

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5417 OF 2015

Sujanil Chemo Industries, Pune	 Petitioner
V/s.	
Madhukar Narayanrao Janrao & Ors.	 Respondents

Mr. Nikhil Wadikar, i/by Mr. Nandu V. Pawar, for the Petitioner.

Mr. Jayendra D. Khairnar, a/w. Mr. Amey Deshpande, for Respondent No.1.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 25TH APRIL, 2018.

P.C. :

1. Heard Mr. Wadikar, learned counsel for the Petitioner, and Mr. Khairnar, learned counsel for Respondent No.1.

2. By this Writ Petition, filed under Article 227 of the Constitution of India, the Petitioner is challenging the order dated 25th March 2015, passed by the Court of Civil Judge, Junior Division, Pune, below the application at “Exhibit-65” filed in Regular Civil Suit No.93 of 2012.

3. The application at “Exhibit-65” was filed by the Petitioner, who is Defendant No.9 before the Trial Court, requesting the Court for framing

of preliminary issue regarding limitation, under Section 9-A of the Code of Civil Procedure, 1908. The said application was opposed by Respondent No.1/Plaintiff and the Trial Court has, after placing reliance on the Judgment of the Apex Court in the case of *Kamalakar Eknath Salunkhe Vs. Baburav Vishnu Javalkar*, (2015) 3 SCALE 34, was pleased to hold that, the issue of limitation being a mixed question of fact and law, that issue cannot be decided as a preliminary issue, under Section 9-A of CPC, and hence, rejected the said application.

4. Being aggrieved thereby, this Writ Petition is preferred. The submission of learned counsel for the Petitioner is that, in view of the order passed by the Apex Court in the case of *Foreshore Co-operative Housing Society Limited Vs. Praveen D. Desai (Dead), Through LRs., and Ors.*, (2015) 6 SCC 412, the issue of limitation also being an issue relating to jurisdiction, it has to be decided as a preliminary issue. The provisions of Section 9-A of CPC are, to that effect, mandatory in nature.

5. Learned counsel for Respondent No.1-Plaintiff has, however, by placing reliance on the order of the Apex Court dated 17th August 2015, in the case of *Jagdish Shyamrao Thorve Vs. Mohan Sitaram Dravid and Ors.*, in *Special Leave to Appeal (C) No.22438 of 2015*, submitted that, in this order, the Hon'ble Supreme Court was pleased to hold that, "*the authority in Kamalakar Eknath Salunkhe (Supra) was a binding*

precedent on the later Bench and, therefore, it should not have been ignored in the case of Foreshore Co-operative Housing Society Limited (Supra)”.

6. Thus, it is submitted by learned counsel for Respondent No.1-Plaintiff that, if the authority of *Kamalakar Eknath Salunkhe (Supra)* is a binding precedent, as held in the aforesaid order of the Apex Court, and if relying on that Judgment, the Trial Court has rejected the application of the Petitioner, then, no interference is warranted therein.

7. However, the further order passed by the Apex Court in the case of *Jagdish Shyamrao Thorve (Supra)* goes to show that, the Apex Court has, in the light of the two conflicting decisions; one in the case of *Foreshore Co-operative Housing Society Limited (Supra)* and another in the case of *Kamalakar Eknath Salunkhe (Supra)*, referred the matter to a larger Bench. However, the fact remains that, as on today, there is no decision of larger Bench. Hence, in view of the decision of the Apex Court in the case of *Foreshore Co-operative Housing Society Limited (Supra)*, it has to be held that, the Trial Court should have framed the issue of limitation as preliminary issue, in view of the mandate of Section 9-A of CPC.

8. At this stage, the submission of learned counsel for Respondent

No.1-Plaintiff is that, the Respondent No.1-Plaintiff has filed a pursis before the Trial Court on 16th February 2016, informing the Court that the Respondent No.1-Plaintiff does not want his application at “Exhibit-5” to be heard at this interim stage, but it may be heard along with the Suit. In view thereof, it is submitted that, now the provisions of Section 9-A of CPC need not be invoked and there is no propriety at this stage for framing or deciding the issue of limitation as the preliminary issue.

9. However, on this aspect, learned counsel for the Petitioner-Defendant No.9 has placed reliance on the Judgment of this Court in the case of *Mukund Limited Vs. Mumbai International Airport and Ors., 2011 (5) Bom.C.R. 456*, wherein, in paragraph No.15 of the said Judgment, this Court was pleased to hold that,

“Once the objection is raised to the jurisdiction of the Court, as such objection goes to the root of the matter, it has to be decided by the Court as a preliminary issue”.

10. In the said decision also, the statement was made on behalf of the Defendant that the objection relating to the jurisdiction of the Court was not being pressed for the purpose of motion for interim relief and, therefore, the issue of jurisdiction need not be decided as a preliminary issue. However, this objection was overruled and it was held that, whether such objection is pressed or not pressed, as the issue pertains to the very jurisdiction of the Court to try and entertain the Suit, such

statement made by the Defendant that he is not pressing the objection to jurisdiction is meaningless. It was categorically held that,

“The Court has to, once the issue is raised, decide the objection to jurisdiction, as it is germane to the maintainability of the Suit itself and not merely to the motion for interim relief.”

11. It was further held that,

“It becomes a duty of the Court then to frame a preliminary issue under Section 9-A of CPC. It is not open to the Defendant to obviate a decision on the issue as a preliminary issue before the application for interim relief is decided, by merely stating that the objection is not pressed for the purpose of the motion for interim relief. Once raised, the objection as to jurisdiction is germane to the maintainability of the suit itself and not merely to the motion for interim relief.”

12. Here in the case also, as already the objection is raised as to the Suit being barred by limitation, thereby challenging the jurisdiction of the Court to entertain the Suit, merely because the application for interim relief is not pressed at this stage, does not have any effect, as it is the duty of the Trial Court to frame such issue and to decide the same, it being germane to the maintainability of the Suit itself and not merely to the motion for interim relief. Hence, the impugned order passed by the Trial Court, rejecting the Petitioner's application for framing of

preliminary issue relating to the issue of limitation of the Suit, is required to be quashed and set aside.

13. Accordingly, the Writ Petition is allowed. The impugned order passed by the Trial Court is quashed and set aside. As a result, the application filed by the Petitioner-Defendant No.9 at “Exhibit-65” in Regular Civil Suit No.93 of 2012, is allowed.

14. The Trial Court is directed to frame the preliminary issue regarding limitation and to decide the same in accordance with law.

[DR. SHALINI PHANSALKAR-JOSHI, J.]