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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 3111 OF 2017
WITH
CIVIL APPLICATION NO.2397 OF 2017**

- | | | |
|--|---|------------|
| 1. Mohini Gurdassingh Panjwani |] | |
| age: 74 yrs, Occn. Housewife |] | |
| r/at Golden House, Hill View Area |] | |
| Sec.17, near Ekta Apartment, |] | |
| Ulhasnagar No.3, District: Thane |] | |
| |] | |
| 2. Shri.Gurumukhsingh Gurdassingh Panjwani |] | |
| age: 52 years, Occn. Business |] | |
| r/at Golden House, Hill View Area |] | |
| Sec.17, near Ekta Apartment, |] | |
| Ulhasnagar No.3, District: Thane |] | |
| |] | |
| 3. Shri. Jagjitsingh Gurdassingh Panjwani |] | |
| age:50 yrs. Occn. Business |] | |
| r/at Golden House, Hill View Area |] | |
| Sec.17, near Ekta Apartment, |] | |
| Ulhasnagar No.3, District: Thane |] | |
| |] | |
| 4. Shri. Gurdeepsingh Gurdassingh Panjwani |] | |
| Age: 48 years, Occn. Business |] | |
| r/at Golden House, Hill View Area |] | Plaintiffs |
| Sec.17, near Ekta Apartment, |] | |
| Ulhasnagar No.3, District: Thane |] | |
| |] | |
| 5. Shri. Harisingh Gurdassingh Panjwani |] | |
| age: 45 years, Occn. Business |] | |
| r/at Golden House, Hill View Area |] | |
| Sec.17, near Ekta Apartment, |] | |
| Ulhasnagar No.3, District: Thane |] | |
| |] | |
| 6. Shri.Ajitsingh Gurdassingh Panjwani |] | |
| Age: 42 years, Occn. Business |] | |
| r/at Golden House, Hill View Area |] | |

Sec.17, near Ekta Apartment,
Ulhasnagar No.3, District: Thane

7. Shri.Kartarsingh Gurdassingh Panjwani
age: 41 years, Occn. Business.
r/at Golden House, Hill View Area
Sec.17, near Ekta Apartment,
Ulhasnagar No.3, District: Thane

8. Mrs. Manjeet Kaur Prakashsingh
age: 44 years,Occn.housewife
r/at Waheguru Niwas, Kon Kalyan Road
Village Rajnoli, Kalyan, Dist.Thane

V/s.

1. Shri. Genu Baburao Kadu
age:45 years, Occn. Business
r/at Old Khandala Road, Near Railway Gage
Lonavala, Tal. Maval, Dist.Pune

2. Mr. Jimmy Dara Engineer
age:75 years, Occ. Business
r/at Warkar Mansion, Lady Jehangir Road
Mancharji Joshi Colony, Dadar
Mumbai 400 0141

3. Mrs. Zareen Dara Engineer
age: 73 years, Occn. Business
r/at Warkar Mansion, Lady Jehangir Road
Mancharji Joshi Colony, Dadar
Mumbai 400 0141

4. Mr. Datta Narayan Rane
age: 50 years, Occn. Business
r/at D-ward, Lonavala
Tal.Maval, Dist.Pune

5. Mrs. Anita Anil Gupta
age:51 years,Occn. Business
r/at flat No.602, Lake view-1, Aarey colony road
Imperial Palace, Royal Park, Goregaon(E)
Mumbai 400 065

6. Mr. Anand Prabhakar Gokarna
 age: 56 years, Occn. Business
 r/at H-194, Oishwara Tarapur Garden CHS Ltd
 Opp. Oshiwara Police Station, Mumbai 400 012

7. Shri.Prem hashmatrai Lalwani
 age:58 years,occn. Business
 r/at 102, Gajdhar Apartments,
 Juhu Tara Road, Ville Parle (W)
 Mumbai 400 056.

and
 At Grand Exotica Hotel
 opp. Tata Bazar, Kalbhor Nagar,
 Chinchwad, Pune 411 019

8. M/s Asian Hotel Corporation,
 a partnership firm, Through its : Partner
 Shri.Pravin Hashmatrai Lalwani
 r/at 102, Gajdhar Apartments,
 Juhu Tara Road, Ville Parle (W)
 Mumbai 400 056.

and
 At Grand Exotica Hotel
 opp. Tata Bazar, Kalbhor Nagar,
 Chinchwad, Pune 411 019

Respondents.

