

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 14166 OF 2016

M/s. Metro Development

...Petitioner

Versus

Dr. Hemang Dayashankar Koppikar

And Ors.

...Respondents

....

Mr.Atul Rajyadhksha, Senior Advocate a/w. Nishant Tripathi,
Vaibhav Bandgar i/b. M. Tripathi & Co., for the Petitioner.

Mr. P.K. Dhakephalkar, Senior Advocate a/w. Ashish Kamat,
Farid Karachiwala, Ms. Shoma Maitre, Ahurmazda Postvala i/b.
Wadia Ghandy & Co. for Respondent No.1.

None appears for Respondents No.4, 5 and 8.

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CORAM : R. G. KETKAR, J.

DATE : 13th JANUARY, 2017

P.C.

1. Heard Mr.Atul Rajyadhksha, learned Senior Counsel for the petitioner and Mr.P.K. Dhakephalkar, learned Senior Counsel for respondent No.1, at length. None appears for respondents No.4, 5 and 8.

2. Rule. Mr.Dhakephalkar waives service on behalf of respondent No.1. As respondent No.1 is the only contesting respondent and though respondents No.4, 5 and 8 are

represented none appears on their behalf, notice on rest of the respondents is dispensed with. At the request and by consent of the parties, Rule is made returnable forthwith and the petition is taken up for final hearing.

3. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 7.12.2016 passed by the learned Jt. Civil Judge, Junior Division, Vashi below Exhibits-169 and 180 in Regular Civil Suit NO.140/2012. By that order, the learned trial Judge partly allowed the application Exhibit-169 and framed preliminary issue under Section 9-A in respect of (1) incorrect valuation, (2) deficit Court fees and (3) pecuniary jurisdiction. The learned trial Judge declined to frame issue of limitation as a preliminary issue. The learned trial Judge partly allowed Exhibit-180 and issued injunction restraining defendants No.9 & 7 from creating third party interest in the suit property and to maintain status quo till the preliminary objections are decided on merits. The parties shall be hereinafter referred as per their status in the trial Court.

4. The matter was heard at length on different dates and

even on today. After arguing the Petition for quite some time, Mr. Rajyadhksha, upon taking instructions from the petitioner, states that the petitioner will file Appeal From Order /Misc. Civil Appeal under Order XLIII Rule 1(r) of C.P.C. challenging the judgment and order dated 7.12.2016 below Exhibit-180 within two weeks from today. He submits that if such appeal is filed, the learned District Judge may be directed to dispose of the same within four weeks from filing of the appeal.

5. As far as the issue of limitation is concerned, Mr. Rajyadhksha submitted that the learned trial Judge did not frame the preliminary issue on the question of limitation, namely, whether the suit instituted by the first respondent is barred by limitation. Mr. Dhakephalkar submitted that the issue of limitation cannot be framed as a preliminary issue. In support of this submission, he relied upon following decisions :

I. *Kamalakar Eknath Salunkhe v. Baburav Vishnu Javalkar*, (2015) 7 SCC 321.

II. Order dated 17.8.2015 passed by the Apex Court in *Jagdish Shyamrao Thorve v Shri Mohan Sitaram Dravid and ors*, whereby the Apex Court has referred the question as to whether

the limitation can be framed as a preliminary issue to a larger Bench. He has also taken me through the said order to contend that the decision of *Kamalakar Salunkhe* (supra) was directly on the interpretation of Section 9A of C.P.C. As against this decisions relied upon in *Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) through L.Rs and others, (2015) 6 SCC 412* are not on Section 9A. The Apex Court is of the opinion that the authority in *Kamalakar Salunkhe* (supra) was a binding precedent on the later Bench, and, therefore, it should have been referred to a larger Bench. In short, he submitted that this Court has to follow the decision in *Kamalakar Salunkhe* (supra), which is a binding precedent.

