

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

WRIT PETITION NO. 1693 OF 2014

Shivaj Shankar Dalvi and Others ..PETITIONERS

VERSUS

Sugandhabai Eknath More and Others ..RESPONDENTS

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Mr. N.V. Gaware, Advocate for petitioners.

Mr. R.R. Sancheti, Advocate for Respondent No.1.

Mr. G.D. Tanpure, Advocate for Respondent No.3.

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CORAM : T.V. NALAWADE, J.

DATED : 01st DECEMBER, 2016

ORDER :

1. The petition is filed to challenge the order made by Civil Judge, Senior Division, Ahmednagar on Exhibit 88 in Regular Civil Suit No. 410 of 2006. Both sides are heard.

2. Application at Exhibit 88 was filed by present petitioners – original Defendant Nos. 1, 3 and 4 in partition suit filed by respondents for permission to amend the written statement. They want to contend that the plaintiff was ousted from the property and due to ouster the defendants have become owner of the property due to the adverse

possession. They want to get relief of declaration that they have become owner due to adverse possession by filing counter claim. The application is rejected by the Court though different reasons are given than permissible.

3. The suit is filed by Sugandhabai for relief of partition, for getting one half share in the suit property. She has contended that the suit property was owned by her father and as successor of Bhausahab, she and her brother Shankar are only entitled to get the property and they have equal share. Mother of Sugandhabai is also dead. Her father died in the year 2001 and her mother also died in the year 2001.

4. In the first written statement filed by Defendant No.1, the claim was disputed. It appears that after making amendment of plaint, Defendant No.1 filed additional written statement. In that written statement, Defendant No.1 had contended that in the year 1975, their father – Bhausahab transferred the property in the names of Defendant Nos. 2, 3 and 4 by making application to the revenue authority and since then those defendants are in possession of the property. It was also contended that property no.2 from the plaint was in the name of Defendant No.1 since 1975. The other contentions were also made but

main contention was that due to the mutation made in favour of the defendants no right is left in favour of the plaintiff. Then, one more application was filed by Defendant No.1 for making amendment in the written statement and in that application he contended that the grandfather of Defendant No.1 was absolute owner of one property like Gut No. 130 and he had given application alongwith Bhausahab – father of Defendant No.1 for mutation of 8 Aane share in favour of Defendant No.1 and in that way Defendant No.1 became the owner of that portion. He contended that Gut No. 129 was also similarly mutated in the names of Defendant Nos.2 , 3 and 4 and property was also mutated in the name of wife of Defendant No.1 and so the father of Defendant No.1 was not left with any property at the time of his death. Even though this contention is contrary to the previous contention, the amendment was also allowed by the Court. Then the present application came to be filed in which plaintiff wants to contend that there was total ouster of plaintiff from the suit property and due to that she is not entitled to get any share.

5. If the aforesaid contentions are read as they are, they do not show that property was partitioned. The suit is filed for relief of partition. Admittedly, Bhausahab has left behind two issues. Though wife of Bhausahab died after Bhausahab, the fact remains that if Bhausahab had

left some property which was absolute property, Sugandhabai will have equal share and if it was ancestral property, then the partition will be made in accordance with relevant provision of Hindu Succession Act. Admittedly, the suit property was standing in the name of either Bhausahab or his father. This circumstance can never be ignored. Hindu co-owner can never contend against the other co-owner due to such mutation that there is ouster. In respect of that circumstance, different stands were taken on different occasions by Defendant No.1 as mentioned above. Due to this stand taken by Defendant No.1 and proceeding filed by him even in this Court, the matter could not make any progress. Issues are also framed. It can be said that Defendant No.1 is trying only to protract the decision of the suit and there are no merits in his application filed for amendment.

6. Learned Counsel for petitioner drew the attention of this Court to the provision of Order 8 Rule 6A and submitted that counter claim can be made at any time and even after filing of the written statement, provided that the cause of action for counter claim had arisen prior to expiry of time fixed for filing of written statement. On this point he placed reliance on the case reported as ***AIR 1987 SC 1395 (Mahendra Kumar Vs. State of Madhya Pradesh)***. There is no dispute over this

proposition. Counter claim can be made as mentioned above but that does not mean that the party can be allowed to make any counter claim which could not be made in law and making of such counter claim amounts to changing nature of defence and it is only to protract the things. This Court holds that there are no merits in the present proceeding.

7. In the result, petition stands dismissed. Trial Court is expected to expeditiously dispose of the suit considering the age of plaintiff as she has crossed 70 years of age.

(T.V. NALAWADE, J.)

SSD