9. M/s Reliance Jio Infocomm Ltd.
 Reliance Telecommunication Division
 Sacred World, 6th floor, North Block
 Near Jagtap Chowk, Wanwari
 Pune 411 040

10. The State of Maharashtra
 Council Road, Vidhan Bhavan, New Bldg.
 Bund Garden, Pune 411 001.

11. The Collector, Pune
 and Deputy Custodian of Evacuees
 Council Road, Vidhan Bhavan, New Bldg.
 Bund Garden, Pune 411 001.

12. The Tahasildar,
Wadgaon Maval, District: Pune
13. The Talathi
Village: Lonawala
Tal.Maval, Dist.Pune
14. The Chief Officer,
Lonawala Municipal Council
at/po Lonavala, Tal. Maval
15. The City Engineer
Lonawala Municipal Council
at/po Lonavala, Tal. Maval
16. The City Survey Officer
at/po Lonavala, Tal. Maval. Dist.Pune
17. The Taluka Inspector of Land Records
at/po Wadgaon, Tal. Maval. Dist.Pune

Mr. S. P. Kanuga, i/by Sapna N. Nath, for the Applicant.

Mr. Girish Godbole a/w Ms. Ketki Gadkari,
for the Respondent respondent Nos.7 and 8

Mr. Girish R. Agrawal, for respondent No.5.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 4th JANUARY, 2018.

ORAL JUDGMENT

1] Heard learned counsels for the petitioners and respondents.

2] Rule.

3] With the consent of learned counsel for both the parties, rule is made returnable forthwith.

4] By this petition, the petitioners are challenging the orders dated 12th April, 2016, 8th July, 2016 and 8th November, 2016, passed by the Court of III Jt. Civil Judge Senior Division, Pune, in Special Civil Suit No.240 of 2016.

5] By the order dated 12th April 2017, passed below Exh.79, the trial Court has allowed application filed by defendant Nos. 7 and 8 for framing of preliminary issue as to whether the suit is barred by limitation. By the order dated 8th July,2016, passed below the same application at Exh.79, the trial Court after hearing learned counsel for both the parties, held that on the preliminary issue of limitation, plaintiff will have to lead evidence first. By the order dated 8th November, 2011, the trial Court has rejected petitioners' application at Exh.101 for review of the order, passed below Exh.79 on 12.4.2016 thereby directing framing of preliminary issue relating to limitation.

6] The submission of learned counsel for petitioners is that the issue as to whether the suit is barred by limitation can be tried as preliminary issue under Section 9-A of Code of Civil Procedure, is placed for consideration before the ***Larger Bench*** as per order passed by the Hon'ble Supreme Court on 17.8.2015, in a ***Petition for Special leave to Appeal (C) No.22438 of 2015***, in the case of ***Jagdish Shyamrao Thorve -vs- Shri. Mohan Sitaram Dravid and ors***, and therefore till the said reference is decided, it is necessary to stay the proceeding before the trial Court as the trial Court has already framed such preliminary issue relating to limitation and has directed the parties to lead evidence and insisting on proceeding with the same.

7] Secondly it is submitted that there should have been at least some material brought before the trial Court to show that the suit is apparently barred by limitation. It is urged that merely because a vague plea is raised in the written statement and in the application filed before the trial Court at Exh.79, the trial Court should not have framed such preliminary issue when apparently as per cause of action given in the plaint, the suit is very well within the limitation and it does not appear to be barred by limitation.

8] Moreover, it is submitted that Application at Exh.79 was filed with composite prayers that it should be treated under Section 9-A read with Order VII Rule 11 of Code of Civil Procedure. According to learned counsel for the petitioners, as the plain reading of the plaint sufficiently discloses the cause of action to be within the limitation, provision of Order VII Rule 11 CPC, has no application at all as the plaint cannot be rejected on the bare reading of the averments made therein.

9] As regards to application for framing of preliminary issue to that effect under Section 9-A of CPC, it is submitted that the averments in the plaint relating to cause of action clearly go to show that the suit is within limitation; especially the prayers like relief of perpetual injunction, declaration, mandatory injunction etc., which petitioners are claiming in the suit are within the period of limitation from the date of cause of action and therefore, framing of preliminary issue of limitation and proceeding with leading evidence on that issue is as good as conducting trial in piecemeal. Merely because a vague contention is raised that the suit is not within limitation, it was not mandatory and not proper on the part of trial Court to frame said issue and to decide it as preliminary issue. According to learned counsel for the petitioners, therefore, the impugned order passed by

the trial Court needs to be quashed and set aside.

