

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

***FIRST APPEAL NO.78 OF 2014  
WITH  
CIVIL APPLICATION NO.246 OF 2014***

- |     |                              |   |
|-----|------------------------------|---|
| 1.  | Dilip Mahasukhlal Shah       | } |
| 2.  | Shri Haresh Mahasukhlal Shah | } |
|     | (Since deceased)             | } |
| 2.a | Mr. Ketan Dilip Shah         | } |
| 2.b | Mr. Keyur Dilip Shah         | } |
| 3.  | Shri Ashok Mahasukhlal Shah  | } |

**..Appellants/Applicants**

**Versus**

- |     |                                |   |
|-----|--------------------------------|---|
| 1.  | Shri Chandrakant Kantilal Shah | } |
| 2.  | Shri Jayraj Kantilal Sonawala  | } |
| 3.  | Shri Nitin Kantilal Sonawala   | } |
| 4.  | Shri Madhu Kantilal Sonawala   | } |
| 5.  | Mrs. Ketki Dinesh Shah         | } |
| 6.  | Smt. Rekha Bharatkumar Malbari | } |
| 7.  | Smt. Bharati Dilip Shah        | } |
| 8.  | Smt. Amita Virendra Sonawala   | } |
| 9.  | Shri Alok Virendra Sonawala    | } |
| 10. | Smt. Karishma Ajay Agarwal     | } |
| 11. | Shri. M. P. Shah               | } |
|     | 11-A Smt. Induben V. Shah      | } |
|     | 11-B Mr. Pankaj V. Shah        | } |
|     | 11-C Mr. Atul V. Shah          | } |
|     | 11-D Mr. Navinchandra I. Shah  | } |
|     | 11-E Mr. Rajiv N. Shah         | } |
|     | 11-F Smt. Savitaben P. Shah    | } |
|     | 11-G Smt. Damayanti H. Shah    | } |
|     | 11-H Smt. Neeta M. Master      | } |
| 12. | Shri Kailash P. Shah           | } |
|     | 12-A Shri Dinesh P. Shah       | } |
|     | 12-B Shri Jatin P. Shah        | } |
|     | 12-C Smt. Nayna N. Shah        | } |

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|------|-----------------------------------------------|---|--|
| 13.  | Shri Arvind Kantilal Shah                     | } |  |
| 14.  | Shri Anupam Kantilal Shah                     | } |  |
| 15.  | Shri Sailesh Balubhai Kapadia                 | } |  |
| 16.  | Shri Yogesh Balubhai Kapadia                  | } |  |
| 17.  | Mrs. Hasumati Vinod Shah                      | } |  |
| 18.  | Mrs. Bina Chetan Shah                         | } |  |
| 19.  | Mrs. Saroj Arvind Parekh                      | } |  |
| 20.  | Mrs. Aruna Pratap Kapadia                     | } |  |
| 21.  | Shri Parag Pratap Kapadia                     | } |  |
| 22.  | Smt. Geeta Patkar                             | } |  |
| 23.  | Mrs. Padma Rajendra Patel                     | } |  |
| 24.  | Mrs. Sujatha Madhubai Patel                   | } |  |
| 25.  | Shri Dilip Jasubai Patel                      | } |  |
| 26.  | Shri Ashwin Jasubai Patel                     | } |  |
| 27.  | M/s. Sonawala Brothers                        | } |  |
| 28.  | M/s. Marathon Group                           | } |  |
|      | Consisting of the following Companies         |   |  |
| 28-A | M/s. Cornell Housing & Infrastructure P. Ltd. | } |  |
| 28-B | M/s. Svarnim Enterprises Pvt. Ltd.            | } |  |
| 28-C | M/s. Marathon Next                            | } |  |

.. Respondents

**WITH**  
**INTERIM APPLICATION NO.1132 OF 2019**

- |    |                             |   |              |
|----|-----------------------------|---|--------------|
| 1. | Shri SEBASTIAN J. SEQUEIRA  | } |              |
| 2. | Shri FELIX MICHAEL SEQUEIRA | } | ..Applicants |

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Mr.Rubin Vakil a/w Ms.Mahek Kamdar, Mr.Rishabh Ranka & Mr.Hersh Choksi i/by Kanga & Co. for the Appellants.

Mr.Rajendra V. Kamble for the Applicant-Intervener in IA/1132/2019 in FA/78/14.

