

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 1211 OF 2016

Industrial Bhavan (Worli) Ltd., a
company incorporated under the
provisions of the Companies Act, 1956,
having its registered office at Shashi
Deep, 5-A, Worli Sea Face,
Mumbai 400 030

**...Petitioner
(Ori.Plaintiff)**

Versus

1. Municipal Corporation of Greater
Mumbai, having its head office at
Mahapalika Marg, Mumbai 400 001
2. Food and Drug Administration
Government of Maharashtra, Survey
No.341, Bandra-Kurla Complex, Bandra
(East), Mumbai 400 051
3. Sushil Kanubhai Shah, Indian
inhabitant, age around 64 years,
occupation Business, having his
address at Metropolis Healthcare, Udyog
Bhavan, 250-D, Worli, Mumbai 400 030
and residece at 71, Apurva, 5, Napean
Sea Road, Mumbai 400 006
4. Duru Sushil Shah, Indian Inhabitant,
age around 63 years, Occupation
Doctor, having her address at Metropolis
Healthcare Ltd., Udyog Bhavan, 250-D,
Worli, Mumbai 400 030 and residence at
71, Apurva, 5 Nepean Sea Road,
Mumbai 400 006
5. Metropoli Healthcare Ltd., a Company
registered under the Companies Act,
1956 and having its business at Udyog
Bhavan, 250-D, Worli, Mumbai 400 030

6. Ammera Sushil Shah, Indian Inhabitant, age around 32 years, Occupation Business, Director of Metropolis Healthcare Ltd., Udyog Bhavan, 250-D, Worli, Mumbai 400 030 and residence at 71, Apurva, 5 Nepean Sea Road, Mumbai 400 006
7. Niten Kharaiti Lal Malhan, Indian Inhabitant, age around 40 years, Occupation Business, Director of Metropolis Healthcare Ltd., Udyog Bhavan, 250-D, Worli, Mumbai 400 030 and residence at Flat No.2705, 27th Floor, North Tower, The Imperial Bldg. MP Mill Compound, Tardeo, Mumbai 400 034
8. Gomathi babu Sadacharam Kulandai Velu, Indian Inhabitant, age around 44 years, Occupation Business, Director of Metropolis Healthcare Ltd., Udyog Bhavan, 250-D, Worli, Mumbai 400 030 and residence at 25, First Main Road, CIT Colony, Mylapore, Chennai, 600 004
9. Athmanathan Ganesan, Indian Inhabitant, age around 56 years, Occupation Business, Director of Metropolis Healthcare Ltd., Udyog Bhavan, 250-D, Worli, Mumbai 400 030 and residence at Flat No.1-A, Old No.17, New No.2, Shyam Nivas, Second Crescent Park Road, Gandhi Nagar, Adyar, Chennai, 600 020

**...Respondents
(Ori.Defdts)**

Mr. Dileep Nevatia, Director of Petitioner-in-person.
Mr. C. D. Mali, AGP for the State/Respondent.
Mr. Santosh Parad, for Respondent no.1/MCGM.
Mr. Chetan Yadav, i/b M/s. Makrand Gandhi & Co., for Respondent nos.3 to 6.

**CORAM: N. J. JAMADAR, J.
RESERVED ON: 14th OCTOBER,, 2019
PRONOUNCED ON: 22nd OCTOBER, 2019**

JUDGMENT:-

- 1.** Rule. Rule made returnable forthwith and, with the consent of the Counsels for the parties, heard finally.
- 2.** This petition under Article 227 of the Constitution of India takes exception to an order dated 2nd September, 2015, passed by the learned Judge, City Civil Court, Mumbai, in Notice of Motion No.303 of 2013, in L. C. Suit No.2531 of 2011, taken out by respondent nos.3 to 9 – defendant nos.3 to 9, for framing preliminary issues under Section 9A of the Code of Civil Procedure (“the Code”), in its application to the State of Maharashtra, whereby the learned Judge was persuaded to allow the notice of motion partly and, *inter alia*, frame the issues of ‘bar of jurisdiction’ under Section 149 of the Maharashtra Regional and Town Planning Act, 1966 (“the Act”), and ‘limitation’ as the preliminary issues.
- 3.** The petitioner – plaintiff has instituted suit being L. C. Suit No.2531 of 2011 against the Municipal Corporation of Greater Mumbai (respondent – defendant no.1), Food and Drugs Administration (respondent – defendant no.2) and defendant nos.3 to 9 with the assertions that defendant nos.3 to 9 are conducting pathology tests in the Pathological Laboratory situated in the suit premises without the requisite permission

from defendant nos.1 and 2 and other statutory authorities. It is averred that the said activities are not permissible in the General Industries “I-2” Zone in which the suit premises as well as the plaintiff’s premises are situated. The grant of Commencement Certificate, dated 8th February, 2001, for erecting the building, wherefrom large-scale pathological laboratory is operated, and the acceptance to the Completion Certificate, dated 14th November, 2003, in respect of the said structure by defendant no.1, are illegal and bad in law.

