

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 7164 OF 2015

Digambar s/o Bhagwan Nakate,
Died through his L.R.
Mahesh s/o Prakash Nakate,
Age: 34 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.

...Petitioner

versus

1. Janardan s/o Shivappa Nakate,
Age: 65 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.
2. Nirmalabai w/o Janardan Nakate,
Age: 55 years, Occ: Household.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.
3. Dhanraj s/o Janardan Nakate,
Age: 38 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.
4. Meghraj s/o Janardan Nakate,
Age: 34 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.
5. Sanjay s/o Digambar Nakate,
Age: 50 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.
6. Prakash s/o Digambar Nakate,
Age: 55 years, Occ: Agri.,
R/o. Kemwadi, Tq. Tuljapur,
Dist. Osmanabad.

...Respondents

.....
Mr. K.K. Kulkarni, Advocate for petitioner

Mr. B.R. Sontakke Patil, Advocate for respondent Nos. 1 to 4
.....

CORAM : N.W. SAMBRE, J.

Reserved on : 04/12/2015

Pronounced on: 05/12/2015

ORDER :

In a Regular Civil Suit No. 101 of 2005, Joint Civil Judge, Junior Division, Tuljapur, by an order dated 18/03/2015 ordered framing of following additional issues.

- (2) Whether the suit is bad for non-joinder of necessary parties?
- (3) Whether the suit is bad for non-involvement of whole ancestral property?

2. Mr. Kulkarni, learned Counsel for the petitioner-plaintiff would urge that the above referred additional issues are framed at the behest of defendants-respondents. According to him, the issues were framed in mechanical manner, as there has to be supporting pleadings to that effect. He would then assert that merely for asking even burden shifts on defendants, an issue cannot be ordered to be framed in absence of pleadings to that effect. While drawing support to the above referred submissions, learned Counsel for the petitioner has relied upon the judgment of this Court of Goa Bench in the matter of ***Mahabaleshwar Pandurang Halankar vs. Damodhar Pandurang Halankar and others*** reported in ***2012(5) Mh.L.J. 826***.

According to him, on the basis of vague claim, the issues cannot be framed.

3. The above referred submissions are objected by Mr. Sontakke, learned Counsel for respondent Nos. 1 to 4, who supports the order impugned. According to him, the issues which are casted earlier were in accordance with the fact that he has raised specific objection as regards non joinder of necessary parties and non inclusion of entire ancestral property in common hotch-potch, additional issues were rightly ordered to be framed. He would then urge that for proving the said issues, burden is on the respondents-defendants and in any case, if the defendants failed to prove the said issue, consequences will follow.

4. The plea of the petitioner in the matter of sustainability of the order passed below Exhibit-131 i.e. for framing of additional issues is required to be analyzed in view of provisions of Order 14 of Code of Civil Procedure.

5. It is required to be noted here that said additional issues are ordered to be framed at the behest of respondents-defendants which was objected by the plaintiff.

6. It is also required to be noted here that by moving application Exhibit-131 for framing of additional issues, the respondents-defendants have relied upon in paragraph-9 of the written statement, wherein the plea is about non joinder of necessary parties and non tenability of the suit, in view of non inclusion of entire ancestral property in common *hotch-potch* seeking partition, being not pleaded.

7. With the assistance, having perused paragraph-9 of the written statement, what is noted is, bald statement is made by present respondents that in relation to non joinder of necessary parties to the suit for partition and non inclusion of entire ancestral property. Except this statement, there is hardly anything on record to suggest necessary details of non included and property of which partition as is sought is limited to the extent of only one pleadings in the suit and other property which is not added or pleaded. In the back ground of above, it is required to be analyzed as to whether learned trial Court was right in allowing the application for framing of additional issues, particularly in view of bald pleadings in the written statement referred above.

8. Appropriate reliance can be placed on the judgment of the Apex Court in the matter of **Thomas Antony vs. Varkey Varkey** reported in **AIR 2000 SC 1**. Paragraph-16 of the said judgment reads

thus :

“16. While making a reference to the Tribunal mandatory the legislature cannot be said to have intended that even a patently frivolous, malafide and illegal plea of tenancy taken by a party merely to delay the proceeding and to remain in possession of the property is also to be referred to the Tribunal. The statutory provisions in our considered view, envisage a case where a bonafide and legally sustainable plea of tenancy is taken by the party, that question shall be referred to the Tribunal.”

9. Perusal of the above observations made by the Apex Court contemplates that while exercising the powers under Order 14 Rule 2 and 3 of Code of Civil Procedure, it is required to be taken note of the fact that as to whether pleadings have any substance so as to form an opinion as regards framing of issues based on the same.

