

**Order below Exh. 76 in R.C.S.No.47 of 2012.**

- 1) Defendants No.1 to 7 filed this application under Section 9A of the Code of Civil Procedure, 1908 for framing preliminary issues regarding bar of jurisdiction and bar of limitation.
- 2) The plaintiffs resisted the application vide say at Exh.77.
- 3) It is the contentions of defendants No.1 to 7 that the plaintiffs filed this suit for declaration of settlement dated 09/07/2002 in the Writ Petition No.3531/1989 before the Hon'ble Bombay High Court as wrong and illegal and not binding on the plaintiffs, for mandatory injunction regarding the demolition of Grampanchayat house No.1180 constructed by defendant No.1 and for perpetual injunction. The father of the plaintiffs Abdul Rehman Husain Waghu filed Writ Petition No.3531/1989 in the Hon'ble Bombay High Court. After his demise, his legal heirs including the plaintiffs brought on record on 18/06/1993 vide Civil Application No.280/1993. The said matter was compromised between the parties by virtue of settlement dated 09/07/2002 before the Hon'ble Bombay High Court. The plaintiff challenged this settlement by filing Civil Application No.2049/2012 in the Hon'ble Bombay High Court. The plaintiffs had withdrawn this application with permission to file appropriate proceedings. The plaintiffs did not challenge the said settlement before the Hon'ble Supreme Court. Therefore, this settlement becomes final. The plaintiffs have no right to challenge this settlement before this Court. This Court has no jurisdiction to entertain the claim of the plaintiff. The plaintiffs challenged the settlement after delay of nearly 10 years. Further, defendant No.1 completed the

construction of the house in the year 2008. The plaintiffs filed this suit in the year 2012. Therefore, the suit is not within limitation. Hence, defendants No.1 to 7 prayed that preliminary issues regarding the bar of jurisdiction and bar of limitation be framed.

4) The plaintiffs resisted the application by way of say at Exh.77. They contended that defendants No.1 to 7 filed their Written Statement at Exh.51 before 2 years. Therefore, the defendants have no right to raise such defences at this juncture. The plaintiffs filed Civil Application No.2049/2012, which came to be disposed of on 21/08/2012. Thereafter, immediately the plaintiffs filed this suit. Therefore, the suit is within limitation. The plaintiffs have not challenged the settlement as null and void. They only prayed for declaration that the said settlement is not binding on them. Therefore, there is no need to frame preliminary issue regarding the jurisdiction. Hence, the plaintiffs sought rejection of the application.

5) Perused the record.

6) Heard Ld. Adv. Shri. N. K. Chavan for defendants No.1 to 7 and Ld.Adv.Shri.Y.R.Patkar for the plaintiffs.

7) After perusing the rival contentions in the application and say, and after hearing both the parties, following points arise for my consideration. These points are mentioned here-in-below along with findings for the reasons mentioned thereunder:

### **P O I N T S**

### **F I N D I N G S**

(1) Whether the preliminary issues as to bar of jurisdiction and bar of limitation are required to be framed as sought by defendants No.1 to 7?

.....Yes.

(2) What order? ..... Application Exh.76  
is allowed

## **REASONINGS**

### **As to Point No.1:-**

8) The undisputed facts of the case are the father of the plaintiffs Abdul Rehman Husain Waghu filed Writ Petition No.3531/1989 in the Hon'ble Bombay High Court. After demise of Abdul Rehman Husain Waghu, the plaintiffs and the defendants No.8 to 12, being heirs of him, continued this litigation. The said matter was disposed of in view of settlement dated 09/07/2002. The plaintiffs challenged this settlement before the Hon'ble Bombay High Court by filing Civil Application No.2049/2012. The plaintiffs had withdrawn this application with liberty to adopt appropriate proceedings.

9) On reading averments of the plaint, it becomes clear that it is the case of the plaintiff that defendants No.1 to 7 entered into settlement in Writ Petition No.3531/1989, behind back of the plaintiffs and by playing fraud on defendants No.8 to 12. Therefore, the said settlement is null and void and not binding on the plaintiffs.

10) At this juncture, the provisions of Rule 3A of Order 23 need to be looked into. It provides that *"no suit shall lie to set aside a decree on the ground that the compromise on which the decree is based was not lawful."*

11) Ld.Adv.Shri.Y.R.Patkar for the plaintiffs argued that the plaintiffs have not prayed for setting aside the decree and they only prayed for declaration that the settlement was not binding on them. However, considering the pleading of the plaintiffs, it clearly reveals that the plaintiffs have challenged the settlement

being not lawful as it was entered into behind back of the plaintiffs and by playing fraud on defendants No.8 to 12. Considering these averments, it becomes clear that there is substance in the application of defendants No.1 to 7. The plaintiffs challenged the settlement arrived at between the parties in Writ Petition No. 3531/1989 before the Hon'ble Bombay High Court. Therefore, whether this Court, being inferior in rank, has jurisdiction to entertain and try the present suit is required to be decided firstly before going to decide other issues.

