IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1878 OF 2024

Leena Chhaban Tonde
(before marriage Leena Yashvant Padale) .. Petitioner

Versus

Dilip Yashwant Padale and Ors. .. Respondents

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- Mr. Ashutosh Kumbhakoni, Senior Advocate a/w. Mr. Hitesh Vyas, Mr. Aksshay Shinde and Ms. Rasika Raut, Advocates for Petitioner.
- Mr. Girish Godbole, Senior Advocate a/w. Mr. Sumit Kothari i/by Ms. Deepashikha Godbole, Advocate for Respondent No.12.
- Mr. Mayur Khandeparkar a/w. Mr. Akshay Doctor, Mr. Parag Sawant, Mr. Kartik Shetty and Mr. Aaryan Parab i/by P.S. Chambers for Respondent Nos.13 and 14.

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CORAM : MILIND N. JADHAV, J.
RESERVED ON : MAY 08, 2024
PRONOUNCED ON : JUNE 10, 2024

JUDGMENT:

1. This Writ Petition is filed by the Petitioner i.e. original Plaintiff before the learned Trial Court Trial Court to challenge the legality and validity of the order dated 21.04.2023 (for short "**the impugned order**") passed below Exhibit "274" in Special Civil Suit (SCS) No.1387 of 2012. The original Plaintiff filed Application below Exhibit "274" seeking deletion of the issue of limitation framed by the Trial Court on the ground stated in the Application which shall be adverted to later. The Application came to be rejected resulting in filing of the present Writ Petition.

2. Briefly stated, some of the facts necessitated for adjudication of the present dispute are required to be considered for dealing with the merits of the impugned order.

3. Petitioner is the original Plaintiff who has filed Suit for partition of the suit properties by metes and bounds and for declaration that various Gifts and Sale Deeds executed in respect of the suit properties are not binding on the Petitioner. One of the contention is the fact that Gift Deed dated 18.12.1957 is challenged by the Petitioner in the present Suit instituted in the year 2012. However, that may not be of relevance according to the Petitioner for considering the *lis* in respect of the impugned order. Though it has been vehemently argued by the Respondents that the aforesaid fact needs to be considered by the Court on the aspect of limitation, but the issue before the Court according to the Petitioner is different.

4. The array of parties is required to be seen. There are 14 Respondents. Respondent Nos.1 and 2 are the real brothers of the Petitioner. There are 4 land parcels of immovable properties which are described as suit properties. According to Petitioner, the suit properties belong to their ancestor Mr. Pandurang Vishnu Padale who expired intestate on 12.09.1962 leaving behind his son Mr. Yashawant Pandurang Padale and daughter Smt. Godavari Vitthal Chinchavade. Thereafter Yashwant Pandurang Padale expired intestate on

04.10.1981 leaving behind Petitioner and Respondent Nos.1 and 2 and his legal heirs. Similarly, Godavari Vitthal Chinchavade expired intestate leaving behind two sons and three daughters as her legal heirs. The legal heirs of Godavari Vitthal Chinchavade are Defendants to the Suit instituted by the Plaintiff.

5. According to Plaintiff, Respondent No.1 - Dilip Yashwant Padale is in charge of the suit properties. She called upon Respondent No.1 in the year 2011 to effect partition of the suit properties by metes and bounds. According to Petitioner, Respondent No.1 at that time assured that he will call for a family meeting, but did not do so despite her repeated follow up. At that time, Plaintiff became aware that Respondent No.1 by virtue of Gift Deed dated 18.12.1957 shown to be registered at Sr. No.1002 of 1957 claimed to be the owner of all suit properties exclusively. This Gift Deed was made by Pandurang Vishnu Padale in favour of Defendant No.1 (his grandson) in the year 1957, according to Respondent No.1. 3 out of the 4 suit properties were sold by Respondent No.1 to Respondent No.4 and one late Musa Babu Tamboli by a registered Sale Deed dated 07.09.1977. The said Musa Babu Tamboli sold his share in the 3 suit properties to Respondent No.6 in 1979. Thereafter in 1997, legal heirs of Respondent No.4 sold share of Respondent No.4 to Respondent No.5 by a release deed. Thereafter Gift Deed dated 29.06.2004 was executed by legal heirs of Respondent No.4 in respect of 1 out of the 4 properties. According to

Petitioner, Respondent No.6 claims to be holder of 2 suit properties with the consent of legal heirs of Respondent No.4. Further one out of the 4 suit properties has been sold to Respondent No.9 in the year 2009 by legal heirs of Respondent No.4. One property out of the suit properties is sold to Respondent No.10 in the year 2009 by the legal heirs of Respondent No.4. Further Respondent No.9 sold one of the suit property held by him in favour of Respondent No.10 in the year 2010. This is how the suit properties have been dealt with.

6. On 09.04.2012, Petitioner came across a published public notice in daily 'Prabhat' by Advocate for Respondent No.12 calling for objections in respect of 3 out of the 4 suit properties. The Petitioner took objection and pointed out the aforementioned details. Hence all above parties are impleded as proper and necessary party to the Suit filed by the Plaintiff / Petitioner.

7. The genesis of the present dispute emanates from the year 2012 onwards when the S.C. Suit No.1387 of 2012 is filed.

8. Respondent No.12 filed Application for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure, 1908 (for short "CPC") below Exhibit "58". Learned Trial Court after hearing the parties, rejected the Application. Civil Revision Application (CRA) No.799 of 2013 was filed in this Court. This Court disposed of the CRA allowing Respondent No.12 to file an Application under Section

9-A of the CPC to challenge maintainability of the Suit on the ground of limitation. At the same time, original Defendant No.7 filed Application under Section 9-A of the CPC below Exhibit "138" for framing of the issue of jurisdiction on the ground of the Suit having been filed beyond the period of limitation. That Application was allowed by the Trial Court by framing the preliminary issue of limitation by order dated 16.11.2015. That order is appended at Exhibit "B1" – page No. 64 of the Writ Petition.