6. Mr. Rajyadhksha relied upon the decision of this Court in *Suresh Dhirajlal Marthak v. Nalini Manojkumar Asara, 2015 SCC OnLine Bom 7582* and in particular paragraph-9. In paragraph-9, this Court relied upon the decision of *Ashok Sadarangani v. Union of India, (2012) 11 SCC 321* wherein the Apex Court has held that pendency of a reference to a larger Bench does not mean that all other proceedings involving the same issue should remain stayed till a decision was rendered in

the reference. Till such time, as the decisions cited at the Bar are not modified or relied in any way, they continue to hold the field. He, therefore, submitted that as the matter is referred to a larger Bench, the issue of limitation has to be framed and cannot be kept in abeyance.

7. I have considered the submissions advanced by learned Counsel appearing for the parties. I have also perused the material on record. As far as order below Exhibit-180 is concerned, the petitioner is at liberty to file Misc. Civil Appeal under Order LXIII Rule 1(r) of C.P.C. within two weeks from today. If such an appeal is preferred, the learned District Judge is requested to decide the appeal on its own merits and on the basis of the material on record and in accordance with law uninfluenced by the observations made herein. All contentions of the parties on merits are expressly kept open.

8. As far as the order below Exhibit-169 is concerned, the learned trial Judge did not frame the issue of limitation as preliminary issue. Mr.Dhakephalkar relied upon the order in *Jagdish Thorve's* case and in particular following paragraph:

“It is pertinent to mention here that the

pronouncement in Kamalakar Eknath Salunke vs. Baburav Vishnu Javalkar (2015) 3 SCALE 34, was directly on the interpretation of Section 9A of the Code of Civil Procedure, whereas the decisions which have been relied upon in Foreshore Cooperative Housing Society Limited (supra) are not on Section 9A of the Maharashtra Amendment Act in the Code of Civil Procedure. Therefore, we are inclined to think that the authority in Kamalakar Eknath Salunkhe (supra) was a binding precedent on the later Bench and, therefore, it should have been referred to a larger Bench.”

9. That issue was considered by this Court in the case of *Suresh Marthak* (supra). In paragraphs-8 and 9, it was observed thus :

“8. In the case of Foreshore Cooperative Housing Society Limited (supra), the Apex Court held that the decision in Kamalakar Eknath Salunkhe's case is per incurium and is contrary to the law settled by the Constitution Bench and the 3 Judges Bench. The decisions in the cases of Kamalakar Eknath Salunkhe (supra) and Foreshore Cooperative Housing Society Limited (supra) were considered by the Apex Court in Jagdish Shyamrao Thorve

Vs. Shri Mohan Sitaram Dravid and ors. By order dated 17/08/2015, 2 learned Judges of the Apex Court referred the issue to the larger Bench. Mr.Yadav, therefore, submitted that even otherwise as the reference is pending, the issue whether issue of limitation can be framed as a preliminary issue in proceedings taken out under Section 9A of C.P.C. may be kept in abeyance.

9. In the case of Ashok Sadarangani Vs. Union of India, (2012) 11 Supreme Court Cases, 321, the Apex Court has held that pendency of a reference to a larger Bench does not mean that all other proceedings involving the same issue would remain stayed till a decision was rendered in the reference. Till such time, as the decisions cited at the Bar are not modified or altered in any way, they continue to hold the field. In view thereof, Court has to proceed on the basis of law as it stands today and merely because reference is made to a larger Bench, the Court cannot stay on its proceeding raising identical issue and must proceed on the basis of law as it stands. In view thereof, the impugned order, is liable to be set aside and Notice of Motion is restored for deciding it afresh. All the contentions of the parties including plaintiff's contention that decision of Foreshore Cooperative Housing Society Limited (supra) is prospective are kept open. Hence, following order is passed."

10. In view of the decision in *Ashok Sadarangani* (supra), the issue of limitation cannot be kept in abeyance and is required to be framed as a preliminary issue. By order in

Jagdish Thorve's case, Apex Court has referred the matter to a larger Bench. As of date the Apex Court has not either modified or altered the decision in *Foreshore Cooperative Housing Society Limited* (supra), the issue of limitation cannot be kept in abeyance. Application at Exhibit-169 is required to be allowed and the trial Court is directed to frame additional issue of limitation as a preliminary issue in addition to the issues already framed by the impugned order. Rule is partly made absolute in aforesaid terms with no order as to costs. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)