4. The plaintiff had sought interim reliefs by taking out Notice of Motion No.115 of 2012 in the said suit. Defendant nos.3 to 9 raised objection to the tenability of the suit itself on the ground that the suit was barred by the provisions of Section 149 of the Act and, therefore, the Court had no jurisdiction to entertain, try and decide the suit. Secondly, it was contended that since the acceptance to Completion Certificate was issued by defendant no.1 on 14th November, 2003; the legality of which was assailed, the suit instituted in the year 2011 was clearly beyond the period of limitation.

5. As the plaintiff did not press the Notice of Motion No.115 of 2012 for grant of interim relief, the same came to be disposed of for want of prosecution. In the meanwhile, defendant nos.3 to 9

took out the instant Notice of Motion No.303 of 2013 and prayed that the issues of 'jurisdiction' and 'limitation' be framed and determined as the preliminary issues. The plaintiff resisted the said notice of motion by filing Affidavit-in-reply thereto.

6. Initially, by order dated 1st September, 2014, the learned Judge was persuaded to dismiss the Notice of Motion No.303 of 2013 holding that the facts of the case did not warrant framing of the preliminary issues and decision thereon, as sought by defendant nos.3 to 9.

7. The said order dated 1st September, 2014 was assailed by the defendants by filing Civil Revision Application No.1041 of 2014, before this Court. After hearing the parties this Court by order dated 5th August, 2015, by consent of the parties, quashed and set aside the order passed by the learned Judge in Notice of Motion No.303 of 2013, restored it to the file of the learned Judge and directed that the notice of motion be heard and decided afresh.

8. In adherence to the aforesaid order, the learned Judge heard the notice of motion afresh. By the impugned order, the learned Judge framed the following issues as preliminary issues:

“1. Whether this Court has no jurisdiction in view of Section 149 of The Maharashtra Regional & Town Planning Act?

2. Whether present suit is within limitation?”

9. The learned Judge was of the view that in the backdrop of the challenge to the Commencement Certificate dated 8th February, 2001 and the acceptance to the Completion Certificate dated 14th November, 2003, the bar under Section 149 of the Act was attracted. Likewise, in view of the institution of the suit in the year 2011, assailing the said Commencement Certificate and acceptance thereto, which occurred in the year 2001 and 2003 respectively, the question of limitation also arose. Discarding the objection of the plaintiff that the question of limitation being a mixed question of law and fact, the learned Judge was persuaded to frame the aforesaid issues on the premise that in view of the judgment of the Division Bench of this Court in the case of *Forshore Co-operative Hsg. Soc. Ltd. vs. Shri. Praveen D. Desai & ors.*¹, even the question of limitation could be decided as a preliminary issue under Section 9A of the Code.

10. Being aggrieved by and dissatisfied with the aforesaid impugned order, the plaintiff has invoked the writ jurisdiction of this Court.

¹ 2008(6) ALL MR 600.

11. I have heard Mr. Nevatia, Director of petitioner, who professes to represent the petitioner - plaintiff, Mr. Yadav, the learned Counsel for respondent nos.3 to 9 and Mr. Mali, the learned AGP for the State/Respondent. I have also perused the material on record.

12. Mr. Nevatia submitted that the learned Judge committed a grave error in framing the issue of limitation as a preliminary issue under Section 9A of the Code. It was further submitted that the jurisdictional condition for framing and deciding the preliminary issues under Section 9A of the Code was not fulfilled. When the Notice of Motion No.303 of 2013 was taken out, and decided by the trial court, no application for granting any interim relief was pending before the trial court. Thus, there was no occasion to resort to the provisions contained in Section 9A of the Code. As the defendant nos.3 to 9 have not filed their written statement and suit has been directed to be proceeded without written statement of defendant nos.3 to 9, it was a patent error on the part of the trial court to frame the preliminary issues under Section 9A of the Code. Mr. Nevatia further urged that even if the tenability of the notice of motion for framing preliminary issues is upheld, yet, in view of the recent developments in law as regards the framing and

determination of preliminary issue under Section 9A of the Code, as it applied to the State of Maharashtra, the issue of limitation could not have been framed as a preliminary issue as it is a mixed question of law and fact. In support of this submission, Mr. Nevatia placed reliance upon the three Judge Bench judgment of the Supreme Court in the case of *Nusli Neville Wadia vs. Ivory Properties & ors.*².

