

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL REVIEW PETITION [L] NO. 12304 OF 2017

IN

WRIT PETITION NO. 535 OF 2017

Mrs. Kusum Jugalmohan Nagar	]	
alias Yagnik & Anr.	]	Applicants
		[Org. Petitioners]

Vs.

Shraddha Pramod Kulkarni & Anr.	]	Respondents
		[Org. Respondents]

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Dr. Birendra Saraf a/w Ms. Pooja Kshirsagar a/w Mr. Jintendra Jain i/b Yogesh N. Adhia, for petitioner.

Mr. T.A. Shaikh, for respondent No.1.

Mr. Pradeep M. Patil, for respondent No.2/B.M.C.

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CORAM : R.G. KETKAR, J.

DATE : 27TH SEPTEMBER, 2017.

P.C:

Heard Dr. Birendra Saraf, learned Counsel for the petitioner, Mr. Shaikh, learned Counsel for respondent No.1 and Mr. Patil, learned Counsel for respondent No.2 at length.

2. This Petition seeks clarification/modification/review of the order dated 27th January, 2017 after condoning the delay of 58 days in filing the Petition.

3. Dr. Saraf invited my attention to paragraph 13 of the

order dated 27th January, 2017 passed in Writ Petition No. 534 of 2017, 535 of 2017 and 542 of 2017. While dismissing Writ Petition No. 535 of 2017, clarification was given to the effect that the learned trial Judge will frame issue of limitation as one of the issues and the said issue shall be tried along with other issues.

4. Dr. Saraf seeks limited clarification/modification/review to the extent of directing the trial Judge to frame issue of limitation as a preliminary issue. He invited my attention to following decisions:

- [1] M/s. Metro Development Vs. Dr. Hemang Dayashankar Koppikar & Ors., Writ Petition No. 14166 of 2016 decided on 13th January, 2017.
- [2] Foreshore CHS Ltd. Vs. Praveen D. Desai (dead through Lrs.), (2015) 6 SCC 412.
- [3] Kamalakar Eknath Salunkhe Vs. Baburav Vishnu Javalkar & Ors., (2015) 7 SCC 321.
- [4] Messr Holdings Limited Vs. Bombay Oxygen Corporation Ltd & Ors., MANU/MH/0496/2017.
- [5] Sandeep Gopal Raheja Vs. Sonali Nimish Arora & Ors, MANU/MH/1795/2016.

He submitted that it is, therefore, necessary to direct the learned trial Judge to frame a preliminary issue as regards limitation.

5. Dr. Saraf submitted that in fact in the replies filed to;

- [1] Notice of Motion No. 4803 of 2007.
- [2] Notice of Motion No. 3017 of 2015.
- [3] Notice of Motion No. 913 of 2017.

Petitioners herein have specifically raised issue of limitation. He relied upon decisions of this Court in **Mukund Ltd Vs. Mumbai International Airport and Ors, 2011 (2) Mh. L. J. 936** and in particular paragraph 15 to contend that it is not open to a defendant, having raised an objection to the jurisdiction of the Court at the hearing of an application for interim relief to obviate and adjudication by the Court upon that issue as a preliminary issue by merely postulating that the objection is not pressed for the purpose of Notice of Motion. The objection to jurisdiction u/s 9A is required to be determined not only for the purpose of the motion for the interim relief, but the objection raised as to jurisdiction goes to the root of the jurisdiction of the Court to entertain the suit itself. Once raised the objection has to be decided by the Court as a preliminary issue.

