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

**SECOND APPEAL NO.137 OF 2023
WITH
INTERIM APPLICATION NO.1490 OF 2023
IN
SECOND APPEAL NO.137 OF 2023**

Vijay Paul Misquita
since deceased Through his heirs
and legal Representatives

1A. Doley Vijay Misquita and Ors. ...Appellants

Versus

William Joseph Misquitta
since deceased through his heirs
and legal Representatives

(1) Alan William Misquitta and Ors. ...Respondents

- Mr. U.S.R. Singh, for the Appellants/Applicants.

CORAM : MADHAV J. JAMDAR, J.

DATE : 20th FEBRUARY 2023

P.C. :

1. Heard Mr. Singh, learned counsel appearing for the Appellants
i.e. heirs of the original Defendant No.1. According to him, the
following substantial question of law arises in the Second Appeal:

- I] Whether the learned First Appellate Court committed
illegality in holding that the suit filed by the Respondents is
within limitation?

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2. The learned Trial Court in application filed at Exh.34 allowed framing of preliminary issue with regard to limitation. This appears to have been done by exercising power under section 9A of the Civil Procedure Code, 1908, as applicable to the State of Maharashtra which has been subsequently deleted. It appears that the said issue was framed by order dated 24th March 2017.

3. The learned Trial Court by Judgment and Decree dated 4th January 2020 held that the suit is not within limitation and therefore, dismissed the suit. Learned First Appellate Court by Judgment and Decree dated 31st March 2022 has allowed the Appeal and restored the said suit to the file of the learned Trial Court and directed that the learned Trial Court to decide the said suit by framing all the issues together.

4. The learned First Appellate Court has *inter alia* relied on the judgment of the Supreme Court in the matter of **M/s. Mongia Realty and Buildwell Private Limited Vs. Manik Sethi**¹. In the said decision, it has been held that in a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b) of the Civil Procedure Code, 1908.

1 (2022) 11 SCC 572

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Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order XIV Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. It is further held that in case of dispute as to facts, it is necessary to be determined to give a finding on a question of fact and such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed, it cannot be decided as a preliminary issue. If the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue and the same is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.

5. Emphasis of Mr. Singh is on paragraph 13 of the plaint, wherein it is stated that cause of action has firstly arisen in or around 1985 and thereafter, in March 2012 when the Plaintiff learnt about the illegal and invasive construction done by the Defendant No.1 and the same continues. Thus, his submission is that Article 58 of the Limitation Act, 1963 will apply to the present case. Article 58 is regarding suit to obtain any other declaration and for the same, the

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period of limitation is three years and the time from which the limitation period begins to run is when the right to sue first accrues. However, perusal of the prayers in the plaint show that the same is seeking declaration about erection of unauthorized construction on the suit structure as illegal and various other reliefs. The reliefs in the plaint are set out herein-below for ready reference:

- “a. Decree be granted declaring that the said suit structure and the erection on the suit structure be declared as unauthorized;
- b. Decree be granted directing the Defendant No.1 to demolish the suit structure and the erection done on the suit structure which is invading into the right of the Plaintiff;
- c. Decree be granted directing the Defendant No.2 not to grant any permission for carrying out any construction or regularizing the construction of the suit structure and the illegal erection on the suit structure;
- d. Pending the final hearing and disposal of the suit the Defendant No.2 be directed not to grant any permission for carrying out any construction or regularizing the construction of the suit structure and the illegal erection on the suit structure;
- e. decree be granted directing the Defendant No.2 to demolish the illegal portion of the suit structure.

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- f. Decree be granted restraining the Defendant No.1, his agents, representatives, heirs, servants, assigns or anyone claiming through him or his predecessor-in-title be restrained by an Order of Perpetual Injunction from carrying on the construction of the suit structure or any erection thereon;
 - g. Pending the hearing and final disposal of the suit the Defendant No.1, his agents, representatives, heirs, servants, assigns or anyone claiming through him or his predecessor – in-title be restrained by an order of injunction from carrying on the construction of the suit structure or any erection thereon.
 - h. Ad-interim reliefs in terms of prayer clause (d) and (g);
 - i. Any other and further prayer deemed necessary and just by this Hon'ble Court;
 - j. Costs of this suit.”
6. Various averments in the plaint show that the relief is sought on the basis of title in the property. In para 1 of the plaint, it has been stated that the Plaintiff and the Defendant No.1 are co-owners of the suit property. Article 65 of the Limitation Act, 1963 provides that for possession of immovable property or any interest therein based on title, the limitation is twelve years and the time from which the period begins to run is when the possession of the defendant becomes

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adverse to the plaintiff. Therefore, in this particular case, it cannot be said that determination of the issue of limitation in this case is only a pure question of law and therefore, the decision of the Supreme Court in the case of *M/s. Mongia Realty and Buildwell Private Limited (supra)*, is squarely applicable to the facts of this case. There is no illegality committed by the learned Appellate Court and therefore, Second Appeal is dismissed with no order as to costs. In view of dismissal of Second Appeal, nothing survives in the Interim Application and the same is also disposed of.

7. It is clarified that the reasoning given in this order is only from the point of view of examining the legality and validity of the order passed by the learned First Appellate Court and to deal with the contentions raised by learned counsel of the Appellants.

8. All the contentions of both the parties are expressly kept open including on the issue of limitation.

9. Second Appeal is disposed of in above terms with no order as to costs. As the Second Appeal is disposed of, nothing survives in the Civil Application and the same is also disposed of.

[MADHAV J. JAMDAR, J.]