9. After noting down the facts, the Trial Court opined that it was justified and mandated to frame the preliminary issue on the ground of jurisdiction and allowed the Application filed below Exhibit "138" and on the same date by separate order passed below Exhibit "1" in SCS No.1387 of 2012 framed the preliminary issue as to 'whether the suit is barred by law of limitation?'. The Trial Court in that order directed that parties are at liberty to lead evidence on the preliminary issue and held that it was for the Plaintiff to lead evidence first. This order was passed on 16.11.2015. *Pursis* dated 29.02.2016 was filed by Advocate on behalf of Defendant Nos.10, 11 and 12 before the Trial Court. In that *pursis*, it was stated that Defendant Nos.10, 11 and 12 did not want to lead oral evidence on the preliminary issue of jurisdiction. That *pursis* was taken on record by the Trial Court on 29.02.2016. Thereafter when the Suit was listed before the Trial Court, the Trial Court after hearing the parties made an order which is

appended at Exhibit “B3” - page No.70 of the Writ Petition. By that order, the Trial Court noted that Defendant Nos.1 to 3, 4, 8, 9 and 12 failed to lead evidence on the preliminary issue hence their evidence is closed. The Trial Court thereafter after hearing the parties passed a reasoned order below Exhibit “1” in respect of the determination of preliminary issue and answered the said issue in the negative holding that the Suit is in limitation. That order dated 14.11.2016 is appended at Exhibit “C” – page No.71 of the Writ Petition. In paragraph No.10 of that order, the Trial Court noted that the preliminary issue is framed below Exhibit “1” relating to limitation of the Suit. Thereafter it is noted that the Plaintiff as well as Defendants have not chosen to lead oral evidence. Thus, the oral evidence of the parties is closed. It further holds that since the issue of limitation impinges upon the jurisdiction of the Court, it be tried as a preliminary issue under Section 9-A of the CPC. The learned Trial Court noted that averments in the plaint would decide the issue and from the perusal of the Suit plaint, the Suit is filed for partition and separate possession alongwith declaration and injunction.

10. In paragraph Nos.12 and 13 the Trial Court noted that the Plaintiff is neither a party or signatory to the Gift Deed nor she was even born on the day of execution of the said Gift Deed. That the birth of the Plaintiff is after the execution of the Gift Deed. It further holds that the Plaintiff came to know about the Gift Deed in the year 2012

after she visited the house of Defendant No.1 and collected the documents pertaining to the same and immediately thereafter filed the Suit proceedings in the year 2012. The Trial Court holds that reliance of the Defendant No.7 on the specific wordings in the Suit plaint is that the Plaintiff came to know about the Gift Deed of the year 1957 recently and has not given the precise date of such realization cannot be taken on face value as the entire plaint has to be read as a whole. It is baffling to note here that even before the birth of the Plaintiff, the grandfather made the alleged Gift Deed in favour of the grandson to the exclusion of the second grandson, namely Tushar. It is however not come on record as to whether Tushar was born before the alleged Gift Deed was made in favour of Defendant No.1 – Dilip Yashwant Padale. Hence, on the basis of the knowledge acquired by the Plaintiff about the Gift Deed in the year 2011, the Trial Court held that the Suit filed on 28.09.2012 was within limitation. Thus the Trial Court held that the Suit is not barred by the law of limitation.

11. Being aggrieved, Defendant No.12 filed CRA No.117 of 2017 in this Court which was pending hearing and adjudication. Thereafter Section 9-A of the CPC came to be amended and in view of that amendment, this Court on 21.01.2019 passed the following order:-

> *"1 Heard.*
>
> *2 By these Civil Revision Applications, Applicant is challenging the order dated 14.11.2016 passed by 4th Additional Judge and Small Causes Court and Joint Civil Judge,*

Senior Division, Pune below Exhibit-1 in Special Civil Suit No. 1387 of 2012 holding that suit filed by the plaintiff is within limitation. That order was passed under section 9A of the Code of Civil Procedure, 1908.

3 In view of subsequent development, I.e. deletion of section 9A of the Code of Civil Procedure, 1908, nothing survives in the present Civil Revision Applications.

4 Hence, Both the Civil Revision Applications stand disposed of as infructuous.

5 No order as to costs."

11.1. By the above order, this Court held that nothing survived in the CRA and they stood disposed of as infructuous.

12. The learned Trial Court thereafter vide Exhibit "273" framed the issues in SCS No.1387 of 2012. These issues are appended at Exhibit "E" - page No.83 of the Writ Petition. In these issues framed on 02.03.2023, incidentally the Trial Court once again framed the issue of limitation as Issue No.7 namely, "Whether suit is within limitation?

13. The Plaintiff being aggrieved therefore filed Application below Exhibit "274" requesting the Trial Court to delete the issue of limitation which was already decided by the Trial Court vide order dated 14.11.2016. To this Application of the Plaintiff, Defendant Nos.10 and 12 filed their reply opposing the Application on the ground that evidence was not lead in the Application under Section 9-A of the CPC which was filed earlier and decided by the Court. Equally, Defendant No.13 filed reply stating that the issue of limitation has not been finally decided. In so far as Defendant Nos.4A to 4C, 7, 9 and 14 are concerned, they filed *pursis* adopting the reply of Defendant No.13.

