

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****APPEAL FROM ORDER NO. 90 OF 2012****WITH****CIVIL APPLICATION NO. 111 OF 2012****IN****APPEAL FROM ORDER NO. 90 OF 2012**

Sou. Shobha Vishwas Bavale & Anr.

.....Appellants.

Vs.

Mr. Krishna Vasudeo More & Ors.

.....Respondents.

Mr. Rahul Walvekar for the Appellants.

Mr. P.D. Dalvi for the Respondent Nos. 3 and 4.

CORAM : A. S. GADKARI, J.

DATE : 21st FEBRUARY, 2020.

P.C.:-

By the present Appeal from Order, the Appellants/Original Defendants have impugned Judgment and Order dated 30th August, 2011 passed by the learned Ad-hoc District Judge-1, Kolhapur in Regular Civil Appeal No. 209 of 2003.

2 By the impugned Order dated 30th August, 2011, the Appellate Court has set aside the Order dated 9th April, 2003 passed in Regular Civil Suit No. 1182 of 2001 by the learned Joint Civil Judge, Junior Division, Kolhapur holding that, the Suit is barred by limitation.

The Appellate Court has remanded the said Suit back for its trial afresh, as per the issues raised in the Suit and the evidence lead by both the parties to it.

3 The Hon'ble Supreme Court in the case of *Nusli Neville Wadia Vs. Ivory Properties & Ors. Reported in 2019 SCC OnLine SC 1313*, has held that, the decision in the case of *Kamalakar Eknath Salunkhe Vs. Baburao Vishnu Javalkar, reported in (2015) 7 SCC 321* has been correctly decided by the said Court and cannot be said to be *per incuriam* as held in *Foreshore Cooperative Housing Society Limited Vs. Praveen D. Desai (Dead) through Legal Representatives reported in (2015) 6 SCC 412*.

The Hon'ble Supreme court in the case of *Kamalakar Eknath Salunkhe* (Supra), has opined that, the issue of limitation cannot be decided as a 'preliminary issue' under Section 9 of the Code of Civil Procedure.

4 Perusal of Judgment and Order dated 9th April, 2003 passed in Regular Civil Suit No. 1182 of 2001 by the learned Joint Civil Judge, Junior Division, Kolhapur clearly indicates that, the Trial Court has erroneously considered the issue of limitation as a preliminary issue and has passed elaborate Order in that behalf.

The Appellate Court, has rightly applied the provisions of law and remanded the matter back to the Trial Court as noted above.

5 Perusal of the impugned Order would indicate that, the

Appellate Court has not committed any error while passing the impugned Order, either in law or on facts.

Appeal being devoid of any merits, is accordingly dismissed.

In view of dismissal of Appeal No. 90 of 2012 itself, Civil Application Nos. 111 of 2012 does not survive and is also disposed off.

(A.S. GADKARI, J.)

Sanjiv S.
Mashalkar

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