13. Mr. Yadav, the learned Counsel for respondent nos.3 to 9, on the other hand, urged with tenacity that defendant nos.3 to 9 had raised objection to the tenability of the suit on the ground of limitation as well as bar of jurisdiction, in reply to the Notice of Motion No.115 of 2012, by which the plaintiff had sought interim relief. Thus, defendant nos.3 to 9 had taken objection to the jurisdiction of the court and tenability of the suit on account of bar of limitation at the earliest possible opportunity and, thus, the withdrawal of Notice of Motion No.115 of 2012, was of little consequence. To bolster up this submission, the learned Counsel for respondent nos.3 to 9 drew attention of the Court to the roznama dated 25th September, 2012, wherein it is recorded that the proceeding was adjourned for argument on framing of preliminary issues and for passing of necessary orders for filing written statement. The plaintiff did not press the

² Special Leave Petition (Civil) No.31982-31983 of 2013.

Notice of Motion No.115 of 2012 on 16th January, 2013 and on the very day respondent nos.3 to 9 tendered instant notice of motion along with affidavit. Thus, the plaintiff cannot be heard to state that since the application for grant of interim relief was disposed of, there was no occasion to frame the preliminary issue.

14. The aforesaid submission of the learned Counsel for respondent nos.3 to 9 appears to be borne out by the material on record, especially the roznama, adverted to above. It is incontestible that in the Affidavit-in-reply to the Notice of Motion No.115 of 2012, defendant nos.3 to 9 had raised specific objection to the tenability of the suit on the count of bar of limitation and the jurisdiction of the Court. In this view of the matter, the trial court can not be said to have committed any error in entertaining the Notice of Motion No.303 of 2013, despite the dismissal of the Notice of Motion No.115 of 2012, taken out by the plaintiff, for want of prosecution.

15. Even otherwise, the said objection of the plaintiff seems to have been relegated to a subsidiary level. The learned Judge, City Civil Court, Mumbai, has expressly observed, by placing reliance upon the judgment of this Court in the case of *Foreshore Co-operative Hsg. Soc. Ltd.* (supra) that even the

issue of limitation can be decided as a preliminary issue under Section 9A of the Code.

16. The correctness of the decision of the Supreme Court in *Foreshore Co-operative Hsg. Soc. Ltd. vs. Praveen D. Desai & ors.*³ with respect to the interpretation of the provisions contained in Section 9A of the Code, in its application to the State of Maharashtra, to the effect that the word “jurisdiction” used therein is wide enough to include the issue of limitation, came up for consideration before the Three Judge Bench of the Supreme Court in the case of *Nusli Wadia* (supra). The Supreme Court held that the issue of limitation being a mixed question of law and fact can not be decided as a preliminary issue either under Section 9A or Order XIV Rule 2 of the Code. The observations of the Supreme Court in paragraph 51 are of material significance. They read as under:

“51. Within the ken of provisions of section 9A, CPC jurisdiction of the Court to entertain the suit has to be decided without recording of evidence. Recording of evidence is not contemplated even at the stage of framing issue under Order XIV Rule 2 much less it can be allowed at the stage of grant of injunction, it would be the grossest misuse of the provisions of the law to permit the parties to adduce the evidence, to prove facts with respect to a preliminary issue of jurisdiction to entertain a suit. In case it is purely a question of law, it can be decided within the purview of section 9A of CPC as applicable in Maharashtra. The scope of Section 9A is not broader than Order XIV Rule 2(2) of the CPC. The scope is a somewhat limited one. Two full-fledged trials by leading evidence are not contemplated in CPC, one of the preliminary issue and another on other issues. Until and unless the

³ 2015(6) SCC 412.

question is pure of the law, it cannot be decided as a preliminary issue. In our opinion, a mixed question of law and fact cannot be decided as a preliminary issue, either under Section 9A or under Order XIV Rule 2 CPC. Before or after its amendment of CPC concerning both provisions, the position is the same.”

(emphasis supplied)

17. With the aforesaid observations, ultimately, the Supreme Court answered the question in paragraph 77 (a) as under:

“77(a) Given the discussion above, we are of the considered opinion that the jurisdiction to entertain has different connotation from the jurisdictional error committed in exercise thereof. There is a difference between the existence of jurisdiction and the exercise of jurisdiction. The expression jurisdiction has been used in CPC at several places in different contexts and takes colour from the context in which it has been used. The existence of jurisdiction is reflected by the fact of amenability of the judgment to attack in the collateral proceedings. If the court has an inherent lack of jurisdiction, its decision is open to attack as a nullity. While deciding the issues of the bar created by the law of limitation, *res judicata*, the Court must have jurisdiction to decide these issues. Under the provisions of section 9A and Order XIV Rule 2, it is open to decide preliminary issues if it is purely a question of law not a mixed question of law and fact by recording evidence. The decision in *Foreshore Cooperative Housing Society Limited* (supra) cannot be said to be laying down the law correctly. We have considered the decisions referred to therein, they are in different contexts. The decision of the Full Bench of the High Court of Bombay in *Meher Singh* (supra) holding that under Section 9A the issue to try a suit/jurisdiction can be decided by recording evidence if required and by proper adjudication, is overruled. We hold that the decision in *Kamlakar Shantaram* (supra) has been correctly decided and cannot be said to be *per incuriam*, as held in *Foreshore Cooperative Housing Society Limited* (supra).