14. After hearing the parties, the learned Trial Court passed the impugned order dated 21.04.2023 which is appended at Exhibit "I" - page No.102 to the Writ Petition. By the said order, the Court noted down the facts and the submissions made across the bar by the parties. In paragraph Nos.15 and 16, the learned Trial Court observed as under:-

> *"**15.** Admittedly, the issue of limitation has been framed as per the provision of Section 9A of Code of Civil Procedure and the Court while passing order below Exh.138 held that the suit is filed within limitation. Further, it is admitted fact that after amendment applicable to the State of Maharashtra relating to Section 9A of the Code of Civil Procedure, the Hon'ble Bombay High Court has disposed off Civil Revision Application filed against the order passed below Exh. 138. Admittedly, the parties have not laid their respective evidences for the preliminary issue. There is no opportunity to conduct the cross examination of plaintiff on the point of limitation was available to defendants. The issue of limitation is not at all purely issue of law but it is mixed question of facts and law and the pleadings of the defendants in their respective written statements wherein contended that the suit is hopelessly barred by the law of limitation. Therefore, opportunity to laid evidence to both the parties was not offered and the preliminary issue decided holding that the suit is within limitation. But the issue of limitation is mixed question of facts and law and as per the ratio laid down in case of **Nusli Neville Wadia case (Supra)** wherein, it has been held that issue of limitation can be decided as preliminary issue when it is based on admitted facts. When facts about issue of limitation are disputed, it cannot be decided as preliminary issue. A mixed question of law and facts cannot be decided as a preliminary issue under Section 9A or Order XIV Rule 2 of Code of Civil Procedure.*
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> ***16.** In present case at hand, after going through the pleadings of the parties, the issue of limitation is not at all purely question of law. But it is mixed question of law and facts. In such circumstances, I am of opinion that the issue of limitation is needs to be decided alongwith other issues."*

15. On the basis of the above observation and findings, the learned Trial Court held that though admittedly the issue of limitation

was framed and decided by the Trial Court earlier, it held that admittedly the parties have not laid (to be correctly understood as led) their respective evidences (evidence) on the preliminary issue. It is further held that there is no opportunity given to lead evidence on the point of limitation which was (made) available to the Defendants. These two crucial findings on the face of record are vehemently challenged by the Petitioner before me.

16. Mr. Kumbhakoni, learned Senior Advocate appearing for Petitioner i.e. the original Plaintiff would submit that these two findings are patently incorrect on the face of record itself. He would draw my attention to the previous orders passed by the learned Trial Court which are referred to and alluded to herein above namely, the orders appended at Exhibit “B2” and Exhibit “B3” – at page Nos.68 to 70 and contend that in the wake of those orders, these findings of the learned Trial Court are false and should not be countenanced. He would next submit that the order dated 14.11.2016 has been passed after hearing the parties and on merits of the matter which has decided the preliminary issue framed by the Trial Court under Section 9-A of the CPC. He would submit that in view of the above it is wrong on the part of the contesting Defendants to argue that the issue of limitation under Section 9-A of the CPC will now have to be re-framed and re-argued by leading evidence once again before the Trial Court. Mr. Kumbhakoni is fair in his submission to state that it shall always be

open to the contesting Defendants to agitate the issue of limitation before the Appeal Court. He would vehemently attack the observations and findings of the learned Trial Court where it holds that limitation is a mixed question of law and facts. In the present case, chance to lead evidence was given to both parties by the Trial Court and therefore the stand adopted by the contesting Defendants is malafide. He would submit that the Plaintiff for the first time in the year 2011 / 2012 came to know about the conspiracy in the respect of the suit properties between the Defendants who are related to the Plaintiff. He would submit that out of all suit properties, admittedly the Plaintiff is entitled to 1/3rd share in them which is denied by Defendant No.1. He would submit that in so far as the legal heirs of Godavari are concerned, they are supporting the Defendant No.1 for reasons best known to them.

16.1. Mr. Kumbhakoni would next attempt to address the Court on the legal issue. He would submit that the act of framing the issue of limitation for the second time by the Trial Court would amount to reviewing its own previous order passed by the Trial Court and this is impermissible in law. He would submit that when the issue of limitation was tried as a preliminary issue, it was settled position that parties were called upon to lead evidence and incidentally in the present case all parties were given opportunity to lead evidence, but they waived the same and issue was decided on merits after hearing the parties. He would submit that this is the most crucial factor since

the learned Trial Court in paragraph No.15 of the impugned order completely disregards the same, rather it is an incorrect assumption of the Trial Court to quote a finding that parties were not given an opportunity to lead evidence and parties did not lead their evidence. He would submit that the ordinance dated 27.06.2018 and amended by order dated 29.10.2018 followed by another order dated 15.12.2018 on the above issue to be decided by the Trial Court has not been correctly appreciated by the Trial Court. The aforesaid copies of the ordinance dated 27.06.2018, amendments dated 29.10.2018 and 15.12.2018 are annexed at Exhibit "J", Exhibit "J1" and Exhibit "J2" of the Writ Petition. Both parties have addressed their concerns and submissions on the above pleadings in support of their respective cases.

16.2. Mr. Kumbhakoni would submit that the findings returned by the learned Trial Court in paragraph No.18 of the impugned order, namely "*However it does not speak that the issue of limitation if decided under the provision of Section 9A of Code of Civil Procedure, then it is not at all necessary to decide* ***again alongwith*** *other issues.*" He would submit that if the amendment and the above finding is read, then the above finding is patently illegal and contrary to law as such when the issue of limitation has once been decided after giving an opportunity to all parties to lead evidence and if the parties filed their say and recorded their say that they did not wish to lead evidence and thereafter argued the issue of limitation under Section 9-A of the CPC

fully and invited a speaking order from the Court on determination of the said issue, then the aggrieved parties cannot be granted one more opportunity before the same Trial Court to re-determine the same issue once again by now contending that they wished to lead evidence. That such an order would amount to the Defendants getting second opportunity to deal with the issue of limitation once again. He would contend that there would be no sanctity to the order dated 14.11.2016 which had attained finality and this aspect is completely ignored.