6. On the other hand, Mr. Shaikh has taken me through the Roznama dated 8th March, 2017, 30th March, 2017, 13th April, 2017 and in particular 21st April, 2017, 3rd May, 2017 and 4th May, 2017. He submitted that on 8th March, 2017, Notice of Motion No. 913 of 2017 for interim relief was tendered. It was made returnable on 30th March, 2017 for hearing. Motion was heard on 13th April, 2017. On 13th April, 2017, Motion was kept for passing orders on 21st April, 2017. Concerned Judge who heard the Motion finally was transferred and, therefore, as on date, no orders are passed in that Motion. He submitted that during the course of hearing of Motion before the learned Trial Judge, petitioners herein did not advance contentions on limitation. He submitted that as the petitioners herein did not advance any arguments as

regards limitation, they are now precluded from raising the said contention. He submitted that petitioners herein have waived their rights to agitate the said contention. In support of this proposition, he relied upon the decision of the Apex Court in **Provash Chandra Dalui and another Vs. Biswanath Banerjee and another, AIR 1989 Supreme Court 1834.**

7. I have considered rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record. As noted earlier, respondent No.1/plaintiff has taken out Motions in the year 2007, 2015 and 2017. Petitioners have filed replies to these Motions and in all these replies, it is not disputed, that they have raised issue of limitation.

8. In case of **Sandeep Gopal Raheja** [supra] in paragraph 13, this Court has observed thus;

“The Apex Court, therefore, held that Section 9-A makes a complete departure from Rule 2 of Order XIV of the said Code in view of the non obstante clause. However, the Apex Court observed that if the case is governed by Rule 2 of Order XIV of the said Code, the Court has discretion to decide an issue based on jurisdiction as a preliminary issue. Thus, in paragraph 62, the Apex Court has made a clear distinction between Section 9-A and Rule 2 of Order XIV. What is held by the Apex Court is that Section 9-A is mandatory and once the issue of jurisdiction is raised in the reply to the application for interim injunction or for appointment of Court Receiver, the Court has no choice but to frame the issue of jurisdiction and to decide it in accordance with law. The Apex Court distinguished Rule 2 of Order XIV of the said Code by observing that under the said provision, there is a discretion to decide whether the issue based on law can be decided as a preliminary issue.

Thus, there is no discretion left to the Court as far as Section 9-A is concerned”.

9. In the case of M/s. Metro Development [supra], after considering the decision of the Apex Court in Kamlakar Eknath Salunke v. Baburav Vishnu Javalkar, 2015 (7) SCC 321, Foreshore Co-operative Housing Society Limited Vs. Praveen D. Desai (Dead) Through Legal Representatives and Ors., (2015) 6 Supreme Court Cases 412, Order dated 17th August, 2015 passed in Jagdish Shyamrao Thorve Vs. Shri Mohan Sitaram Dravid and Suresh Dhirajlal Marthak Vs. Nalini Manojkumar Asara, 2015 SCC Online, Bom. 7582 and Ashok Sadarangani Vs. Union of India (2012) 11 S.C. 321, this Court held that the issue of limitation cannot be kept in abeyance. The Trial Court was directed to frame additional issue of limitation as preliminary issue.

10. Mr. Shaikh relied upon decision of Provash Chandra Dalui and another [supra] to contend that as in Motion No. 913 of 2017, petitioners have not agitated issue of limitation, they have waived their rights. It is not possible to accept this submission for more than one reason. In the first place, Section 3 of the Limitation Act lays down that although limitation has not been set up as defence, the Court has to consider aspect of limitation while trying the suit. Secondly, as noted earlier, after the first Motion was filed in the year 2007, petitioners had filed application for framing preliminary issue u/s 9-A of the Civil Procedure Code, 1908. Thirdly, as is evident, Motion was heard for ad-interim relief and not finally. Mr. Shaikh disputes this position. Be that as it

may. The fact remains that no final order is passed till date in this Motion and the said Motion is pending.

11. Apart from that, while passing order dated 27th January, 2017, during the course of arguments, it was not pointed out to me that Motion for interim relief was pending. In view thereof, I had directed the learned Trial Judge to frame issue of limitation as one of the issues and try the same along with other issues. If the parties would have brought to my notice pendency of Motion for interim relief, the said direction would not have been issued on 27th January, 2017.

12. In view thereof, Petition is allowed and the order dated 27th January, 2017 is modified by directing the learned trial Judge to frame preliminary issue of limitation u/s 9-A of the C.P.C and decide the same in accordance with law. All the contentions of the parties are expressly kept open.

[R.G. KETKAR, J.]