

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9429 OF 2019
(@ SLP (CIVIL) NO. 25341 OF 2019)

SHYAM MADAN MOHAN RUIA & ORS.

...APPELLANT(S)

VERSUS

MESSER HOLDINGS LIMITED & ORS.

...RESPONDENT(S)

WITH

SLP (CIVIL) NO. 26642 OF 2019

J U D G M E N T

R. BANUMATHI, J.

Leave granted in SLP(C) No.25341 of 2019.

2. Being aggrieved by the order dated 08.08.2019 as corrected by order dated 19.09.2019 passed by the Division Bench of the High Court of Bombay in Commercial Appeal No.148 of 2017 in Suit No.2410 of 2008 in and by which the Division Bench has reversed the order of the Learned Single Judge dated 16.03.2017 by holding that the Suit No.2410 of 2008 filed by respondent No.1- MHL is within the period of limitation, the appellants are before this Court in this appeal.

3. On the first date of hearing, Mr. Fali S. Nariman, learned senior counsel appearing for the appellants-Ruias sought permission to amend the synopsis and also grounds of appeal. By the order dated 13.11.2019, the same was permitted.

4. When the matter came up for admission, Ms. Aruna Gupta, learned counsel for respondent No.1 who is contesting respondent, has taken notice. The first respondent was represented by learned Senior counsel Mr. Dhruv Mehta.

5. For hearing, the matter was adjourned to number of dates and taken up on 13.12.2019. We have heard Mr. Fali S. Nariman, Mr. S. Ganesh and Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the appellants as well as Mr. Dhruv Mehta, learned senior counsel appearing on behalf of the respondent no.1 along with Mr. Sreegish N.K. learned counsel.

6. For convenience, the parties are referred in abbreviated form: Appellants - Ruias; Respondent No.1 - Messer Holdings Limited (MHL); Respondent No.2 - Bombay Oxygen Investments Ltd. (BOIL); Respondent No.3 - Messers Giresheim GmbH (MGG) and Respondent No.4 - Goyal MG Gases Private Limited (GGL).

7. The contesting parties have had several rounds of litigations:- (i) Civil Suit No.I - 1810 of 1998 filed by respondent no. 4 - GGL against respondent No.3 (MGG); (2) Suit No.II - 2499 of 1999 filed by the appellants-Ruias against respondent No.3(MGG) and respondent No.4(GGL); (3) Suit No.III - 509 of 2001 filed by the appellants-Ruias against respondent No.4 (GGL) and respondent No.3(MGG) and (4) Suit No.IV - 2410 of 2008 filed by respondent No.1(MHL) with which we are concerned.

8. In Suit No.III - 509 of 2001, Ruias and MGG (respondent No.3) entered into a settlement on 05.12.2002 wherein MGG (respondent No.3) is purported to have transferred 75,001 shares of

BOIL(respondent No.2) and Ruias is purported to have agreed to pay US\$ 154.642 etc. for those 75,001 shares of BOIL (respondent No.2). It is stated that parties thereon viz Ruias(appellant) and MGG(respondent No.3) have agreed that in view of the settlement, Ruias would not prosecute the proceedings against respondent No.3 (MGG); but they would pursue their proceedings against respondent No.1(MHL) and respondent No.4(GGL).

9. Respondent No.1-MHL filed the Suit No.IV - 2410 of 2008 to cancel the said Settlement Agreement dated 05.12.2002 under which 75,001 shares of respondent No.2(BOIL) has been transferred to the appellant(s)- Ruias by respondent No.3 (MGG). In Suit No.IV, MHL (respondent No.1) *inter alia* prayed for injunction against the development agreement dated 04.02.2008 granting development rights to one Company by name HDIL and for declaration of MHL-respondent No.1's ownership of 75,001 shares of BOIL (respondent No.2) and other reliefs.

10. The dispute between the parties had also travelled up to Supreme Court and this Court decided the matter in the case of *Nugen Machineries Limited v. Minal A. Goswami & Anr. reported in (2016) 11 SCC 484*. Considering the contentions of the parties, and observing that rights of parties are to be established in Suit No. IV, in paras (38), (44) and (45), the Supreme Court held as under:-

"38. The existence of title in MGG in the said 75,001 shares cannot be disputed by either GGL or MHL, at least, till the date of the consent award i.e. 21-9-2000 because GGL and MHL's claim for title over the said shares flows from MGG's prior title and the subsequent alleged transfer pursuant to the consent award. In such a case, because of MGG's purported transfer of the title

in the 75,001 shares to the Ruias under the settlement dated 5-12-2002, the Ruias should normally be entitled to have their names entered into the records of BOCL as holders of the said shares by following appropriate procedure. If either GGL or MHL is objecting to the right of MGG to effect the said transfer in favour of the Ruias, they must establish a superior title (to MGG) in the said shares. It goes without saying that it can be done only in some legal action initiated by either GGL or MHL or both jointly. But they cannot seek a declaration of their title in Suits II and III filed by the Ruias. In a bid to establish their title MHL filed Suit IV¹⁹. The right of MHL, if any, will have to be decided in the said suit. Until the said suit is decided, we do not see any ground in law on which either GGL or MHL can object to the transfer of the shares in favour of the Ruias pursuant to the settlement dated 5-12-2002.