12) At this juncture, case law ***Mumbai International Air Port Pvt. Ltd; Vs. Edward @ Adward Paul Machado and Ors; 2014 (2) Bom.C.R. 329***, cited by defendants No.1 to 7, is necessary to be looked into. In this case, the Hon'ble Bombay High Court held that *“When Court has no pecuniary jurisdiction to entertain suit, it ought not to have proceeded to decide other issues, because it has no jurisdiction and any decision by it would be 'coram non judice'.”* This ratio is applicable in the present case. In case in hand, considering the above particular facts and circumstances, there is cloud over jurisdiction of this Court. Therefore, it is not justifiable to proceed with the suit without deciding about the jurisdiction of this Court to entertain and to try the present suit. Hence, preliminary issue as to jurisdiction of this Court is required to be framed.

13) Defendants No.1 to 7 raised plea that the settlement is dated 09/07/2002. The plaintiffs filed the suit in the year 2012 i.e. after nearby delay of 10 years. Per contra, the plaintiffs contended that they filed Civil Application No.2049/2012 in the Hon'ble Bombay High Court and the same was withdrawn by the plaintiffs with liberty to adopt appropriate proceedings.

Immediately, thereafter, the plaintiffs filed this suit. Therefore, the suit is within limitation.

14) Admittedly, the settlement is dated 09/07/2002. The plaintiffs filed Civil Application No.2049/2012 challenging the settlement in the year 2012. It is pleadings of the plaintiffs that they came to know about the settlement when defendant No.1 constructed house in the year 2008. Further, defendants No.1 to 7 submitted that they completed construction of the house in the year 2008. On perusal of prayer clause of the plaint, it reveals that the plaintiffs claimed relief of mandatory injunction of demolition of this house. Considering all these aspects, it reveals that there is substance in the application of defendants No.1 to 7. Issue of limitation is required to be decided earlier as a preliminary issue before deciding other issues.

15) In case law ***Sunita Sudam Ranaware (Smt.) and Ors. Vs. Sou. Rama Vijay Oberoi and Ors. 2013(4) Bom. C.R. 815, the Hon'ble Bombay High Court*** relying on the ratio laid down in ***Foreshore Co-Operative Housing Society Ltd; Bombay Vs. Praveen D.Desai, 2009(1) Bom.C.R. 757 (O.S.)*** held that “*whether the suit is barred by the limitation is required to be decided by framing preliminary issues under Section 9A of the Code of Civil Procedure, 1908.*” This ratio is squarely applicable to the present case. In view of this ratio, issue of limitation is required to be decided as preliminary issue.

16) Ld.Adv.Shri.Y.R.Patkar for the plaintiffs raised objection that defendants No.1 to 7 filed their Written-Statement at Exh.51 before 2 years and they have no right to raise such defences at this juncture. No doubt, before filing this application, defendants No.1 to 7 filed their Written-Statement. However, on perusal of

record, it reveals that the application of the plaintiffs at Exh.11 for temporary injunction is not yet decided and it is pending. Section 9 of Code of Civil Procedure, 1908 provides that where at the hearing of application relating to interim-relief in a suit, objection to jurisdiction is taken, such a issue to be decided by the Court as a preliminary issue. Therefore, there is no hurdle to entertain the present application. Further, the defences raised by defendants No.1 to 7 vide this application are purely legal issues. Ld.Adv.Shri.N.K.Chavan for defendants No.1 to 7 relied on the ratios laid down in Lachman Singh Vs. Hazara Singh, 2008(8) SCALE 220, Prem Singh and Ors. Vs. Bubal Singh and Ors; AIR 2006 S.C.3608 and Noharlal Verma Vs. Distt. Co-Operative Central Bank Ltd; Jagdalpur, AIR 2009 S.C. 664 referred in case law ***Santosh Puri Vs. Anil Puri and Another, CS(OS) 2338/2012, decided on 16/10/2012***, cited by defendants No.1 to 7. It is held that *“even in absence of plea by the defendant, respondent or opponent, the Court or Authority must dismiss such suit, appeal or application, if it is satisfied that the suit, appeal or application is barred by limitation.”* Therefore, considering this ratio, there is no substance in the arguments of Ld.Adv.Shri.Y.R.Patkar for the plaintiffs.

17) Considering the above reasonings, the following preliminary issues are required to be framed:-

*“(i) Whether this Court has jurisdiction to entertain and try the present suit?*

*“(ii) Whether the suit is barred by limitation?”*

18) Thus, considering the above discussion, I answer point No.1 in the affirmative.

**As to Point No.2:-**

19) Considering the above reasonings, I pass following order:-

**ORDER**

(1) The application of defendants No.1 to 7 at Exh.76 is allowed.

(2) The following preliminary issues are framed:-

*“(i) Whether this Court has jurisdiction to entertain and try the present suit?*

*“(ii) Whether the suit is barred by limitation?”*

(3) The parties are at liberty to lead evidence as to preliminary issues.

(4) Consequential order is passed below Exh.1, for framing above preliminary issues.

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**Date: 21/12/2017.**  
**Place: Lanja**

**(D.M.Hinglajkar)**  
**Civil Judge (J.D.),Lanja,**  
**Dist.Ratnagiri**