

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

WRIT PETITION NO. 3445 OF 2016

Subhash Gopalrao Zingade

..PETITIONER

VERSUS

Kisanrao Ramrao Zingade and Another

..RESPONDENTS

....

Mr. H.I. Pathan, Advocate for petitioner.

Mr. S.W. Patne, Advocate for Respondent No.1.

Mr. P.V. Ambade, Advocate for Respondent No.2.

....

CORAM : T.V. NALAWADE, J.

DATED : 13th OCTOBER, 2016

ORDER :

1. The petition is filed to challenge the order made by learned Civil Judge, Junior Division, Lohara on Exhibit 19 filed in Regular Civil Suit No. 167 of 2014. Similarly order made on application at Exhibit 29 is also challenged. Heard both sides.

2. The suit is filed by present respondents for relief of possession on the basis of title in respect of property situated in the limits of village panchayat. It is his case that he has purchased the property under sale deed and behind his back the Defendant No.1 who was Village

Development Officer created false record of mutation and on that basis he sold the property to Defendant No.1. It is contended that false record was created in the year 2007 and sale transaction took place in the year 2013 and the suit was filed in the year 2014.

3. Defendant No.1 has filed written statement and he has contended that the property was purchased from the joint family income though in the name of plaintiff in the year 1959, there was partition and in the partition, the property had come to the share of father of Defendant No.1 and at the time of mutation on 23rd March, 2001, a consent document was also executed by plaintiff in favour of Defendant No.1.

4. When there are aforesaid circumstances, Defendant No.1 had requested for framing limitation issue as preliminary issue and for giving decision on that issue. Learned Counsel for petitioner – Defendant No.1 placed reliance on some observations made by Apex Court in the case *(2015) 6 SCC 412 (Foreshore Co-operative Housing Society Ltd. Vs. Praveen D. Desai (died) Through L.Rs. And Others)* and *2016(1) Mh.L.J. 635 (Prakash Manohar Senad and Others Vs. Varsha Sharad Parwekar and Another)*. The Apex Court and this Court has discussed the provision of Section 9(A) of the Code of Civil Procedure and necessity

of deciding the points of jurisdiction and limitation of preliminary issue. There cannot be dispute over the proportion made by Apex Court and this Court in the aforesaid two cases.

5. In the present matter, Defendant No.1 has admitted that in the year 1959 under the sale deed, property was purchased in the name of plaintiff. It is up to Defendant No.1 to show and prove that property had come to share of his father and after that some consent documents were created by plaintiff in favour of Defendant No.1. When the suit is filed for possession on the basis of title, for proving aforesaid things, burden lied on Defendant No.1. Thus the point of limitation cannot be separately considered in the matter like present one. The Trial Court has not committed any error in rejecting the application. In that result, petition stands dismissed.

(T.V. NALAWADE, J.)

SSD