10] Per contra, learned counsels for respondents have supported the said order by submitting that in view of law laid down by the Apex Court in case of *Foreshore Co-operative Housing Society Ltd -vs- Praveen D. Desai (dead) Through legal Representatives and ors*, (2015) 6 SCC 412, whenever such objection is raised as to the suit being barred by limitation, then it is mandatory on the part of the trial Court to frame such issue in view of provisions of Section 9-A of the Code of Civil Procedure. It is urged that said provision being of a mandatory nature, the trial Court has rightly held that as in the application Exh. 79, defendant Nos. 7 and 8 had clearly raised the issue of suit being barred by limitation, it was necessary to frame preliminary issue to that effect and direct the parties to lead oral evidence if necessary and to proceed with the hearing on that issue. According to learned counsel for respondents, the trial Court has acted as per the mandate laid down by the Apex Court and also as per mandate laid down under Section 9-A of CPC. Hence no fault can be found in impugned order so as to interfere with the same.

11] As regards merits, it is submitted that clear averments

are made in the written statement and in the application Exh.79 to show how the suit is barred by limitation and hence clever drafting of the plaint cannot take the suit away from the bar of limitation. According to learned counsels for respondents, no prejudice is likely to be caused to the petitioners-plaintiffs by framing and deciding of issue relating to limitation as preliminary issue, in view of the provisions of Section 9-A (ii) of CPC, as till such issue is decided, the interim relief can be availed by the petitioners. It is submitted by learned counsel for the respondents that when the mandate of the law is clear, then there is no substance in the argument that the trial will be conducted in piecemeal. The very object of provision under Section 9-A of CPC is that valuable time of the Court could be saved in case, if it is found that the suit itself is barred by limitation. By placing reliance on the judgment of the Apex Court in case of ***Foreshore Co-operative Housing Society Ltd -vs- Praveen D. Desai (dead) Through legal Representatives and ors, (supra)***, it is urged that the Court is bound to dismiss a suit barred by limitation as it has no jurisdiction to entertain the same. The plea of limitation is a question of law which is related to the jurisdiction of the Court and the Court is precluded from adjudicating the matter on merits when the suit is barred by limitation. Thus, according to learned counsels for respondents, impugned order passed by the trial Court being just,

legal and correct, no interference is warranted therein.

12] In my considered opinion, in order to appreciate these rival contentions raised by learned counsels for the petitioners and respondents, it would be necessary to consider the reliefs which the petitioners are seeking in the suit in Para 73 which reads thus :-

“(a) It be declared that the Plaintiff is the allottee owner of the suit properties more particularly described in para 1C, 1D and 1F of the plaint on the basis of Sanad dated 09/01/1956;

(b) It be further declared that the Defendant Nos. 1 to 8 jointly and/or severally do not have any right, title and interest in the suit properties described in para 1C, 1D and 1F of the plaint;

(c) It be declared that the transaction between the Defendant No.1 and Defendant No.9 in respect of the portion of land beneath the telecommunication tower erected on the property described in para 1E of the plaint, is illegal, null and void ab-initio and not binding on the plaintiff and the property;

(d) A decree for mandatory injunction be passed against Defendant No.1 and Defendant No.9 jointly and severally, for the demolition of the steel fabricated tower and for possession of the land beneath there under which is more particularly described in 1E of the plaint.

(e) A decree for possession of house property described in para

1G of the plaint be passed against Defendant No.1 and the Plaintiffs be put in actual, physical and vacant possession thereof.

(f) The Defendant Nos 1 to 9 jointly and severally be restrained by an order of permanent injunction restraining them from obstructing the Plaintiff's peaceful possession over the open land from the suit properties described in para 1C, 1D and 1F of the plaint and from intruding upon the said open land and from forcibly dispossessing the plaintiff therefrom and from forcibly altering and changing its nature which is open on the date of the suit;

(g) The Defendant Nos 1 to 8 jointly and severally be restrained by an order of permanent injunction restraining them from taking any steps in furtherance of any illegal and non-est document and from in any manner transferring, selling alienating and/or creating any third party interest in any part or portion of the properties described in para 1C to 1G of the plaint;

13] The cause of action for claiming these prayers in the suit is stated in paragraph No.68 of the plaint which is as follows :-

“68. The cause of action for the suit first arose on the dismissal of Special leave to Appeal No.5102/2006 which was dismissed on 06/01/2015 but with liberty to the parties to prosecute the remedies in the civil court as aforesaid. The cause of action then arose on or about 08/12/2015 when the Defendant No.1 in

collusion with Defendant No.9 has unauthorizedly commenced and completed erection of a telecommunication tower which is more particularly described in Para 1E of the plaint thereby obstructing and interfering in the Plaintiffs peaceful possession over the suit properties described in para 1C and 1F of the plaint. The cause of action then arose when the Defendants in collusion started giving threats for forcibly dispossession by misinterpreting and misreading the judgments and orders of the Hon'ble Supreme Court and by assuming and presuming that their alleged claims and rights have been accepted by the Supreme Court, but when the same is not as clearly observed by the Supreme Court in the said judgment. The cause of action thereafter continues to arise from time to time.”

