

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8074 OF 2013**

Balasaheb Maruti Tapkir ... Petitioner
V/s.
Pandharinath Tukaram Tapkir & Ors. ... Respondents

**WITH
WRIT PETITION NO.6385 OF 2013**

Nanasaheb Maruti Tapkir ... Petitioner
V/s.
Pandharinath Tukaram Tapkir & Ors. ... Respondents

Ms.Bhavna Punalekar h/f Shakuntala Wadekar for the Petitioner in WP No.8074/2013.

Mr.Siddharth S. Chapalgaonkar i/b Nitin P. Deshpande for the Respondent Nos.1 to 3 in both petitions.

Mr.Vivek Salunkhe for Respondent No.4 in WP No.8074/2013.

CORAM : MADHAV J. JAMDAR, J.

DATE : 9TH MARCH, 2021.

P.C:-

1. In Writ Petition No.8074 of 2013, the Original Defendant No.8 has challenged the common order dated 26/03/2013 passed by the Learned 2nd Joint Civil Judge, Senior Division, Pune below Exhibit-76 and 123 in Special Civil Suit No.522 of 2009. In Writ Petition No.6385 of 2013, the Original Defendant No.7 has challenged the same order dated 26/03/2013.

2. The Special Civil Suit No.522 of 2009 was filed by Respondent Nos.1 to 3 seeking declaration that the Plaintiffs have 1/5th share in the suit

properties and for possession. The Defendant Nos.2 and 3 have filed an Application bearing Exhibit-76 under section 9-A (Bombay Amendment) of the Code of Civil Procedure (for short "C.P.C.") contending that the suit is hit by the principles of res-judicata and same be dismissed. Defendant Nos.7 and 8 filed an Application bearing Exhibit-123 under section 9-A of CPC (Bombay Amendment) inter alia praying that issue whether the Court has jurisdiction to decide the suit or not be decided as preliminary issue. The contention raised in the Application at Exhibit-123 is that the suit is barred by limitation and also the same is barred by the principles of res-judicata.

3. By the impugned order dated 26/03/2013 both these Applications were rejected on the ground that both these issues namely limitation and res-judicata are mixed questions of law and facts and therefore, they will be decided after recording evidence.

4. Ms.Bhavna Punalekar, learned Advocate appearing for the Petitioner pointed out the contentions raised in Application bearing Exhibit-123. She further contended that both the contentions that the suit is barred by the principles of res-judicata and also barred by limitation can be examined even without recording evidence. She contended that the Learned Trial Court has not taken into consideration the decree passed in earlier suit bearing Regular Civil Suit No.1128/2003 filed for partition, and, therefore, the present suit is barred by principles of res-judicata. Apart from that she contended that the suit is barred by limitation.

5. Mr.Vivek Salunkhe, learned Advocate appearing for Respondent No.4 i.e. original defendant No.1 submitted that the Learned Trial Court has not observed that all these issues will be decided after recording the evidence in the impugned order and therefore submitted that the same be clarified.

6. Mr.Siddharth Chapalgaonkar, learned Advocate appearing for Respondent Nos.1 to 3 i.e. Original Plaintiff supported the impugned order. He submitted that for deciding both these issues namely that the suit is barred by the principles of res-judicata and the same is barred by Law of Limitation, the evidence is required to be led as both these issues are mixed questions of law and facts.

7. A bare perusal of Application at Exhibit-76 and 123 clearly show that basically two contentions are raised viz. that the suit is barred by the principles of res-judicata and barred by law of limitation.

8. As far as contention regarding res-judicata is concerned, the Learned Trial Court has observed that in the earlier suit certain properties were not included and, therefore, fresh suit was filed and in any case whether it will be barred by the principles of res-judicata is mixed question of law and facts. As far as limitation is concerned, in the suit what is challenged is inter alia sale deed dated 2/12/2002. It is the contention of the Plaintiffs in the suit that they came to know about said sale deed at the later point, therefore, also as rightly observed by the learned Trial Court this is also mixed question of law and facts.

9. Apart from the reasons given by the Learned Trial Court it is to be noted that both these Applications are under section 9-A of CPC (Bombay Amendment). As far as section 9-A of CPC (Bombay Amendment) is concerned, the Hon'ble Supreme Court in the judgment of ***Kamlakar Salunkhe vs. Baburav Vishnu Javalkar and Others reported in (2015) 7 SCC 327*** has held as follows :

“16.The expression “jurisdiction” in Section 9-A is used in a narrow sense, that is, the court's authority to entertain the suit at the threshold. The limits of this authority are imposed by a statute, charter or commission. If no restriction is imposed, the jurisdiction is said to be unlimited. The question of jurisdiction, sensu stricto, has to be considered with reference to the value, place and nature of the subject-matter. The classification into territorial jurisdiction, pecuniary jurisdiction and jurisdiction over the subject-matter is of a fundamental character. Undoubtedly, the jurisdiction of a court may get restricted by a variety of circumstances expressly mentioned in a statute, charter or commission. This inherent jurisdiction of a court depends upon the pecuniary and territorial limits laid down by law and also on the subject-matter of the suit. While the suit might be barred due to non-compliance with certain provisions of law, it does not follow that the non-compliance with the said provisions is a defect which takes away the inherent jurisdiction of the court to try a suit or pass a decree. The law of limitation operates on the bar on a party to agitate a case before a court in a suit, or other proceedings on which the court has inherent jurisdiction to entertain but by operation of the law of limitation it would not warrant adjudication.”

“19.The provision contemplates that when an issue of jurisdiction is raised, the said issue should be decided at first as expeditiously as possible, and not be adjourned to a later date. The primary reason is that if the Court comes to finding that it does not have jurisdiction vested in it in law, then no further enquiry is needed and saves a lot of valuable judicial time.”

“20. A perusal of the Statement of Objects and Reasons of the Amendment Act would clarify that Section 9-A talks of maintainability only on the question of inherent jurisdiction and does not contemplate issues of limitation. Section 9-A has been inserted in the Code to prevent the abuse of court process where a plaintiff drags a defendant to the trial of the suit on merits when the jurisdiction of the court itself is doubtful.”

10. In view of conflicting view between the decision in Kamlakar Eknath Salunkhe’s case and in the case of Foreshore Co-operative Housing Society

Limited Vs. Praveen D. Desai reported in (2015) 6 SCC 412, the same was referred to larger bench and decided by Judgment in the case between ***Nusli Neville Wadia vs. Ivory Properties & Ors. 2019 (13) SCALE 620***. In the said case it has been held as follows :

“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)”.

Thus, it is clear that it is open to decide preliminary issues if it is purely a question of law and not a mixed question of law and fact by recording evidence.

11. The learned Trial Court in the impugned order has specifically observed that both these issues namely of Res-judicata and limitation are

mixed questions of law and fact. It is to be noted that objection raised by Mr.Vivek Salunkhe, learned Advocate also is not correct as it is specifically observed in paragraphs 8 and 9 that all these issues will be decided after recording evidence. Thus no interference under Article 227 of the Constitution of India is warranted.

12. In view of above there is no substance in the Writ Petition, and the same is dismissed with no order as to costs.

[MADHAV J. JAMDAR, J.]