

IN THE HIGH COURT OF JUDICATURE AT BOMBAYW
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 40 OF 2016
IN
NOTICE OF MOTION NO.2634 OF 2012
IN
SUIT NO.1209 OF 2012

Hari Niwas Co-operative Housing Society
Ltd.

.. Appellant
(Org. Plaintiff)

Vs

Grace Construction and Others.

.. Respondents

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Shri Amir Arsiwala along with Shri Vrinda i/b Ms. Mansi K. Patel for the
Appellant.

Shri Sanjay Gawde for the Respondent No.1.

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CORAM : A.S. OKA & A.A. SAYED, JJ
DATED : 7TH JULY 2016

PC.

1. Notice for final disposal of the Appeal was issued on 30th March 2016. Though the Appeal was kept back once on the request made by the first Respondent, on the second occasion when it was called out, again a request is made for keeping back the matter.

2. Considering the limited controversy involved in this Appeal, request made by the first Respondent cannot be acceded to.

3. The Appellant is the original Plaintiff. A Notice of Motion was taken out by the Eighth Defendant being Notice of Motion No.2634 of 2012 claiming for following two substantive reliefs.

- “(a) That this Honourable Court be pleased to frame issue of jurisdiction under Section 9-A as no leave under Order 2 Rule 2 is sought by the Plaintiff herein before instituting the present suit;
- (b) That this Honourable Court be pleased to dismiss the suit for want of jurisdiction as leave under Order 7 Rule 9 was not sought from the Learned City Civil Court before whom the Short Cause Suit No.66 of 2007 is pending.”

4. By the impugned order dated 23rd September 2015, the learned Single Judge has disposed of the Notice of Motion by framing the issue of bar of limitation.

5. The contention of the learned counsel appearing for the Appellant/Plaintiff is that in the Notice of Motion on which the impugned order is passed, the issue of bar of limitation was not raised at all. He pointed out that the issues which are raised are reflected from the prayer clauses (a) and (b). He, therefore, submitted that the Notice of Motion needs to be reconsidered by the learned Single Judge.

6. The learned counsel appearing for the first Respondent submitted that there was another Notice of Motion taken out by the first

Respondent in which the issue of bar of jurisdiction was raised. In fact, time was granted till today to produce copies of the other Notice of Motion. However, copies are not produced.

7. We have carefully perused the impugned order. The impugned order is passed only on Notice of Motion No.2634 of 2012 in which the issue of bar of limitation was not at all raised. In the said Notice of Motion, there was no prayer made for framing a preliminary issue of bar of limitation. Though in the impugned order, the learned Single Judge has made a reference to the submissions of the first Respondent, there is no reference in the impugned order to the Notice of Motion filed by the first Respondent raising an issue of bar of limitation. We must note that the impugned order has been passed on the Notice of Motion taken out by the Eighth Defendant. As there was no prayer made in the Notice of Motion for framing a preliminary issue of bar of limitation, we are of the view that the Notice of Motion will have to be heard afresh by the learned Single Judge after giving an opportunity of being heard to all the concerned parties. Accordingly, we dispose of the Appeal by passing the following order.

ORDER :

- (a) The impugned order dated 23rd September 2015 is quashed and set aside and the Notice of Motion

No.2634 of 2012 is restored to the file of the learned Single Judge;

- (b) If there are other Notices of Motion taken out by the Respondents for raising preliminary issue, the said Notices of Motion along with the Notice of Motion No.2634 of 2012 shall be heard and disposed of by the learned Single Judge after giving an opportunity of being heard to all the concerned parties;
- (c) All contentions are kept open;
- (d) All concerned to act upon an authenticated copy of this order;
- (e) The Appeal is disposed of on above terms;
- (f) Pending Notices of Motion are disposed of.

(A.A. SAYED, J)

(A.S. OKA, J)