.....

44. However, in the absence of any legally established title as on today to the abovementioned shares in any party other than MGG, whether the Ruias would be entitled, pursuant to the settlement dated 5-12-2002, to have their names entered into the registers of BOCL as holders of the said shares is a matter for the Ruias to explore. However, such an entitlement, if any, should be subject to the result of Suit IV.

45. We make it clear that we are not deciding by this order, the existence or otherwise of any right or its enforceability in the 75,001 shares of BOCL in favour of either MHL or GGL. It is open to them to establish their right in Suit IV. The defendants in Suit IV are at liberty to raise every defence available in law and fact to them."

11. In Suit No. IV-2410 of 2008 filed by respondent No.1 (MHL), the appellants filed affidavit under Section 9A CPC (Maharashtra Amendment) raising preliminary issue of limitation by contending that the suit prayers (q), (r), (s), (t), (u) and (v) in respect of

claiming ownership over the 75,001 shares of BOIL (respondent No.2) by MHL (respondent No.1) is barred by limitation as the Settlement Agreement between the appellants - Ruias was entered into on 05.12.2002 and the Suit No. IV- 2410 of 2008 filed by respondent No.1(MHL) has been filed in the year 2008 which is clearly barred by limitation. Respondent No.1(MHL) contested the said affidavit by contending that MHL (respondent No.1) was kept in dark about the settlement dated 05.12.2002 between the Ruias and MGG (respondent No.3) and that the same came to their knowledge only on 14.10.2005 when they were handed over the copy of the settlement agreement dated 05.12.2002. Respondent No.1 further contended that the suit filed by respondent No.1 was within the period of limitation as they came to know about the Settlement only on 14.10.2005.

12. By the order dated 16.03.2017, the learned Single Judge allowed the petition filed by the appellants-Ruias by holding that respondent No.1 (MHL) is a stranger to the Settlement dated 05.12.2002. Learned Single Judge held that the cause of action arose to respondent No.1 (MHL) way back on 24.08.2002 when respondent No.1-MHL was impleaded as defendant in Suit No.2499 of 1999 in which MHL came to be impleaded as the defendant as per Chamber Summons No.455 of 2002 dated 04.10.2002. Learned Single Judge held that by virtue of Chamber Summons an order passed thereon, respondent No.1 had knowledge that the appellants are claiming title of the shares in dispute even in the year 2002 and the receipt of copy of the settlement agreement dated 05.12.2002 on 14.10.2015 was immaterial. It was held that respondent No.1 (MHL)

approached the Court only in the year 2008 by filing the Suit No.2410 of 2008 and therefore, the suit filed by respondent No.1 (MHL) is barred by limitation.

13. Being aggrieved by the order of the learned Single Judge, respondent No.1 (MHL) filed Commercial Appeal before the Division Bench of Bombay High Court. The Division Bench vide its impugned order set aside the order passed by the learned Single Judge by holding that the right to sue occurred to respondent No.1 on 14.10.2005 when the copy of the Settlement Agreement dated 05.12.2002 between respondent No.3 (MGG) and the appellants-Ruias was supplied to respondent No.1(MHL). The Division Bench held that since respondent No.1 had knowledge of the Settlement only on 14.10.2005, the suit filed by MHL-respondent No.1 in the year 2008 is well within the period of three years from the date of knowledge of the Agreement and, therefore, the suit is within the period of limitation. The Division Bench directed the suit to proceed in respect of all other prayers made in the suit. Being aggrieved, the appellants-Ruias have preferred this appeal.

14. We have heard the submissions of learned Senior counsel appearing for the appellant and learned Senior counsel appearing for the first respondent. We have considered the impugned judgment and perused the materials on record.

15. Though, various contentions have been raised on the merits of the matter, in view of the change in the law and deletion of Section 9A of the Code (in its application to the State of Maharashtra) and the judgment of the Supreme Court in *Nusli Veville*

Wadia v. Ivory Properties & Ors. (2019) 13 SCALE 620, we are of the opinion that it is not necessary to consider the merits of the contentions. Suffice to refer to the change in the law and the interpretation given by this Court.

16. The State of Maharashtra inserted Section 9A to the Code of Civil Procedure vide Code of Civil Procedure (Maharashtra Amendment) Act, 1977. Section 9A provided that where an application has been made for granting or setting aside an order granting interim relief in a suit, if either of the party challenged the jurisdiction of the Court to entertain the suit, the Court would have to decide the preliminary issue of jurisdiction before deciding the aforesaid application. The amended Section 9A came to be repealed by CPC Maharashtra (Amendment) Ordinance 2018 with effect from 27.06.2018 and Section 9A of the Code (in its application to the State of Maharashtra) was deleted by Section 3 of the Ordinance. The above Ordinance was replaced by the Code of Civil Procedure (Maharashtra Amendment) Act, 2018 on 29.10.2018. It was provided that the preliminary issues framed under Section 9A shall be treated as an issue under Order XIV CPC and be decided by the courts with other issues as the court may deem fit. On 15.12.2018, the State of Maharashtra enacted the Code of Civil Procedure (Maharashtra Amendment) Act, 2018 which provided for a saving clause. Section 2 of the Amendment Act provided that if the court has ordered to decide an issue as a preliminary issue before the date of deletion of Section 9A, it shall be decided by the court as a preliminary issue.