17. Though Mr. Godbole, learned Senior Advocate and Mr. Khandeparkar, learned Advocate appearing for the contesting Defendants would argue and contend that the CRA challenging the order dated 14.11.2016 was pending at the then time but since it was not decided, there could be a possibility that if it was decided then the parties could have been entitled to lead evidence. However, such submission on the part of the contesting Defendants cannot be argued based on assumptions. These are pure submissions of law. The effect of the order dated 16.11.2015 passed below Exhibit “138” read with the order dated 14.11.2016 passed below Exhibit “1” and the order dated 29.02.2016 passed below Exhibit “163” recording that Defendant Nos.10, 11 and 12 did not want to lead oral evidence on the preliminary issue and the order dated 01.04.2016 passed by the Trial Court recording that Defendant Nos.1 to 3, 4, 8, 9 and 12 have failed to lead evidence on the preliminary issue and hence their evidence is

closed are required to be considered and countenanced. This is so because, if the impugned order is to be upheld, all the above orders passed by the same Trial Court would become infructuous in the same suit proceedings.

18. Record shows that there were two CRAs namely, CRA Nos.117 of 2017 and 168 of 2018 filed by Defendant No.12 and Defendant No.7 which were pending in this Court with respect to challenging the order dated 14.11.2016 which had determined the issue of limitation. Petitioner has argued that the Plaintiff's case is not about the jurisdiction of the Trial Court since the Trial Court has already determined the issue of limitation as a preliminary issue and therefore the concept of nullity would not apply to the present case in hand. According to the Plaintiff, Defendants can take every ground to challenge the order dated 14.11.2016 when they would challenge the decree passed, but allowing the Defendants at this stage a second opportunity to redetermine the same issue of limitation, now by leading evidence would not be correct.

19. Mr. Kumbhakoni would strongly submit that the only argument of the Defendants is that the order dated 14.11.2016 is a nullity and cannot be countenanced and should not be countenanced since the statute has provided for remedy of Appeal to challenge the order dated 14.11.2016, against which Appeal can be filed once the

final decree is passed in the Suit in hand. The Plaintiff – Petitioner has referred to and relied upon the ratio of this Court in the case of ***Pandharinath Rambhau Kavitke Vs. Shaikh Hamaja Shaikh Husen***[1] and drawn my attention to paragraph No.10 of the said decision which reads thus:-

> *"**10.** The Apex Court has thus held that invalidity of the order, though plainly visible, it is necessary to take out necessary and appropriate proceedings to establish the case of invalidity and get it quashed, failing which the said order will remain as effective as any other valid order. In para 8 of the said decision the Apex Court has held that the person who claims the order to be nullity, must approach the Court within prescribed period of limitation, if that order is appealable one. That the person challenging the order to be invalid or nullity is thus under an obligation to challenge the said order by way of appeal within the prescribed period of limitation. In the circumstances it is no longer open for the Respondent to contend that since the order was nullity it was not necessary for the Respondent to challenge the same by way of appeal or that there would be no bar of limitation for filing the appeal which challenges the order to be nullity and without jurisdiction."*

19.1. From the above, Mr. Kumbhakoni would vehemently submit that the present Writ Petition be allowed and the impugned order dated 21.04.2023 be quashed and set aside.

20. ***PER-CONTRA***, Mr. Godbole, learned Senior Advocate on behalf of Defendant No.12 has made the following submissions after briefly taking me through the relevant dates and facts of the case. At the outset, he has drawn my attention to the Maharashtra Ordinance No.18 of 2018 by which Section 9-A of the CPC was deleted. Section 3 (2) of the Ordinance provided that, if any, CRA is

1 (2001) 4 Mh.L.J. 43

pending for challenging an order holding that the Court has jurisdiction, such Revisional proceeding shall stand abated. The SOR of the Ordinance specifically refers to the judgment in case of ***Foreshore Co-Operative Housing Society Limited Vs. Praveen D. Desai (Dead) and Ors.***[2]. Subsequently, on 29.10.2018, by Maharashtra Act No.LXI of 2018 the Ordinance was converted into an Act.

20.1. He would submit that on 15.12.2018, by Maharashtra Act No.LXXII of 2018, Section 3 of the earlier amendment was further amended. He would submit that in the decision of the Supreme Court in the case of ***Kamalakar Eknath Salunkhe Vs. Baburao Vishnu Javalkar and Ors***[3], the Supreme Court held that issue under Section 9-A of the CPC can only be in respect of inherent lack of jurisdiction and does not contemplate issue of limitation.

20.2. The Supreme Court in the case of *Foreshore CHS Ltd.* held that the judgment in the case of *Kamalakar Salunkhe* did not lay down any binding precedent and was per incurium. On 21.01.2019, CRA Nos.117 of 2017 and 168 of 2018 were held to have been abated in view of deletion Section 9-A in the year 2018. In the case of ***Nuslie Neville Wadia Vs. Ivory Properties***[4], larger Bench of the Supreme Court overruled the judgment in *Foreshore CHS Ltd.* and approved the ratio of *Kamalakar Salunkhe*. The Supreme Court held that the issue of

2 AIR 2015 SC 2006
3 (2015) 7 SCC 231
4 (2020) 6 SCC 557

limitation can never be considered and decided under Section 9-A of the said Act. In the case of ***Shyam Madam Mohan Ruia and Ors. Vs. Messer Holdings Limited and Ors.***[5], the Supreme Court held that judgments referred to on issue of limitation framed under Section 9-A of the CPC are nullities.