10. Apart from above, law laid down by the Division Bench of this Court in the matter of ***Pulmati Shyamlal Mishra and another vs. Ramkrishna Gangaprasad Bajpai and others*** reported in **1981 Mh.L.J. 321** is required to be taken note of. Paragraph Nos. 34, 35 and 36 of the said judgment reads thus:

“34. It is also not correct to assume that the Court is under any obligation to frame and remit the issue of tenancy

mechanically, merely on of its necessity and justification. Cases can be conceived, when tenancy plea may appear to be patently frivolous, fraudulent and part of the dilatory strategy, and may not by itself attract sections 85 and 85A of the Tenancy Act. The remittance of any such tenancy issue and the trial thereof by the Mamlatdar and higher authorities in appeal and revision, is known to have become a long winding and time consuming process. This delay enures for the benefit of the person in possession of the land. This, not unnaturally, prompts and tempts him to claim to be the tenant out of sheer anxiety to perpetuate his unmerited possession, even if no basis exists for the claim. Nothing can thus prevent a defendant from claiming to be tenant (1) even if his plea to that effect is overruled specifically or constructively by the Tenancy Court in some earlier proceedings in between himself and the landlord or their predecessor-in-title or (2) even if the plea so set up happens to be irreconcilably inconsistent with his defence of being mortgagee, purchaser or owner of the land by inheritance or adoption, in the earlier stage of the same proceedings or in the earlier round of another litigation. A plea to that effect as an integral part of any other fraudulent defences is yet another specie of the same category. Unwarranted remittance of such issue for trial in literal and mechanical compliance with the above provisions, enables the litigants to abuse the process of the Court and cause grave miscarriage of justice. This indeed makes mockery of the judicial process causing damage to the confidence of the litigating public in its efficacy and utility.

35. This only highlights the danger of any literal or mechanical construction of these provisions in disregard of their content and context and any casual approach in the matter. Order 14 of the Code of Civil Procedure contemplates framing of issues by the Court on application of mind, not only to the pleading but also to the documents produced, while Rule 4 thereof empowers it to examine any person and enforce production of additional documents for that purpose. These provisions thus enable the Courts to (1) seek clarification of the bald pleadings, (2) insist on production of documents in doubtful cases, and (3) get explanation for the adverse factors even where the litigant is driven to rely on oral evidence, with a view to frame correct issues and restrict the trial of the case only to the same. There is nothing in section 85 or 85A or in any other provisions of the Tenancy Act, robbing the Courts of these powers so indispensable for the effective adjudication and, relieving it of its duty imposed thereunder. These sections provide for remittance of issues only if and when the same are framed on being found to arise on such scrutiny and it is after that stage that the Civil Court ceases to have jurisdiction with regard to the same till the finding is certified by the Tenancy authorities. The process contemplated under Order 14 does not contemplate any trial of such issue but it does involve nipping of any such plea in the bud, if the Court, subject to any contrary decision in appeal and revision, judicially concludes against its framing and raising. This is implicit in the separate provision for framing issues and the trial thereof. This process does not thus involve any conflict between Order 14 of the Code of Civil Procedure

or sections 85 and 85A of the Tenancy Act nor any question of any lack or excess of jurisdiction. Such scrupulous compliance with these provisions alone can prevent such possible abuse of its process.

36. The Court has thus a duty to examine the substance and refuse to frame and remit any such issue if the same appears to be demonstrably frivolous and mala fide. It is obviously not easy to draw a dividing line between such frivolous and mala fide pleas on the one hand and the ones turning out to be false at the end of the trial on the other. Facts of a given case, however, would rarely fail to furnish the required indication to the judicially trained mind. Facts of the present case, in our opinion, leave no manner of doubt that tenancy plea is a part of the fraudulent defence strategy and does not call for any remittance for trial. The approach could not have been different even if the Defendant No. 5 had pleaded the tenancy specifically. The same picture would have emerged in the careful scrutiny at the preliminary stage contemplated under Order 14 of the Code of Civil Procedure."

11. The Division Bench of this Court, in the above referred observations, has in clear terms noted that while framing issues, procedure that is required to be considered is application of mind by the Court not only to the pleadings but also to the documents as are placed on record. It is also required to be noted that the Court has every right to seek clarification on the bald pleadings, insist on

production of documents in doubtful cases and get explanation for the adverse factors even where the litigant is driven to rely on oral evidence.

12. In the present case, what is noted that the defendants in casual manner have raised other two issues in the written statement, however, the same pleadings are vague, as it could be and there is no supporting documents on record to that effect.

13. In view of above, in my opinion, learned trial Court has committed error of law by ordering framing of issues under Order 14 Rule 2 and 3 of Code of Civil Procedure by the impugned order dated 18/03/2015, which *prima facie*, depicts non consideration of pleadings for framing of such additional issues and in the background of scheme of Order 14 of Code of Civil Procedure.

14. As such, writ petition succeeds. The order impugned is hereby set aside. The application Exhibit-131 stands dismissed.

[N.W. SAMBRE, J.]