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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 662 OF 2014**

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Paresh Damodardas Mahant ...Appellant
Versus
Arun Damodardas Mahant (since deceased) ...Respondent
through legal heirs 1(a) Rani Arun Mahant & Ors

**WITH
INTERIM APPLICATION NO. 1515 OF 2022
IN
APPEAL NO. 662 OF 2014**

Paresh Damodardas Mahant ...Applicant
Versus
Arun Damodardas Mahant (since deceased) ...Respondent
through legal heirs 1(a) Rani Arun Mahant & Ors

**WITH
INTERIM APPLICATION NO.1316 OF 2022
IN
APPEAL NO. 662 OF 2014**

Paresh Damodardas Mahant ...Applicant
Versus
Arun Damodardas Mahant (since deceased) ...Respondents
through legal heirs 1(a) Rani Arun Mahant & Ors

**Mr Sarosh Bharucha, i/b Sanjay Sinha, for the Applicant/Appellant.
Dr Sujay Kantawala, with Anupam Dighe & Minal Pawar, i/b India
Law Alliance, for Respondents Nos. 1(a) to 2.**

**Mr Suhas Deokar, with Atmaram Patade, Yash Patade & Suraj Naik,
i/b Atmaram Patade, for Respondent No.4.**

**CORAM G.S. Patel &
 Madhav J. Jamdar, JJ.**
DATED: 7th July 2022

PC:-

1. The Appeal is directed against an order of 13th October 2014. By that order, the learned Single Judge framed a preliminary issue of jurisdiction on the basis of a bar of limitation. This was under Section 9-A of the Code of Civil Procedure, 1908 as it then stood for Maharashtra. That Maharashtra amendment has subsequently been deleted.

2. The only point canvassed and not seriously contested before us today is that the three-judge decision of the Supreme Court in *Nusli Neville Wadia v Ivory Properties & Ors*¹ clearly lays down that limitation cannot be taken as a bar of jurisdiction. Paragraph 88 of *Ivory Properties* reads thus:

“88. 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

1(2020) 6 SCC 557.

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 9-A and Order 14 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 Coop. Housing Society Ltd.* 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* holding that under Section 9-A 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 Eknath Salunkhe* has been correctly decided and cannot be said to be *per incuriam*, as held in *Foreshore Coop. Housing Society Ltd.*”

3. By way of abundant caution, we also note the decision of the Supreme Court in *Kamalakar Eknath Salunkhe v Baburav Vishnu Javalkar & Ors*² and in *Shyam Madan Mohan Ruia & Ors v Messer Holdings Ltd & Ors*.³ In *Salunkhe*, after explaining the concept of ‘jurisdiction’ and its jurisprudential contours in paragraph 16, the Supreme Court said:

21. In the instant case, the preliminary issue framed by the trial court is with regard to the question of limitation. **Such issue would not be an issue on the jurisdiction of the court and, therefore, in our considered opinion, the trial court was not justified in framing the issue of limitation as a preliminary issue by invoking its power**

2 (2015) 7 SCC 321.

3 (2020) 5 SCC 252.

under Section 9-A of the Code. The High Court has erred in not considering the statutory ambit of Section 9-A while approving the preliminary issue framed by the trial court and thus, rejecting the writ petition filed by the appellant.

(Emphasis added)

In *Messer Holdings*, the Supreme Court applied *Ivory Properties* (which reaffirmed the correctness of *Salunkhe*) and said:

18. **In view of the judgment passed by the Hon'ble three-Judge Bench reported in *Nusli Neville Wadia v. Ivory Properties* [(2020) 6 SCC 557 : (2019) 13 Scale 620], the question of limitation will have to be considered along with other issues that would arise for adjudication in Suit No. 2410 of 2008 filed by Respondent 1 (MHL).** Certain observations have been made by the learned Single Judge as well as by the Division Bench on the merits of the matter and the contention of the parties. In our view, the trial in Suit No. IV — 2410 of 2008 has to be proceeded independently on its own merits. **In view of the judgment [*Nusli Neville Wadia v. Ivory Properties*, (2020) 6 SCC 557 : (2019) 13 Scale 620] by the three-Judge Bench, the decision rendered by the learned Single Judge as well as by the Division Bench on the issue of limitation by considering that as preliminary issue would become nullity and the matter would have to proceed afresh.**

(Emphasis added)

4. In light of this, the impugned order is set aside. The suit is restored to file and will continue. All interim orders as they stood before the date of the impugned order including the interim order of 8th May 2014 will continue until further orders.

5. There are several IAs in the Appeal. Liberty to the Applicant to file these very IAs in the Suit itself. All contentions are expressly kept open.

6. The Appeal and all IAs in the Appeal, whether listed or unlisted today, are disposed of in these terms.

(Madhav J. Jamdar, J)

(G. S. Patel, J)