

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

WRIT PETITION NO. 11516 OF 2016

Laxman Narayan Tode
Age: 61 years, Occu.: Agri.,
R/o Sujalegaon, Tq. Naigaon (Kh.),
Dist. Nanded.

..PETITIONER

VERSUS

1. Narayan Laxman Tode
Age: 81 years, Occu.: Agri.,
2. Hanmant Narayan Tode
Age: 51 years, Occu.: Agri.,
3. Dhondiram Narayan Tode
Age: 46 years, Occu.: Agri.,
4. Venkat Narayan Tode
Age: 41 years, Occu.: Agri.,
5. Gajanan Hanmant Tode
Age: 26 years, Occu.: Agri.,
6. Laxmibai Narayan Tode
Age: 76 years, Occu.: Agri.,

All above R/o Sujalegaon, Tq. Naigaon (Kh.),
Dist. Nanded.

7. Anjanabai Iranna Gade
Age: 44 years, Occu.: Agri.,
R/o Devasi, Tq. Bokar
At present Barad, Tq. Bhokar,
Dist. Nanded.

..RESPONDENTS

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Mr. A.G. Godhamgaonkar, Advocate for petitioner.
Mr. G.S. Shembole, Advocate for respondents.

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CORAM : T.V. NALAWADE, J.
DATED : 01st DECEMBER, 2016

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard both sides by consent for final disposal.

2. The petition is filed to challenge the orders made by the Civil Judge, Senior Division, Biloli on Exhibit 56 and 64 in Special Civil Suit No. 10 of 2015. Application at Exhibit 56 was filed for framing additional issues. The suit is filed for alternate relief of partition by present petitioner though it is his case that there was oral partition in the year 2013 and accordingly he is in possession of the property separately. He has filed the suit for declaration of ownership with perpetual injunction in alternative for partition. The defendants – present respondents have filed written statement and they have contended that the partition took place 30 to 35 years prior to filing of suit between plaintiff and defendants and so the suit is not tenable. In view of these contentions, prayer was made by plaintiff / petitioner to frame following three issues:-

- “1) Does the deft. prove the Suit No. 1285/1, 1094 situated at Naigaon (Bz) are the self-acquired property of deft. No.1?
- 2) Does the defts. prove that suit property, suit land standing in the name of deft. no. 2 to 4 of village Sujlegaon and Iklimore are their self-acquired property which are purchased after the partition took place between plaintiff and defts. before 30 to 35 years?
- 3) Does defts. prove that there was partition in between plaintiff and defts. before 30 to 35 years?”

3. When the suit is filed for relief of partition by Hindu, there is presumption of joint Hindu family but there is no presumption that the property belongs to the joint Hindu family. It is open to the the plaintiff to prove that the property belongs to the joint Hindu family. In view of this circumstance, there is no necessity of framing Issues Nos.1 and 2 mentioned above. However, in view of nature of defence taken by the defendants that partition has taken place, Issue No.3 needs to be framed and to that extent the Trial Court ought to have allowed the application. To that extent the order of Trial Court needs to be set aside and application at Exhibit 56 needs to be allowed.

4. The application at Exhibit 64 was filed for permission to make amendment in the plaint and following amendment was prayed:-

“Plaintiff wants to mention that the plaintiff started living separate from defendants from 1987 when in the plaint he has mentioned that he started living separate from the defendants from the year 1990.”

Considering the nature of defence taken by the defendants, this Court holds that such amendment would not affect the nature of suit and to that extent the Trial Court could have allowed the amendment so the portion mentioned as 2(a) and 2(b) can be allowed to be introduced in the plaint.”

5. The plaintiff wants to delete two properties like Gut No. 249 and 205 from the suit. There is right to plaintiff to give up his claim. In view of that right, it can be said that the Trial Court ought to have allowed the application to make amendment and to delete those two properties from the suit. It is always open to the defendants to say that these properties were ancestral or joint Hindu family properties and their non inclusion in the suit makes the suit itself bad. Such additional written statement can be filed by the defendants. In view of this right given to the defendants, this Court holds that the Trial Court ought to

have allowed to make amendment in the plaint as per paragraph 2(b) at Exhibit 64.

6. The paragraph nos. 2(c), 2(d), 2(e) and 2(ee) show that this will be the explanation of plaintiff to say given by the defendants to the contentions raised by the plaintiff. The defendants have contended that the properties which are mentioned in these paragraphs ought to have been included in the suit and due to non-inclusion of the properties in the suit, the suit itself is bad. Thus plaintiff wants to explain as to why he has not included those properties in the plaint. Such amendment is not permissible as it is only say to the written statement and so the Trial Court has not committed any error in rejecting the prayer of plaintiff to make such amendment.

7. In view of aforesaid discussion, this Court holds that order made by the Trial Court to aforesaid extent needs to be partly set aside in respect of the portion mentioned above and for that the petition needs to be allowed.

8. In the result, writ petition is allowed to that extent. The order made by the Trial Court on Exhibit 56 to the aforesaid extent is set aside

and direction is given to frame issue shown in paragraph 4(3) of the Exhibit 56. Similarly, order made by the Trial Court on Exhibit 64 in respect of prayer at paragraph no. 2(a) and (b) is hereby set aside and plaintiff is allowed to make amendment in the plaint to that extent only. Rule is made absolute in those terms.

(T.V. NALAWADE, J.)

SSD