appearing for the Appellants, the learned senior counsel appearing for the third Respondent and the learned senior counsel appearing for the fourth Respondent.

2. In terms of the order dated 5th February 2016, the Appeal is taken up for final disposal at the stage of admission. The Appeal is filed

by the original Plaintiffs. The original Plaintiffs are aggrieved by the order dated 21st August 2015 passed by the learned Single Judge by which a Notice of Motion taken out by them for various interim reliefs has been dismissed. We have heard the submissions of the learned senior counsel appearing for the Appellants on merits of the Appeal. The learned senior counsel appearing for the third Respondent as well as the fourth Respondent have submitted that the issue of bar of limitation was raised by way of reply to the Notice of Motion and their contention in this Appeal is that as the suit was barred by limitation, the Notice of Motion for interim relief deserved to be dismissed. In short, their contention is that the said Respondents want to support the impugned order by contending that the issue of bar of limitation ought to have been decided in their favour.

3. Our attention is invited to paragraph 14 of the impugned order in which the learned Single Judge seems to have dealt with the issue of bar of limitation. The relevant part of the Paragraph 14 of the said impugned order reads thus:

“..It would be difficult, therefore, to unseat any of the Plaintiffs at this interim stage without material evidence one way or the other as to their actual date of knowledge, and it does seem to me that the period of limitation cannot be expected to operate at a time when the Plaintiffs did not even know that they had a cause of action. I am not, therefore, prepared to hold against the Plaintiffs on the ground of limitation at this

stage and do not think it necessary to deal further with this aspect of the matter.”

(Underline supplied)

4. Our attention is also invited to the further findings recorded by the learned Single Judge. At one place, the learned Single Judge has observed that even leaving aside the issue of bar of limitation, the Plaintiffs have not established a prima facie case.

5. The learned senior counsel appearing for the third Respondent on instructions again states that he wants to press the issue of bar of limitation.

6. As the third Respondent has insisted before this Court that the issue of bar of limitation should be gone into, the same cannot be decided unless a Preliminary Issue is framed under Sub-section (1) of Section 9A of the Code of Civil Procedure, 1908 (for short “the said Code”). The law on this aspect has been laid down by the Apex Court in its decision in the case of *Foreshore Co-operative Housing Society Limited v. Praveen D. Desai (Dead) Through Legal Representatives and Others*¹. The Apex Court held that Section 9A of the said Code is mandatory and though there may be some discretion left to the Court under Rule 2 of Order XIV of the said Code, there is no such discretion vesting in the Court under Section 9A of the said Code. We may note

¹ (2015)6 scc 412

here that the issue of the bar of limitation has been raised in the reply to the Notice of Motion for interim relief. The Apex Court held that the issue of bar of limitation is also an issue of jurisdiction contemplated under Sub-section (1) of Section 9A of the said Code.

7. The learned Single Judge has in Paragraph 14 has observed that he is not prepared to hold against the Plaintiffs on the ground of limitation at the stage of Notice of Motion. As the Defendants had pressed into service the issue of bar of limitation at the time of hearing of the Notice of Motion for seeking interim relief, the learned Single Judge ought to have framed the Preliminary Issue as provided under Sub-section (1) of Section 9A of the said Code. The Notice of Motion could not have been disposed of without deciding preliminary issue of bar of limitation.

8. The learned senior counsel appearing for the Appellants submitted that if this Court is inclined to frame the issue of bar of limitation, the prayer for grant of ad-interim relief in terms of Sub-section (2) of Section 9A of the said Code will have to be considered. He submitted that the appropriate ad-interim relief may be granted for protecting the interest of the Appellants. The learned senior counsel appearing for the third Respondent has invited our attention to the affidavit of the third Respondent dated 21st June 2016. Without

prejudice to the rights and contentions of the third Respondent, on instructions, he stated that the third Respondent does not intend to transfer or create third party interests in respect of the lands described in Item No.II at Page 536, Item No.II at Page 538, Item No.II at Page 539 and Item No.II at Page 540 till the disposal of the prayer which may be made by the Appellants for grant of ad-interim relief in terms of Sub-section (2) of Section 9A of the said Code. He, however, opposed the prayer for grant of any other ad-interim relief and would urge that the question of granting any ad-interim relief under Sub-section (2) of Section 9A of the said Code may be left to the learned Single Judge.

9. Now we have no choice but to direct framing of a Preliminary Issue. In view of Sub-section (2) of Section 9A of the said Code, the Appellants can always apply to the learned Single Judge for grant of ad-interim relief till the disposal of the Preliminary Issue or till the disposal of the Notice of Motion. We may note here that by an order dated 17th April 2015, the learned Single Judge fixed the Notice of Motion for final disposal and therefore, at no stage, the prayer for ad-interim relief pending the final disposal of the Notice of Motion has been considered by the learned Single Judge on merits. Therefore, a liberty will have to be granted to the Appellants to move the learned Single Judge for grant of ad-interim relief in accordance with Sub-section (2) of Section 9A of the said Code.

10. As far as the immovable properties of the minors are concerned, we accept the aforesaid statement which is already made by the learned senior counsel appearing for the third Respondent on instructions and which is recorded in Paragraph 8 above.

11. As the prayer for grant of ad-interim relief was never heard by the learned Single Judge, we do not deem it proper to consider the said prayer in this Appeal and we propose to grant liberty to the Appellants to move the learned Single Judge. Suffice it to say that any transfer or alienation made by the Defendants in relation to the suit properties, both the immovable and movable (except the properties in respect of which aforesaid statement has been made), will be naturally subject to further orders which may be passed by the learned Single Judge.

12. Accordingly, we dispose of the Appeal by passing the following order:-

ORDER :

- (a) The impugned order dated 21st August 2015 is quashed and set aside and the Notice of Motion No.372 of 2015 is restored to the file of the learned Single Judge;

- (b) We direct that a Preliminary Issue on the bar of limitation be framed in terms of Sub-section (1) of Section 9A of the Code of Civil Procedure, 1908;
- (c) We grant liberty to the Appellants to move the learned Single Judge for grant of ad-interim relief in terms of Sub-section (2) of Section 9A of the Code of Civil Procedure, 1908;
- (d) We accept the statement made by the learned senior counsel appearing for the third Respondent on instructions which has been recorded in Paragraph No.8 above. The said statement will continue to operate till the prayer made in terms of Clause (c) above is decided;
- (e) We make it clear that any further alienation made by the Respondents in relation to the suit property (save and except the property covered by the aforesaid statement) will be subject to further orders which may be passed by the learned Single Judge;

- (f) We make it clear that we have not made any adjudication on merits of the controversy as regards the Preliminary Issue of bar of limitation;
- (g) Needless to add that the prayer which may be made by the Appellants under Sub-section (2) of Section 9A of the said Code will be decided by the learned Single Judge on its own merits and we have made no adjudication on that aspect;
- (h) The Appeal is disposed of on above terms.

(A.A. SAYED, J)

(A.S. OKA, J)