(emphasis supplied)

18. In view of the aforesaid pronouncement, wherein the Supreme Court has, in terms, held that the earlier decision of the Supreme Court in the case of *Foreshore Co-operative Hsg.*

Soc. Ltd. vs. Praveen D. Desai & ors. (2015(6) SCC 412), does not lay down the law correctly and that a mixed question of law and fact can not be adjudicated as a preliminary issue under Section 9A of the Code, the impugned order, which proceeds on the legal premise that even the issue of limitation, despite being a mixed question of law and fact, can be framed and determined as a preliminary issue under Section 9A of the Code becomes unsustainable.

19. Faced with the aforesaid situation, the learned Counsel for respondent nos.3 to 9 urged that the impugned order so far as framing issue of limitation as a preliminary issue be quashed and set aside, provided the said ground raised by defendant nos.3 to 9, be permitted to be urged as a ground for rejection of plaint under Order VII Rule 11 of the Code. The submission does not deserves to be countenanced. So far as the aspect of the disclosure of a cause of action in the plaint, by the impugned order itself, the learned Judge had expressly repelled the said contention, in paragraph 25 thereof.

20. The situation which, thus, obtains is that the issue no.2 of limitation, framed as a preliminary issue, can not be decided as preliminary issue under Section 9A of the Code. So far as the issue no.1, which is based on the bar of jurisdiction

incorporated under the provisions contained in Section 149 of the Act, different consideration come into play.

21. The plaintiff assails the Commencement Certificate dated 8th February, 2001 and the acceptance to the Completion Certificate dated 14th November, 2003, which are the orders passed by the planning authority – defendant no.1. Section 149 of the Act clothes finality to the order passed or notice issued by any Regional Board, Planning Authority or Development Authority under the said Act and incorporates a bar to the effect that those orders and notices shall not be called in question in any suit or other legal proceedings. The object of the exclusion of the jurisdiction of the Civil Court under Section 149 of the Act appears to be to avoid unnecessary litigation in respect of the order or notice that may be issued by the authorities under the provisions of the said Act. The aspect of bar of jurisdiction to entertain and try the suit, therefore, can not be said to be the one which is also a mixed question of law and fact. In this view of the matter, the learned Judge was justified in framing the issue of jurisdiction as a preliminary issue.

22. Mr. Nevatia urged that there has not been any progress in the hearing and determination of the preliminary issues. The plaintiff has filed a pursis to the effect that he does not want to

lead any evidence. Since the defendants have not led any evidence, despite several opportunities, the trial court has closed the evidence of defendant nos.3 to 9, on those preliminary issues, by order dated 27th October, 2017. Yet, the matter is pending before the trial court for hearing on the preliminary issues. Thus, Mr. Nevatia submitted that the entire order be quashed and set aside and the suit be directed to be proceeded with, sans determination on the preliminary issue of jurisdiction as well.

23. The copies of the roznama placed on record indicate that the defendants have not led any evidence though ample opportunity was provided to the defendants to lead evidence in the context of the preliminary issues. The matter is posted for argument on the preliminary issues. Once it is found that the issue of jurisdiction was rightly framed as a preliminary issue and it warrants determination, it is in the fitness of things that the said issue be judicially determined. Thus, I am not impelled to accede to the submission of Mr. Nevatia that the impugned order be quashed and set aside in its entirety. However, to take care of the concern of the plaintiff, a direction to the trial court to decide the preliminary issue of jurisdiction within a time frame would be in order.

24. The upshot of the aforesaid consideration is that the petition deserves to be partly allowed. The impugned order to the extent the trial court has framed issue of limitation as a preliminary issue deserves to be quashed and set aside. Hence, the following order:

- (i) The petition stands partly allowed.
- (ii) The impugned order, to the extent the trial court framed the issue of limitation as a preliminary issue, stands quashed and set aside.
- (iii) The trial court is directed to make an endeavour to decide the issue of jurisdiction as a preliminary issue as expeditiously as possible and, in any event, within a period of three months from the date of the communication of this order.

25. No order as to costs.

26. Rule made absolute in the aforesaid terms.

[N. J. JAMADAR, J.]