20.3. That ordinance No.58 of 2018 clearly showed that the Ordinance was issued in view of the judgment in the case of *Foreshore CHS Ltd.*. The judgment in the case of *Foreshore CHS Ltd.* is clearly overruled in the decision of *Nusli Neville Wadia*. In *Shyam Madan Mohan Ruia's* case, Supreme Court has held that the judgments of the learned Single Judge and Division Bench of this Court deciding the issue of limitation under Section 9-A of the CPC are nullities and it is directed that issue of limitation should be framed and decided with all other issues.

20.4. He would submit that a Judgment which is a nullity can never operate as *res judicata* since the same does not exist in the eyes of law. He relied upon the following decisions in respect of the above proposition:-

(i) ***National Institute of Technology and Ors. Vs. Niraj Kumar Singh***[6];

(ii) ***Jagmittar Sain Bhagat and Ors. Vs. Director, Health***

5 AIR Online 2019 SC 1942
6 (2007) 2 SCC 481

Services, Haryana and Ors.[7];

(iii) *Chief Justice of Andhra Pradesh and Ors. Vs. L.V.A. Dixitulu and Ors.*[8];

(iv) *Raju Ramsing Vasave Vs. Mahesh Deorao Bhivapurkar and Ors.*[9];

(v) *Dwarka Prasad Agarwal (D) by legal heirs and Anr. Vs. D.B. Agarwal and Ors.*[10];

(vi) *Mathura Prasad Bajoo Jaiswal and Ors. Vs. Dossibai N. Jeejeebhoy*[11];

(vii) *Ashok Layland Ltd. Vs. State of T.N. and Anr.*[12];

(viii) *Anwar Khan Mehboob Co. Vs. State of Madhya Pradesh and Ors.*[13]; and

(ix) *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) through Lrs.*[14]

20.5. After taking me through the above citations, he argued that since the issue of limitation is a mixed question of law and facts, the contesting Defendants should be allowed to lead evidence. However, what would be the effect of the orders recording that the Defendants did not wish to lead evidence when they were given the opportunity to do so, Mr. Godbole would contend that the order determining the issue has to be treated as nullity and a fresh opportunity has to be given to the Defendants to lead evidence on limitation once again.

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7 (2013) 10 SCC 136
8 (1979) 2 SCC 34
9 (2008) 9 SCC 54
10 (2003) 6 SCC 230 : 2003 SCC Online SC 673
11 1970 (1) SCC 613
12 (2004) 3 SCC 289
13 (1966) 2 SCR 40 : AIR 1966 SC 1637
14 (1990) 1 SCC 193

21. Mr. Khandeparkar, learned Advocate on behalf of Defendant Nos.13 and 14 has also addressed the Court and after taking me briefly through the relevant facts would contend that the order dated 14.11.2016 is to be treated as nullity in the eyes of law and the said order cannot operate as *res judicata* and the issue of limitation in the present case has to be reopened once again. He would submit that the Trial Court had committed a grave error in deciding the issue of limitation as a preliminary issue under Section 9-A of the CPC in as much as the scope of Section 9-A of the CPC restricted to deciding only issues of jurisdiction and pure questions of law. However, limitation is a mixed question of fact and law, hence could never have been decided as a preliminary issue under Section 9-A of the CPC. He would submit that with regard to the scope of Section 9-A of the CPC, various High Courts had given conflicting views. He would submit that the Supreme Court had the occasion to settle the issue finally in the case of *Nuslie Neville Wadia* wherein it *inter alia*, concluded. "*The expression 'jurisdiction' as appearing in Section 9-A is merely in the context of the Court's power to entertain or receive a case for consideration. This would not include within its sweep a consideration of the res judicata or limitation as those issues are not bars on the power of the Court to entertain the Suit itself but they are merely bars to the grant of the reliefs.*"

21.1. He would submit that the view taken by this Court in the case of *Kamalakar Eknath Salunkhe (supra)* was upheld and the view taken in the case of *Foreshore Co-Operative Housing Society Limited (supra)* was held as not being good law. Next he would submit that in a subsequent decision in the case of *Shyam Madam Mohan Ruia (supra),* the Supreme Court had the occasion to consider the effect of orders already passed under Section 9-A of the CPC where the issue of limitation had already been decided under Section 9-A of the CPC. The Supreme Court relied on the ruling in the case of *Nuslie Neville Wadia* in that decision and held that:

(i) *Limitation would have to be decided and considered alongwith other issues that would arise for adjudication in the Suit;*

(ii) In light of the law down in the Nusli Neville Wadia ruling, the decisions of the Single Judge as also the Division Bench on the issue of limitation (which in that case had been considered and decided as a preliminary issue) were declared to be nullities and it was directed that the matter be proceeded with afresh.

21.2. According to him as regards the legal effect of a judgment that has been rendered as nullity, the position has been conclusively laid down by the Supreme Court in the case of *Sushil Kumar Mehta*

(supra) wherein the Supreme Court has categorically held that the doctrine of *res judicata* does not apply to a judgment that is a nullity. Paragraph No.26 in the case *Sushil Kumar Mehta (supra)* is relevant and reproduced as under:-