17. After repeal of Section 9A, because of divergent views, in *Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) Through Legal Representatives and others* (2015) 6 SCC 412 and *Kamalakar Eknath Salunkhe v. Baburav Vishnu Javalkar and Ors.* (2015) 7 SCC 321, Section 9A as it stood came up for consideration before the three Judges Bench of this Court in (2019) 13 SCALE 620(*supra*). The divergent views which led to consideration by the larger Bench is as under:

“The reference has been made by a Division Bench of this Court vide order dated 17.8.2015, doubting the correctness of the decision of this Court in *Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) through Legal Representatives and others*, (2015) 6 SCC 412 with respect to the interpretation provisions contained in Section 9A of the Code of Civil Procedure, 1908 (for short, 'the CPC') as inserted by the Maharashtra Amendment Act, 1977. It has been opined that the word “jurisdiction” under Section 9A is wide enough to include the issue of limitation as the expression has been used in the broader sense and is not restricted to conventional definition under pecuniary or territorial jurisdiction, the decision in *Kamalakar Eknath Salunkhe v. Baburav Vishnu Javalkar and Ors.*, (2015) 7 SCC 321, taking contrary view, is per incuriam in view of the larger Bench decision in *Pandurang Dhondi Chougule and Ors. v. Maruti Hari Jadhav and Ors*, AIR 1966 SC 153 as well as other larger Bench decisions”.

18. After considering the various judgments and the submissions, the Supreme Court summarized the conclusion and held as under:

“77(a) 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 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, resjudicata, the Court must have jurisdiction to decide these issues. Under the provisions of section 9A and Order XIV 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 Cooperative Housing Society Limited (supra) 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 (supra) holding that under section 9A 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 Kamalakar Shantaram (supra) has been correctly decided and cannot be said to be per incuriam, as held in Foreshore Cooperative Housing Society Limited (supra).

77.(b) Section 2 of Maharashtra Second Amendment Act, 2018 which provides that where consideration of preliminary issue framed under section 9A is pending on the date of commencement of the CPC, the said issue shall be decided and disposed of by the court under section 9A as if the provision under section 9A has not been deleted, does not change the legal scenario as to what can be decided as a preliminary issue under section 9A, CPC, as applicable in Maharashtra. The saving created by the provision of section 2 where consideration of preliminary issue framed under section 9A is pending on the date of commencement of the Code of Civil Procedure (Maharashtra Amendment) Act, 2018, can be decided only if its comes within the parameters as found by us on the interpretation of section 9A. We reiterate that no issue can be decided only under the guise of the provision that it has been framed under Section 9A and was pending consideration on the date of commencement of the (Maharashtra Amendment) Act, 2018. The reference is answered accordingly. [underlining added]

Let the matters be placed before an appropriate

Bench for consideration on merits".

19. In view of judgment passed by the Hon'ble Three Judges Bench reported in *2019 (3) SCALE 620 - Nusli Veville Wadia vs. Ivory Properties & Ors.*, 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 No.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 the Suit No. IV-2410 of 2008 has to be proceeded independently on its own merits. In view of the judgment by the Three Judges 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.

20. The appeal is disposed of with the following directions and observations:

(i) The order dated 16.03.2017 passed by the learned Single Judge in Suit No. 2410 of 2008 and the order dated 08.08.2019 (corrected on 19.09.2019) passed by the Division Bench in Commercial Appeal No. 148 of 2017 arising out of Suit No. 2410 of 2008 are set aside.

(ii) Suit No.2410 of 2008 filed by respondent No.1 shall proceed afresh from the stage of framing of the

issues. The question of limitation to be determined along with other issues arising for consideration. The suit shall be proceeded without being influenced by any of the views expressed by the learned Single Judge as well as by the Division Bench of the High Court in the impugned judgment.

(iii) Respondent No.1 is at liberty to request the Court to take up their pending applications and the learned Court shall consider them on their own merits.

(iv) We request the learned Single Judge to take up the Suit No.2410 of 2008 filed by respondent No.1 (MHL) and proceed with the same expeditiously and dispose the same preferably within a period of 18 months.

(v) We make it clear that we have not expressed any opinion on the merits of the matter.

SPECIAL LEAVE PETITION (CIVIL) NO. 26642 OF 2019

Consequently, in view of the order passed in Civil Appeal arising out of SLP(C)No.25341 of 2019, this special leave petition is also disposed of.

..... J.
[R. BANUMATHI]

..... J.
[A.S. BOPANNA]