14] As against it, learned counsels for the respondents have pointed out paragraph No.42 of the plaint which reads as follows :-

“42. The Plaintiffs say that in the year 1984 said Gurudassingh Nawoosingh Panjumaal @ Panjwani for the first time came to know of the purported Sale Certificate dated 17/05/1956 registered on 20/07/1956 and accordingly made a complaint to the Collector of Pune and Deputy Custodian of Evacuee Property i.e. Defendant No.11 based on which the said Authority vide his order dated 18/09/1984 under No.953/84 ordered to suo-motto take the ME No.1836 under revision and accordingly the S.D.O, Haveli, initiated Revision Proceeding under No.14/1984 and by his judgment and order dated 30/07/1985 thereby ordered to cancel M.E.No.1836. Mr. Anil Desai and Defendant No.7 being aggrieved by the said order, filed an R.T.S. Appeal No.128 /1985 which was decided by the Additional Collector of Pune on 28/07/1986 and remanded the

case for decision on merit in the light of observations made in the judgment".

15] Learned counsels for the respondents have also relied on paragraph No.49 of the plaint which reads as follows:-

“49. inspite of the decision of the Collector in RTS Appeal No.128 of 1987, a Mutation Entry No.2377 was proposed on 25/08/1994 and the same was certified on 02/07/199 by which the name of Gulabbai Desai was mutated on the basis of the said alleged Sale Certificate dated 17/05/1956 in respect of the properties bearing Revenue Survey No.328, Revenue Survey No.118/2, CTS No.129, CTS No.130A, CTS No.130B and CTS No.133. Similarly on 11/10/1994 a M.E.No.2394 was proposed in the name of Genu Baburao Kadu i.e. Defendant No.1 herein on the basis of purported Sale deed dated 21/04/1977 purportedly made and executed by Gulabbai Desai in favour of Defendant No.1”.

16] In this respect it would also be necessary to refer to the averments made in the Application Exh.79 which is filed by Defendant Nos.7 and 8 before the trial Court for framing preliminary issue relating to the limitation. Paragraph (B) of the said application reads thus :-

“(B) If the plaint is carefully perused, it will be seen that the plaintiff is seeking declaration of his title on the basis of purported Sanad dated 09/01/1956 and is also seeking removal of a clog on his title (sale certificate in favour of Smt. Gulabbai Gajanan Desai, gift deed dated 15/01/1979, sale deed dated 04/08/1980, sale deed

dated 12/09/1980 etc). The plaintiff therefore, appears to be seeking relief regarding declaration of his ownership as provided u/s 34 of the Specific Relief Act and also seeking cancellation of numerous sale deeds as provided u/s 31 of the Specific Relief Act”.

17] Thus, a very specific plea is raised in the application Exh.79 by the respondents that the cause of action, according to own showing of plaintiffs, first arose, way back in the year 1956 when purported Sanad on the basis of which plaintiff is claiming title, was issued and thereafter in the year 1980 when the gift deed dated 15.01.1979 and sale deeds dated 4.8.1980 and 12.9.1980 were executed creating clog on the title of the plaintiff, and therefore, the suit is hopelessly barred by limitation. It is further stated that merely because the Hon'ble Supreme Court, by the order dated 6.1.2015, held that the parties may prosecute their remedies in Civil Court in accordance with law, does not bring the claim, which is barred by limitation within limitation, particularly when it is stated that the parties to seek remedies “in accordance with law” clearly implying that such remedies should be availed if permissible as per Law of Limitation and then only it can be “in accordance with law”. Herein in the case according to defendant Nos. 7 and 8, the reliefs which plaintiffs are claiming in the suit are as stated above,

apparently barred by limitation.

18] As regards the reliefs of injunction, it is submitted that those reliefs are of consequential nature and the main relief which plaintiffs are claiming is of the declaration of their title to the suit property and for removal of the clog on their title and as regards this relief, the suit is barred by limitation.

19] Thus, the perusal of the pleadings of both parties, prima facie makes it clear that, some triable issue is definitely raised as to whether the suit is within limitation or barred by limitation. It cannot be said that the plea raised by the defendant Nos. 7 and 8 relating to suit being barred by limitation is vague and the trial Court has accepted the same automatically without any application of mind. On the pleadings of the parties themselves, there appears to be some serious dispute as to whether the suit can be called as within limitation or not. Now the question before the trial Court in such situation was that when there appears to be a triable issue relating to limitation, whether it should be tried as preliminary issue or to be kept to be decided at the time of final hearing.

