

Nimba Tryambak Sonawane (decd.) through LRs
Latabai N. Sonawane and others ... Petitioners
Vs.
Anjanabai Kautik Wagh and others ... Respondents

CORAM : R. G. KETKAR, J.
DATE : DECEMBER 18, 2015

Heard Mr. Zade, learned Counsel for petitioners at length.

3. Mr. Zade submitted that earlier, plaintiff had claimed relief of partition. Plaintiff thereafter filed application exhibit-108 and gave up the relief of partition. Subsequently, plaintiff filed application exhibit-209 for including relief of partition. That application was allowed by the trial Court. Aggrieved by that decision, defendants instituted Writ Petition No.7407 of 2013 in this Court. By order dated 08.01.2015, this Court permitted defendants to file additional written statement, if so advised and dismissed the Petition. In pursuance thereof, defendants No.1(b)(1) to 1(b)(3) have filed additional written statement in or about

September, 2012.

4. Mr. Zade submitted that basically, the Suit is hit by the provisions of Order XXIII, Rule 1(4)(b) read with Order II, Rule 2(2) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). The Suit is also barred by limitation. The learned trial Judge, therefore, should have framed issues mentioned in application at exhibit-254 as preliminary issues and decided those preliminary issues first. However, by the impugned order, the learned trial Judge rejected the application by observing that the detailed evidence is required to be recorded before answering the issues, and therefore, it is not necessary to frame preliminary issues.

5. I have considered the submissions advanced by Mr. Zade. I have also perused the material on record. The case of the defendants is that as the plaintiff had given up the relief of partition, the said claim cannot be introduced subsequently by amendment. The claim is clearly hit by Order XXIII, Rule 1(4)(b) read with Order II, Rule 2(2) C.P.C. It is not possible to accept these submissions. Order XXIII, Rule 1(4)(b) provides that where the plaintiff withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he is precluded from instituting any fresh suit in respect of such subject matter or such part of the claim. Order II, Rule 2(2) provides that where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he is precluded from suing in respect of the portion so omitted or relinquished. As noted before, earlier the plaintiff had given up relief of partition. Subsequently, he took out application exhibit-209 for amendment that was allowed. Defendants challenged that order in this Court, and their challenge failed. I, therefore, do not find that Order XXIII, Rule 1(4)(b) read with Order II, Rule 2(2) is applicable in the facts of the present case.

6. As far as the claim that Suit is barred by limitation is concerned, Mr. Zade submitted that plaintiff had given notice on 14.09.1984 and the Suit is instituted in the year 2004. He has taken me through paragraphs 4 to 11 of the written statement. In paragraph 6, defendants specifically referred to notice dated 14.09.1984 issued by the plaintiff and the fact that the Suit is instituted after 20 years.

7. In order to appreciate the plea of Suit being barred by limitation, it is necessary to consider Article 110 of the Limitation Act, 1963. Article 110 provides 12 years for filing of the Suit by a person excluded from the joint family property for enforcing a right to share therein and the limitation of 12 years begins when the exclusion becomes known to the plaintiff. Defendants have not prima facie pleaded ouster of the plaintiff. In view thereof, I do not find that the learned trial Judge has committed any error in not framing the preliminary issues. At any rate, even if I assume in favour of defendants that plea of ouster is pleaded nonetheless, this is not a pure question of law but is a mixed question of law and fact for which parties will have to lead evidence. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

8. 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) C.P.C.

(R. G. KETKAR, J.)