> *"**26.** Thus it is settled law that normally a decree passed by a court of competent jurisdiction, after adjudication on merits of the rights of the parties, operates as res judicata in a subsequent suit or proceedings and binds the parties or the persons claiming right, title or interest from the parties. Its validity should be assailed only in an appeal or revision as the case may be. In subsequent proceedings its validity cannot be questioned. A decree passed by a court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction. It is a corum non judice. A decree passed by such a Court is a nullity and is non est. Its validity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party. If the court has jurisdiction but there is defect in its exercise which does not go to the root of its authority, such a defect like pecuniary or territorial could be waived by the party. They could be corrected by way of appropriate plea at its inception or in appellate or revisional forums, provided law permits. The doctrine of res judicata under Section 11 CPC is founded on public policy. An issue of fact or law or mixed question of fact and law, which are in issue in an earlier suit or might and ought to be raised between the same parties or persons claiming under them and was adjudicated or allowed uncontested becomes final and binds the parties or persons claiming under them. Thus the decision of a competent court over the matter in issue may operate as res judicata in subsequent suit or proceedings or in other proceedings between the same parties and those claiming under them. But the question relating to the interpretation of a statute touching the jurisdiction of a court unrelated to questions of fact or law or mixed questions does not operate as res judicata even between the parties or persons claiming under them. The reason is obvious; a pure question of a law unrelated to facts which are the basis or foundation of a right, cannot be deemed to be a matter in issue. The principle of res judicata is a facet of procedure but not of substantive law. The decision on an issue of law founded on fact in issue would operate as res judicata. But when the law has since the earlier decision been altered by a competent authority or when the earlier decision declares a transaction to be valid despite prohibition by law it does not*

> *operate as res judicata. Thus a question of jurisdiction of a court or of a procedure or a pure question of law unrelated to the right of the parties founded purely on question of fact in the previous suit, is not res judicata in the subsequent suit. A question relating to jurisdiction of a court or interpretation of provisions of a statute cannot be deemed to have been finally determined by an erroneous decision of a court. Therefore, the doctrine of res judicata does not apply to a case of decree of nullity. If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction."*

21.3. From the above, after taking me through the above decisions, he would submit that the order dated 14.11.2016 is a nullity in the eyes of law as per the law laid down by the Supreme Court. The said order dated 14.11.2016 cannot operate as *res judicata* or can be held to be binding on the parties. That limitation is a mixed issue of facts and law and is not an issue of jurisdiction. Hence, a ruling on the issue of limitation when deciding the same as a facet of jurisdiction can never operate as *res judicata* since limitation must be considered in the light of the particular facts of each case. That the issue of limitation must necessarily be tried and considered alongwith all other issues only. That Plaintiff – Petitioner has adopted a broad-brush approach by contending that the order dated 14.11.2016 would operate as *res judicata* against all Respondents. He would however submit without prejudice to the submission that the order itself is a nullity, even assuming *arguendo* that the order dated 14.11.2016 is not a nullity, the same cannot operate as *res judicata* and cannot be binding on

Respondent Nos.13 and 14 at least.

21.4. He would submit that it was critical to highlight that Respondent Nos.13 and 14 were impleaded as parties to the present proceedings only subsequent to passing of the order dated 14.11.2016. Therefore, at the time when the order dated 14.11.2016 was passed, Respondent Nos.13 and 14 were not even parties to the present proceedings. Infact, Respondent Nos.13 and 14, *inter alia,* derive their interest in the suit property from Respondent No.9 who had filed Application on 05.01.2015 for framing the preliminary issue of limitation. However, this Application of Respondent No.9 was rejected by the learned Trial Court vide its order dated 03.03.2015 in light of the prevalent law as laid down in *Kamalakar Eknath Salunkhe (supra)*, that the issue of limitation cannot be decided as a preliminary issue as it was held to be a mixed question of facts and law. Therefore, even assuming that the order dated 14.11.2016 was held to be binding as regards other Respondents, the same cannot be the position as regards Respondent Nos.13 and 14 who are subsequently added parties. Therefore, Respondent Nos.13 and 14 are entitled to take up all defenses available to them including but not limited to the defense of limitation which indeed has been taken up by them in their written statement filed before the learned Trial Court. He would submit that the order dated 14.11.2016 is however held to be binding even as regards Respondent Nos.13 and 14 and this tantamounts to foreclosing

their defense on the point of limitation without affording them an opportunity to lead evidence on the same.

21.5. He would submit that limitation is a mixed issue of facts and law which must be decided in the context of the pleadings of parties. Therefore, determination of the issue of limitation would vary in the context of different Respondents depending on how they have pleaded their case. Therefore, it is clear that determination of issues of limitation done in the context of other Respondents would not operate as an issue of estoppel as regards Defendant Nos.13 and 14 who have only been impleaded subsequently.

21.6. He would submit that the fundamental fallacy in the Petitioner's contentions is in their argument that the order dated 14.11.2016 was a final determination on the issue of limitation and that the issue had been closed for all times to come. However, this is incorrect as can be seen from the following:-

(i) At the outset, the order dated 14.11.2016 had been passed without the parties having led any evidence;

(ii) As regards Respondent Nos.13 and 14, they were not even parties to the proceedings at the time when the Application was made. As already stated earlier, Respondent Nos.13 and 14 were impleaded much later pursuant to an order dated 22.11.2022;

(iii) Let alone Respondent Nos.13 and 14 who had been impleaded subsequently, but even the other Respondents had not led any evidence in respect of the issue of limitation;

(iv) Even otherwise, the order dated 14.11.2016 had been challenged by various parties before this Court by way of CRA Nos. 117 of 2017 and 168 of 2018. However, the said CRAs were never finally decided on merits but were simpliciter disposed off as being infructuous on account of the amendment to the CPC that deleted Section 9-A of the CPC.

21.7. In any event and without prejudice to any of the foregoing submissions, a perusal of the earlier order dated 14.11.2016 demonstrates that the same has decided the issue of limitation as if the same was being decided as an Application under Order XIV Rule 2 of the CPC and not one under Section 9-A of the CPC. This itself demonstrates that the issue of limitation has not appropriately been decided in accordance with the necessary principles that ought to have applied.

21.8. Therefore, it cannot be said that the said order considered the evidence of the parties or that it had attained finality since the challenge to the same on merits had not been heard and decided by

this Court. In these circumstances, the said order cannot operate as *res judicata* and nor can it be said to have decided the rights of the parties in finality.