Mr.Sharan Jagtiani, Senior Advocate a/w Mr. Aman Kacheria, Mr.Prasanna Tare, Ms.Akshada Shetye for respondent nos.1 to 4 & 8 to 10.

Mr.Kunal Vajani a/w Mr.Shubhang Tandon, Mr.Aman Sing Brar, Mr.Sunil Khandare i/by Ms.Deepika Bhonsle for respondent no.28A, 27 & 37d.

Mr.Amey Deshpande for respondent nos.11A-11-H, 12 to 12C & 14.

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**CORAM : A.S. CHANDURKAR &  
JITENDRA JAIN, JJ.**  
**DATE : 17<sup>th</sup> and 24<sup>th</sup> April 2024**

**ORAL JUDGEMENT : (PER : A. S. CHANDURKAR, J)**

1. This appeal filed under Section 96 of the Code of Civil Procedure, 1908 (for short, the Code) raises a challenge to the dismissal of Special Civil Suit No.78 of 2011 in view of the affirmative finding on the preliminary issue framed under Section 9A of the Code that the suit as filed was barred by the law of limitation.

2. The facts relevant for considering the challenge as raised is that the Appellants-original Plaintiffs filed Special Civil Suit No.78 of 2011 for a declaration that the suit properties as described in paragraph 4 of the plaint were the joint properties of the plaintiffs and Respondent Nos.1 to 26- Defendant Nos.1 to 26 and that Defendant Nos.1 to 10, 27 and 28A to 28C had no right to deal with the suit properties in exclusion of the plaintiffs. The plaintiffs prayed that a decree for partition of the suit properties by metes and bounds be also passed. Various other ancillary reliefs were also sought. In the written statement as filed, the claim as made by the plaintiffs was denied. A further plea that the suit was barred by limitation was also raised. The trial Court framed a preliminary issue under Section 9A of the Code so

as to examine whether the suit was barred by the law of limitation. The parties led evidence and were then heard on the said preliminary issue. The trial Court by its order dated 10/12/2013 answered the preliminary issue in the affirmative and held that the suit was barred by limitation. In view of this answer to the preliminary issue, the suit was dismissed on 10/12/2013. It is against this decree that the present first appeal has been filed.

3. Mr. Rubin Vakil, learned counsel appearing for Plaintiffs referred to the judgment of the Supreme Court in *Nusli Neville Wadia Vs. Ivory Properties & Ors.* (2020) 6 SCC 557 to urge that the question as regards bar of limitation was a mixed question of fact and law. The same could not be tried as a preliminary issue and hence such adjudication undertaken by the trial Court under Section 9A of the Code was not sustainable. It was submitted that the issue of limitation was liable to be tried alongwith all other issues framed under provisions of Order XIV Rule 2 of the Code and the suit ought to be decided on merits. Since the same was not done by the trial Court, it was submitted that after setting aside the order passed below Exhibit 81 the proceedings be remanded to the trial Court for being decided afresh on merits. The evidence led by the parties on the question of limitation could be taken

into consideration alongwith all other evidence. It was thus submitted that the decree passed by the trial Court be set aside and the proceedings be remanded for fresh adjudication.

4. Mr. Sharan Jagtiani, learned Senior Advocate appearing for Defendant Nos.1 to 4, 8 to 10 did not dispute the fact that in view of the judgment of the Supreme Court in *Nusli Neville Wadia (supra)* the issue of limitation could not be decided as a preliminary issue under Section 9A of the Code. According to him however, the evidence led by the parties on the preliminary issue of limitation was liable to be taken into consideration with other evidence that would be led by the parties. That evidence could not be ignored even if the proceedings were to be decided afresh. Since the trial Court had found that the suit was barred by limitation, it was not permissible for the Plaintiffs to contend that the evidence already recorded ought to be ignored when the proceedings were decided afresh. Attention was invited to the provisions of Maharashtra Act LXI of 2018 to contend that the evidence recorded prior to the amendment coming in force was saved and was liable to be taken into consideration. It was thus submitted that the aforesaid aspect be considered if the proceedings were to be remanded.

5. On the aforesaid rival contentions, the following point arises for

determination “Whether the order passed by the trial Court below Exhibit 81 under Section 9A of the Code is legal and proper?”.

