

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

WRIT PETITION NO. 9596 OF 2017

1. Satyabalkrushna @ Babarao
s/o Hanmantrao Shinde
Age 62 years, occup. Agril.,
R/o Halda, Tq. Kandhar,
Dist. Nanded
2. Chakradhar s/o Hanmantrao Shinde
Age 57 years, occup. Agri. & Service,
R/o Halda, Tq. Kandhar, Dist. Nanded,
at present R/o Vishnupuri, Asarjan Camp,
Nanded, Tq. and Dist. Nanded
3. Prakash s/o Hanmantrao Shinde, .. Petitioners/
Age 55 years, occup. R/o Halda, Original
Tq. Kandhar, District - Nanded. Defendants

versus

Govind s/o Baburao Shinde,
Age 54 years, occup. Agril. & service,
R/o Halda, Tq. Kandhar, Dist. Nanded,
At present r/o Pramila Apartment, A-Wing,
Flat No.103, Parwadi, Kharegaon, .. Respondent/
Near Fish Market, Kalva, Thane, Original
Dist. Thane Plaintiff

Mr. Kishor J. Ghute Patil, Advocate for petitioners

CORAM : SUNIL P. DESHMUKH, J.
DATE : 2nd August, 2017

ORAL JUDGMENT :

1. Heard learned counsel appearing on behalf of the petitioners.

2. Petitioners – original defendants are before this court purporting to challenge order dated 27-02-2017 whereunder request of the present petitioners under Exhibit – 24 in regular civil suit no. 183 of 2015 to frame an issue pursuant to section 9A of the Code of Civil Procedure, 1908 as they had raised objection to the jurisdiction of the court on the ground of limitation has been rejected.

3. It appears to be the case of the present petitioners which can be reproduced as contained in paragraphs no. 3 and 4 of the application Exhibit – 24, reading thus:

" 3] That, the contention of para no. 11 of the plaint are base-less. The dismissal of the appeal by District Superintendent of land record will not be cause of action to file the present suit. The Maharashtra land revenue code 1966 provide the appeal procedure for the same. The plaint

is a not pleaded about the date of 27/11/2015. The defendant suddenly denied the ownership of plaintiff when according to the plaintiff measurement was completed on date 09/12/2014. It is cleastral clear that plaintiff is trying to cover his plaint within the limitation.

4] That, the on dated 30/11/2011 plaintiff field appeal before District Superintendent of land record Nanded for the amendments and corrections in the record of survey no. 52 B, the defendants served the notice of appeal on dated 20/08/2015. The said appeal dismiss by the District Superintendent of land record Nanded on dated 16/11/2015 for the cause of limitation. Said order also challenged by the plaintiff before Deputy Director of Land record Aurangabad said is pending and also plaintiff filed the present suit on same of cause of action. Hence present plaint is hit by limitation. To decide the present matter and for natural justice it is just and proper. To frame the preliminary issue on the point of limitation. "

4. The trial court while dealing with the same has observed as under :

" 08- Having heard the learned counsel for both the sides at large, I have gone through the entire pleadings of both the parties, nature of the claim and grievances raised therein. I have also gone through the documents filed by the plaintiff

and the defendants and ratio laid down by the Hon'ble Bombay High Court, relied upon by the defendants. I gave my anxious consideration to all the aspects of the matter and find that, the plaintiff filed present suit for declaration of ownership in respect of gut No. 259 (old survey no.52-A) admeasuring 11 A 20 R. He claiming possession of encroached portion of 24 R land and perpetual injunction in respect o 10 A 36 R. Dispute is in respect of correction of revenue record is pending between the parties before concerned authorities. Plaintiff claiming to be owner of the suit property as his father get the same in partition. Thereafter, the plaintiff become the lawful owner and in possession of the suit property. However, defendants not filed written statement to answer the claiming of plaintiff.

09- *It is no doubt true that, as per the framework of Section 9-A of C.P.C., where at the hearing of the application relating to interim relief in a suit, objection to jurisdiction is taken such issue to be decided by the court as a "Preliminary-Issue". The view taken by the Hon'ble High Court in a case cited supra at serial Nos. 1 and 2 is certainly applicable to the averments made by the learned counsel for the defendants. The plea of limitation is a plea which goes to the jurisdiction of the court. However, the facts and circumstances may be different from case to case. In some cases, the issue of limitation may be a pure question of law and in some cases it may be mixed question of law and fact.*

The facts and the circumstances of the cases relied by the defendants are different to that of the present case. It is no doubt true that, the jurisdiction has to be ascertained from the fact alleged in the plaint.

10- In the matter at hand, the claim is based upon the cause of action dated 27/11/2015. The instant suit is not only for the injunction and declaration, but in addition to this plaintiff is also claiming possession by removing encroachment. In para no. 11 of the plaint it is pleading of the plaintiff that, on the basis of order dated 16/11/2015 passed by the Deputy Superintendent of Land Records, Nanded, defendants taking advantage and on 27/11/2015 they denied the ownership of plaintiff. Hence, the said cause of action arises to file the present suit. Looking to the nature of the dispute and the grievances raised therein, I am of the view that the issue of limitation involved in this case is not a pure question of law, but it is a mixed question of law and facts. In such circumstances, I come to the conclusion that, the objection on the point of jurisdiction on the ground of limitation raised at this stage under Section 9-A of C.P.C. is not maintainable. In fact, such objection can be taken into consideration by framing Preliminary issue under Order XIV Rule 2 of C.P.C. And it will be decided along-with all issues on merits. "

5. Having regard to aforesaid reasons as are appearing in the impugned order, it does not appear that any interlude in the proceedings of the suit is required.

6. Writ Petition, as such, stands rejected, keeping all the contentions of the petitioner open.

SUNIL P. DESHMUKH,
JUDGE

pnd