21.9. Orders dated 03.03.2015 and 14.11.2016 militate against each other and are irreconcilable due to the following reasons:-

(i) The order dated 03.03.2015 rejects Application by Respondent No.9 for framing an issue of limitation as an issue under Section 9-A of the CPC. The learned Trial Court relying on the *Kamalakar Eknath Salunkhe* judgment of this Court held that limitation could not be an issue under Section 9-A of the CPC;

(ii) In stark contrast, the order dated 14.11.2016 proceeds to decide the issue of limitation as a preliminary issue under Section 9-A of the CPC and thereby acts contrary to the position of law laid down by the order dated 03.03.2015.

21.10. The effect of the above is that in the very same proceedings, there emanate 2 distinct orders of the same Trial Court that take polar opposite views. Therefore, this Court exercising supervisory jurisdiction over the learned Trial Court ought to consider the effect of the same and determine the process that the learned Trial Court is required to follow in keeping with the position laid down by the Supreme Court, as

enunciated above. Lastly, he would submit that the impugned order does not suffer from any infirmity and the Writ Petition ought to be dismissed.

22. I have heard Mr. Kumbhakoni, learned Senior Advocate for Petitioner; Mr. Godbole, learned Senior Advocate for Respondent No.12 and Mr. Khandeparkar, learned Advocate for Respondent Nos.13 and 14 and with their able assistance perused the record and pleadings of the present case. Submissions made by the learned Senior Advocates and Advocate have received due consideration of this Court.

23. There is no dispute on the facts and the dates which are enumerated herein above. It is seen that the Maharashtra State Legislature enacted the Maharashtra Act No.LXI of 2018, published on 29.10.2018 and which came into force w.e.f. 27.06.2018, whereby Section 9-A was deleted from the CPC. Section 3(2) of the said amending Act is relevant for the purposes of the present proceedings, which reads thus:-

> *"(2) in all the cases, where a preliminary issue framed under section 9A has been decided, holding that the court has jurisdiction to entertain the suit, and a challenge to such decision is pending before a revisional Court, on the date of commencement of the Amendment Ordinance, such revisional proceedings shall stand abated*
>
> *Provided that, where a decree in such suit is appealed from any error, defect or irregularity in the order upholding jurisdiction shall be treated as one of the ground of objection in the memorandum of appeal as if it had been included in such memorandum;"*

24. The effect of the aforesaid amendment was twofold: (a) the pending Revision proceedings where the order holding that Court has jurisdiction was challenged, stood abated; and the order upholding jurisdiction could be challenged only and only in the Appeal proceeding i.e. "*after the passing of the final decree in the suit*."

25. On 21.10.2019, this Court after taking cognizance of the aforesaid amendment was pleased to dispose of both the aforesaid CRAs as infructuous. Thereafter, the Trial Court was pleased to frame issues in the Suit and amongst other issues, the Trial Court framed issue No.7 on limitation once again, in the second instance, as to whether the suit is within limitation? Petitioner filed Application below Exhibit "274" requesting to delete issue No.7 on limitation once since the said issue was not only already framed as preliminary issue earlier, but was already decided, which decision was holding the filed/in operation. However, by the impugned order dated 21.04.2023 the learned Trial Court rejected the said Application, which order is under challenge in the present proceedings.

26. Admittedly, as on the date of passing of order dated 14.11.2016, the learned Trial Court did possess the jurisdiction to decide the preliminary issue. It is worthwhile to note that the Application on which the said decision was passed was filed by the Defendants, and not by the Plaintiff/Petitioner herein, thus, the said

decision was invited by the Defendants (by Defendant No.7 particularly, which was accepted by not opposing the same by the rest of the Defendants). Therefore, the submission of the Respondents that the said decision is a case of inherent lack of jurisdiction is completely misplaced and misconceived. Such an argument of the Respondents herein stands outrightly rejected.

27. Having got the issue framed and answered, it is not now open for the Respondents to raise any such plea. Such a case, at the instance of the Respondents, is only to be stated to be rejected. It is settled principle of law that the principle of *res judicata* applies between two stages, in the same litigation, to this extent that a Court, whether the Trial Court or a higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again, at a subsequent stage in the same proceedings. This legal aspect of the matter is considered by the Supreme Court in the case reported in *AIR 1960 SC 941*, wherein the Supreme Court has referred to an earlier Privy Council judgment dealing with this aspect of the matter.

28. The ratio of the aforesaid judgment will apply to the case in hand with its full force. In the case at hand the learned Trial Court has already decided the issue as to whether the Suit is filed within limitation, as a preliminary issue and has answered the issue in the

affirmative and has held the Suit having been filed within limitation. In that view of the matter, it is not open for the learned Trial Court to once again frame the same issue in the same Suit and to again try and decide the said issue along with other issues once again, since the earlier decision on the said issue will operate as *res judicata* amongst the parties.

29. Secondly, though the said order dated 14.11.2016 was challenged by invoking revisionary jurisdiction of this Court, the proceedings were interjected by a Legislative State Amendment effected in the Code of Civil Procedure. The State amendment provided for following two consequences:-

> *(i) Pending revisions, where an order holding that the Court has jurisdiction, shall stand abated; and*
>
> *(ii) The order holding that the court has jurisdiction can. be taken an exception to only and only in the Appeal that would be filed against the final decree to be passed in such Suit.*

30. Thus, the State amendment provided for "statutory abatement" of pending Revision proceedings and also provided for "a specific and only remedy" to be availed against the order challenged in such revision. It is seen that the impugned order is passed in complete ignorance of the effect of the aforesaid State Amendment. If the impugned order is allowed to sustain, the same will not only amount to making the provisions of state amendment nugatory but it would also

amount to allowing the learned Trial Court to bypass the statute, which is wholly impermissible.