6. Under provisions of Section 9A of the Code, as it then stood, at the hearing of any application for granting or setting aside an order granting any interim relief, if an objection to the jurisdiction of the Court to entertain the suit was taken by any of the parties, the Court was required to determine at the hearing of such application the issue with regard to jurisdiction as a preliminary issue before granting or setting aside the order granting interim relief. The expression “jurisdiction of the Court to entertain such suit” was the subject matter of consideration by the Bench of three learned Judges in *Nusli Neville Wadia (supra)*. It was held that under provisions of Section 9A of the Code and Order XIV Rule 2 thereof it is open for the Court to decide a preliminary issue only if the same raised a pure question of law and not a mixed question of law and fact by recording evidence.

7. From the aforesaid decision, therefore, it becomes clear that under Section 9A of the Code a mixed question of law and fact cannot be decided as a preliminary issue. The question as to whether the proceedings are barred by the law of limitation is a mixed question of

law and fact and thus said issue cannot be decided as a preliminary issue under Section 9A of the Code by recording evidence. To that extent, therefore, we find that the learned Judge of the trial Court erred in deciding the issue as regards the suit being barred by limitation as a preliminary issue under Section 9A of the Code. The order passed Exhibit 81 is after recording evidence on this aspect. In the light of the law laid down by the Supreme Court referred to hereinabove, the said order below Exhibit 81 on 10/12/2013 is liable to be set aside. The point as framed is answered by holding that the trial Court was not legally justified in deciding the preliminary issue as regards bar of limitation being a mixed question of law and fact under Section 9A of the Code.

8. Coming to the admissibility or otherwise of the evidence recorded by the trial Court, it is clear from the provisions of the proviso to Section 3(1) of Maharashtra Act LXI of 2018 that the evidence recorded earlier has to be considered alongwith evidence that the parties may lead on other issues. Hence the evidence on the issue of limitation which is already recorded cannot be effaced. That evidence would be required to be considered alongwith other evidence that the parties may lead on other issues.

9. Since the order passed below Exhibit 81 has been set aside, the proceedings in Special Civil Suit No.78 of 2011 would be required to be remanded to the trial Court for deciding the same afresh. Hence for aforesaid reasons, the following order is passed:-

(i) The order dated 10<sup>th</sup> December 2013 passed below Exhibit-81 answering the preliminary issue framed under Section 9A of the Code as regards the suit being barred by limitation in the affirmative is set aside. Consequently, the dismissal of the Special Civil Suit No.78 of 2011 is also set aside.

(ii) The proceedings are remanded to the trial Court for deciding Special Civil Suit No.78 of 2011 afresh on its own merits and in accordance with law.

(iii) The evidence led by the parties on the issue of limitation shall be retained on record of the suit. In case any party desires to give additional evidence on the issue of limitation, they are free to apply to the trial Court seeking such permission. If such request is made, the trial Court shall consider the same in accordance with law.

(iv) The defendants, who have not filed their written statements, are free to take appropriate steps to do so in accordance with the provisions of Order VIII of the Code of Civil Procedure, 1908.

(v) The issue of limitation shall be decided afresh without being influenced by the observations made in the order dated 10<sup>th</sup> December 2013.

(vi) Since the suit is filed in the year 2011, the trial Court to take appropriate steps to decide the same expeditiously and preferably by 31<sup>st</sup> December 2024 subject to the parties co-operating with the trial Court.

(vii) The First Appeal is disposed of in aforesaid terms leaving the parties to bear their own costs.

#### **INTERIM APPLICATION NO.1132 of 2019**

10. This application has been filed by two applicants seeking leave to intervene in First Appeal No.78 of 2014. The applicants claim interest in the suit property and hence pray that they be permitted to intervene in the proceedings.

11. First Appeal No.78 of 2014 has been decided and the proceedings in Special Civil Suit No.78 of 2011 have been remanded to the trial Court for fresh adjudication. Since the applicants seek to intervene in the proceedings, they are at liberty to approach the trial Court in Special Civil Suit No.78 of 2011 and seek similar relief as sought in the present interim application. Keeping the points raised in the interim

application open and without prejudice to the rights and contentions of the parties to the aforesaid civil suit, the interim application is disposed of with aforesaid liberty.

**CIVIL APPLICATION NO.246 of 2014**

12. Civil Application No.246 of 2014 has been filed by the appellants-plaintiffs seeking grant of interim relief in view of disposal of the first appeal. This civil application is also disposed of with liberty to the parties to seek appropriate relief before the trial Court.

[ JITENDRA JAIN, J]

[A.S. CHANDURKAR, J. ]