

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 5903 OF 2014**

Anant Nana Raut

Petitioner

Vs

Jagannath Pillaji Raut

.. Respondent

Mr. Sachin B.Kadam, Advocate for Petitioner.
Mr.V.A.Gangal, Senior Advocate, for Respondent.

CORAM : R.G.KETKAR,J.

DATE : 24/06/2015

PC:

1. Heard Mr. Sachin B. Kadam, learned counsel for the petitioner and Mr. V. A. Gangal, learned senior counsel for the respondent at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the Judgment and order dated 13.2.2014 passed by the learned Jt. Civil Judge, Jr. Dn., Palghar below Exhibit 15 in Regular Civil Suit No.143 of 2012. By that order, the learned trial Judge rejected the application made by the plaintiff for framing additional issue, namely, whether the defendant has established partition by metes and bounds between the plaintiff and defendant?.

3. In support of this Petition, Mr. Kadam submitted that the petitioner has instituted suit for partition and separate possession. The suit is based on family settlement. He submitted that the defendant resisted the suit by filing written statement.

In paragraph 6, the defendant contended that during the life time Nana Raut he had effected partition between the plaintiff and defendant in the year 1972. In paragraph 7, it is asserted that as per the partition effected in the year 1972, possession was given to the respective sharers and this fact is also borne out from the Will executed by Nana. He submitted that the learned trial Judge has framed the following Issues:

- A) Does the plaintiff prove that there was family settlement in respect of the properties described in Annexure 'A' and 'B' to the Plaint?
- B) Is the plaintiff entitled for relief of partition of suit properties?
- C) What orders and decree?

4. However, the learned trial Judge did not frame Issue as to whether as per the assertions made by defendant in paragraph 6 of Written Statement, he has established previous partition by metes and bounds. It is, therefore, necessary to frame Issue so that the parties will lead evidence on that Issue.

5. On the other hand, Mr. Gangal submitted that in paragraphs 6 and 7 the defendant has asserted that the partition has already effected during the life time of Nana Raut and in pursuance thereof the parties were put in possession of their respective share. This fact is also reiterated in the Will executed by Nana Raut.

6. I have considered the rival submissions made by the

learned counsel appearing for the parties. I have also perused the material on record. The learned trial Judge has framed Issues which are extracted herein above. By Issue A, it is for the plaintiff to establish that there was family settlement in respect of properties described in annexure 'A' and 'B' of the Plaint. Issue No. B is whether the plaintiff is entitled to relief of partition of suit properties. As noted earlier, the defendant came with the case of previous partition in the year 1972. It is for the defendant to establish the case of previous partition. In view thereof, in my opinion, Issue B covers the issue which is suggested by the petitioner in application at Exhibit 15. I, therefore, do not find that the learned trial Judge has committed any error in dismissing the application. Petition fails and the same is dismissed.

7. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R.G.KETKAR, J.)