20] In this respect, the trial Court has considered the law laid

down by the apex Court in case of *Foreshore Co-operative Housing Society Ltd -vs- Praveen D. Desai (supra)*; wherein the Apex Court has in the light of the argument advanced before it that a preliminary objection as to jurisdiction under Section 9-A would not include an objection that it is barred by limitation, considered this very issue in paragraph No.39, which reads thus :

“39. The moot question, therefore, that falls for consideration is as to whether courts shall be guided by the provisions of Order 14 Rule 2 of the Code of Civil Procedure or Section 9-A of the Code as amended by the Maharashtra Amendment Act, in the matter of deciding the objection with regard to jurisdiction of the Court which concerns the bar of limitation as a preliminary issue”.

21] Thereafter in paragraph No.41 of the Judgment, the Apex Court has considered the provision of Section 9-A of the Maharashtra Amendment Act and held that the said provision is a complete departure from the procedure provided under Order XIV Rule 2 of the Code of Civil Procedure and the said provision having received the assent of the President, has to be complied with and can be held to be a valid legislation. Lastly in paragraph No.61, it was held that Section 9-A mandates the Court to decide the jurisdiction of the Court before proceeding with the suit and granting interim relief by way of injunction. In paragraph No.62, it was categorically held that:-

“At the cost of repetition, we observe that Section 9-A provides a self contained scheme with a non obstante clause which mandates the court to follow the provision. It is a complete departure from the provisions contained in Order XIV Rule 2 CPC. In other words, the non obstante clause inserted by the Maharashtra Amendment Act of 1977 in Section 9-A and the express mandate of scheme, the intention of the law is to decide the issue relating to jurisdiction of the Court as a preliminary issue notwithstanding the provision contained in Order XIV Rule 2 CPC”.

22] Thus, in this decision, it is more than sufficiently held that the issue relating to limitation pertains to the jurisdiction of the Court as it oust the jurisdiction of the Court if the suit is barred by limitation. Hence the issue of limitation needs to be decided as issue relating to jurisdiction and therefore be tried as preliminary issue in view of the mandate laid down in Section 9-A of the Maharashtra Amendment Act.

23] Therefore, as the legal position which stands as on today is that the issue of limitation has the effect of ousting the jurisdiction of the Court to decide the suit, it needs to be decided as preliminary issue, whenever such issue is raised by the defendants. It may be true that this issue is pending for consideration before the *Larger*

Bench of the Hon'ble Supreme Court . However, as on today, the law laid down in ***Foreshore Co-op Housing Society Ltd -vs Praveen D. Desai (supra)*** holds the ground.

24] Relying on this very legal position, the trial Court has, after going through the averments made in the plaint, written statement and the application filed by the defendant Nos. 7 and 8, at Exh.79 rightly deemed it fit to frame issue of limitation as preliminary issue and then proceed to hear the same. Needless to state that the trial Court has acted in accordance with mandate of the law, and the order passed by the Trial Court is, thus, within four corners of the law. As stated above, there is definitely a triable issue as to whether the suit is barred by limitation or not. This Court cannot enter into the merits as to whether suit is really barred by limitation or not because that issue is pending for consideration before the trial Court and has to be decided by the trial Court after hearing learned counsels for the parties. The petitioners and the respondents, both are given opportunities to lead their evidence on this issue. At this stage what this Court has to see is only whether there was sufficient pleading before the trial court to frame such issue and as stated above there is such sufficient material for the trial Court to frame that issue and as per the mandate of law laid down

above, the trial Court has to decide this issue as preliminary issue. Hence no fault can be found in the impugned order passed by the trial Court.

25] It may be true that by deciding such issue as preliminary, the trial is going to be conducted in piecemeal, but if it is the legal position, then merely on that ground it cannot be said that the trial Court should not have framed the said issue when on the pleadings of parties there appears substance in framing of the said issue. Moreover, the very object of such provision contained in Section 9-A of CPC is to save the time of the Court, in the conduct of the full-fledged trial. Therefore, the impugned order passed by the trial Court, below Exh.79 and also subsequent consequential orders do not call for any interference.

26] The Writ Petition, hence, being without merits stands dismissed.

27] Rule stands discharged.

28] By way of abundant precaution, it is made clear that whatever observations made hereinabove are only for the purpose of deciding this Writ Petition, and the trial Court is not to be influenced

by the same.

29] In view of disposal of this petition, Civil Application No.2397 of 2017, becomes infructuous and the same is disposed of accordingly.

[DR. SHALINI PHANSALKAR-JOSHI, J.]