31. Thirdly, it has been submitted by the Respondents that the order dated 14.11.2016 is 'a nullity' and therefore the same is '*non-est*' in the eyes of law and therefore the learned Trial Court is right in passing the impugned order.

32. However, this submission ignores the following ratio of the Supreme Court laid down in the case of *Nusli Neville Wadia (supra)*, which is relied upon by the Respondents themselves while answering a reference made by the Division Bench of this Court doubting the correctness of the decision of this Court in *Foreshore Co-operative Housing Society Ltd. (supra)* with respect to interpretation and provisions contained in Section 9-A of the CPC. Paragraph No.79 is relevant and reproduced below:-

> "***79.*** *Reliance has further been placed on Kamlesh Babu and others v. Lajpat Rai Sharma and others, (2008) 12 SCC 577, in which question arose for consideration as to the finding of the trial court which held that the suit was barred by limitation though the judgment was reversed by the First Appellate Court. The previous finding was not dealt with by the First Appellate Court or the High Court. This Court held that plea of limitation maybe a mixed question of law and facts. This Court considered the provisions of limitation and Order VII Rule 11(d) and observed that in case of suit appears from the statement made in the plaint to be barred by law of limitation, the question of law as to jurisdiction of a court goes to the very root of the court's jurisdiction to entertain and decide a matter as otherwise decision rendered without jurisdiction will be a nullity. The expression "nullity" used by Division Bench in Kamlesh Babu (supra) cannot be said to be in the context of the limitation, but the question of jurisdiction when the court has no power to try the suit. In our opinion, a wrong decision on the question of*

> *limitation will not render judgment a nullity. With great respect we observe that the expression used by this Court in para 23 that wrong decision on the question of limitation would render a judgment of the court having jurisdiction to decide the issue as a nullity is ex facie incorrect. It may be a case of illegal exercise of jurisdiction to decide the issue, but judgment would not be a nullity."*

33. As aforesaid, Respondents can take every ground to challenge the order dated 14.11.2016 while laying challenge to the final decree that would be passed in the Suit, but certainly not at this stage of the Suit when the Suit is yet pending awaiting the passing of the final decree.

34. The Respondents have placed strong reliance on the judgment delivered in the decision of the Supreme Court in the case of *Shyam Madan Mohan Ruia (supra)*, to buttress their submission that the order dated 14.11.2016 is 'a nullity'. Firstly, the SLP proceeding in the aforesaid matter arose out of an order deciding the preliminary issue, which is not the case in the present proceedings. It is one thing to conclude that an order that is impugned in the proceedings to be a 'nullity' and totally another to do so when such order is not 'the impugned order' in such proceedings. Secondly, it appears that the Division Bench was not appraised of the above referred paragraph No.79 of the reference judgment delivered by the three bench judgment in the case of *Nusli Neville Wadia (supra)* and therefore the observations regarding 'nullity' made in the case of *Shyam Madan Mohan Ruia* are in complete ignorance of the findings returned in

paragraph No.79 of the reference judgment.

35. It is therefore not open for the Respondents to simply contend that the order dated 14.11.2016 is 'a nullity'. It is settled principle of law that the person contending that an order is 'a nullity' is under a legal obligation to challenge the said order by filing appropriate proceedings. In the present case, the statute has provided for remedy of an Appeal to challenge the order dated 14.11.2016, which Appeal can be filed once the final decree is passed in the suit at hand.

36. In view of the above observations and findings, the impugned order is clearly not sustainable and is required to be interfered with. The contesting Defendants cannot be permitted to argue that the order dated 14.11.2016 has to be treated as nullity in the eyes of law in the present facts and circumstances as it would clearly amount to the contesting Defendants being entitled to a second round of litigation after almost 12 years after filing of the Suit proceedings on the same issue before same Court. I am therefore inclined to accept the submissions made by the Petitioner – Plaintiff in its entirety and reject the submissions of the contesting Defendants.

37. Needless so state that the right of the contesting Defendants to challenge the order dated 14.11.2016 stands fully protected in Appeal strictly in accordance with law. In the wake of the consents

given by the contesting Defendants for not leading evidence on the issue of limitation, the issue being fully argued on merits by the parties and determined, the submissions made on behalf of the contesting Defendants therefore have to fail. The impugned order dated 21.04.2023 is therefore quashed and set aide.

38. Application filed below Exhibit "274" by the Plaintiff seeking deletion of the issue No.7 from the list of issues framed by the learned Trial Court 02.03.2023 stands deleted.

39. The learned Trial Court is directed to proceed with the trial of SCS No.1387 of 2012 *sans* issue No.7.

40. Considering that SCS No.1387 of 2012 has remained pending for more than 12 years, the learned Trial Court is directed by this Court to hear and decide the Suit proceedings as expeditiously as possible and in any event within a period of six months from today strictly on its own merits and in accordance with law.

41. With the above directions, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

42. After the above judgment is pronounced and signed, Mr. Godbole, learned Senior Advocate appearing on behalf of contesting Respondent No.12 would seek stay of the decision of this Court. Mr.

Khandeparkar, learned Advocate appearing on behalf of contesting Respondent Nos.13 and 14 also expresses concern and seeks stay of the decision to enable the parties to approach the Superior Court. Mr. Vyas, learned Advocate appearing on behalf of Writ Petitioner however in view of the pendency of the Suit proceedings since long and there already being an order passed in Appeal From Order No.161 of 2021 for expeditious disposal of the Suit proceedings, opposes the Application. Considering the aforesaid issue involved and facts and circumstances of the present case, I am inclined to allow the Application made by Mr. Godbole and Mr. Khandeparkar. The above decision shall stand stayed for a further period of 10 weeks from today to enable the contesting Respondents to approach the Superior Court.

[MILIND N. JADHAV, J.]

Ajay

AJAY TRAMBAK UGALMUGALE
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