

## WHETHER LIMITATION CAN BE DECIDED AS A PRELIMINARY ISSUE UNDER SECTION 9A OF THE CODE OF CIVIL PROCEDURE

*A full bench of the Supreme Court of India in its decision in **Nusli Neville Wadia v. Ivory Properties & Ors.**, [SLP (Civil) Nos. 31982 – 31983 of 2013] held that under the provisions of Section 9A and Order XIV, Rule 2 of the Code of Civil Procedure (“CPC”), it is open to decide preliminary issues if it is purely a question of law and not a mixed question of law and fact.*

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### **FACTS:**

A reference to a Full Bench was made by the Division Bench of the Supreme Court on account of the divergence in views in two judgements of the apex court. In *Kamalakar Eknath Salunkhe v. Baburav Vishnu Javalkar and Ors.*, (2015) 7 SCC 321, the apex court had opined that the issue of limitation cannot be decided as a preliminary issue of jurisdiction. It was opined that the word “jurisdiction” in Section 9A is used in a narrow sense as to maintainability, only on the question of inherent jurisdiction and does not contemplate issues of limitation. On the other hand, in *Foreshore Cooperative Housing Society Limited v. Praveen D. Desai (Dead) through legal representatives and others*, (2015) 6 SCC 412, it was 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. In *Foreshore Cooperative Housing Society Limited (supra)*, it was held that the decision in *Kamalakar Eknath Salunkhe (supra)* is contrary to the law.

### **ISSUE:**

The question for consideration was the interpretation of the expression “jurisdiction of the court to entertain such suit” used in Section 9A of the CPC.

### **SUBMISSIONS:**

It was submitted on behalf of the Petitioner that the CPC does not confer jurisdiction upon the Court to try a suit on a mixed question of law and facts as preliminary issue and that the plea of limitation is a mixed question of law and facts and cannot be decided as an abstract principle divorced from facts. It was submitted that the decision in *Foreshore Cooperative Housing Society (supra)* cannot be said to be laying down the law correctly. It was submitted that given the amended Order XIV Rule 2, CPC, the preliminary issue can only be a pure question of law.

On the other hand, on behalf of the Respondents, it was submitted that the provisions of Order XIV Rule 2, CPC have no relevance for construing the expression “jurisdiction of the court to entertain such suit.” It was further submitted that the expression jurisdiction used in Section 9A need not be qualified by the word inherent as that would amount to re-writing the statute. Thus, the provision deploys a broader spectrum. It was further submitted that the speedy conclusion of the trial is vital if a case can be decided on the point of jurisdiction as also of limitation.

### **JUDGMENT:**

The apex court considered the meaning of the term “jurisdiction” which is the authority of law to act

officially. It is the power to take cognizance and decide the cases. It does not depend upon whether a decision is right or wrong. The court recognised that jurisdiction to entertain is distinguished from merits, error in the exercise of jurisdiction or excess of jurisdiction. The court also considered the meaning of the phrase “entertain the suit” i.e. to admit for consideration. It does not mean giving relief. The court further noted that there is a difference between the existence of jurisdiction and the exercise of jurisdiction. As an illustration, if a court has jurisdiction to entertain a suit but in exercise of jurisdiction, a mistake is committed, it would be a jurisdictional error but not lack of it.

On the difference between existence and exercise of jurisdiction, the court stated:

*“...erroneous decision on the question of res judicata or limitation would not oust the jurisdiction of the Court nor render the decision a nullity liable to collateral attack. The test of having no jurisdiction by the Court is that its judgment is amenable to attack in collateral proceedings.”*

On a perusal of the objects and reasons for enactment of Section 9A, provisions of Section 9A and Order XIV, Rule 2, CPC the court held that the expression “jurisdiction to entertain” used in Section 9A as incorporated in Maharashtra is to be interpreted narrowly and its purport cannot be taken to be comprehensive.

The court stated as follows: *“45. When we consider what colour expression “jurisdiction” has in Section 9A, it is clearly in the context of power to entertain, jurisdiction takes colour from accompanying word ‘entertain’; i.e. the Court should have jurisdiction to receive a case for consideration or to try it. In case there is no jurisdiction, court has no competence to give the relief, but if it has, it cannot give such relief for the reason that claim is time-barred by limitation or is barred by the principle of res judicata or by bar created under any other law for the time being in*

*force. When a case is barred by res judicata or limitation, it is not that the Court has no power to entertain it, but it is not possible to grant the relief...*

*... Thus, the meaning to be given to jurisdiction to entertain in Section 9A is a narrow one as to maintainability, the competence of the court to receive the suit for adjudication is only covered under the provisions. The word entertain cannot be said to be the inability to grant reliefs on merits, but same relates to receiving a suit to initiate the very process of granting relief.”*

It was held that only the maintainability of the suit is covered with the purview of Section 9A, CPC and that in a case where question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order XIV Rule 2(2)(b), CPC. However, if the facts on limitation are disputed, the determination of the question of limitation cannot be made as a preliminary issue. It was reiterated that until and unless the question is purely of law, it cannot be decided as a preliminary issue. A mixed question of facts and law cannot be decided as a preliminary issue.

The apex court accordingly held that the decision in *Foreshore Cooperative Housing Society Limited (supra)* does not lay down the law correctly. Further, the full bench decision of the Bombay High Court in *Meher Singh v. Deepak Sawhny*, (1999) 1 BomCR 107 holding that under Section 9A, the issue to try a suit / jurisdiction can be decided by recording evidence is overruled. The decision in *Kamalakar Eknath Salunkhe (supra)* was upheld for having been correctly decided.

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*The content of this article is intended to provide a general guide to the subject matter. Specialist*

*advice should be sought about your specific circumstances.*