

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 162 OF 2016

SHRI ARUN BALKRISHNA DEVARI AND 2
ORS.,

... Petitioners

Versus

SHAHIKANT RAMA NAIK BORKAR AND 2
ORS.,

... Respondents

Mr. Gaurish N. Agni, Advocate for the petitioners.

Mr. D. J. Pangam and Mr. S. P. Munj, Advocates for the respondent
nos.1 and 2.

Coram:- C. V. BHADANG, J.

Date:- 10th June, 2016

P.C.

Heard the learned Counsel for the petitioners and the learned
Counsel for the respondent nos.1 and 2.

2. By this petition, the petitioners, who are the original plaintiffs
are challenging the order dated 31/07/2015 (below Exh.45) passed by
the learned Civil Judge, Junior Division, Ponda in Regular Civil Suit
No.59/2011/C. By the impugned order, the learned Trial Court has
refused to strike out issue no.1 framed in the suit, which reads as
under :

"Whether the plaintiffs prove that they are the co-owners in the
suit property ?"

3. The petitioners have filed the aforesaid civil suit for permanent injunction and damages in respect of property better known as "DEVARSAI" OR "DEULBHAT" described as a whole under Land Registration No.1071 of Book B-13 of Old Ilhas, bearing Matriz No.533 and 534 of Borim village, presently surveyed under Survey Nos.264/1, 264/2, 264/3, 264/4 and 264/5. According to the petitioners, they are co-owners in peaceful possession and enjoyment of the said property. This was denied on behalf of the respondent nos.1 and 2, upon which the aforesaid issue no.1 came to be framed.

4. The petitioners filed an application Exh.45 claiming that in the earlier civil suit, namely RCS No.38/1976, decided on 05/03/1990 and RCS No.49/1988, decided on 29/01/1992, there is already a declaration about the petitioners being co-owners of the said property. The petitioners have produced the copies of the judgments and decrees in RCS No.38/1976 and RCS No.49/1988.

5. The learned Trial Court has rejected the application on the ground that the petitioners have not shown that the parties and the subject matter in the earlier two suits are the same as in RCS No.59/2011. The learned Trial Court also found that the suit property is different and the petitioners have not established their relation with the plaintiffs in the two previous suits.

6. The learned Counsel for the petitioners has taken me through the judgments and decrees in the two previous suits and also the Land Acquisition Case Nos.182/1997 and 183/1997 in order to submit that the petitioners or their predecessors/ ancestors were parties to the earlier two suits. The learned Counsel has also made an attempt to point out that the property bearing Survey Nos.264/2 to 264/5 was the subject matter of dispute in the earlier suits and the Land Acquisition Cases. He has also referred to the family tree, produced on record, in order to demonstrate that the predecessors of the plaintiffs, were parties in the earlier suits.

7. The learned Counsel for the respondent nos.1 and 2 has supported the impugned order. It is submitted that this is not a case in which the issue as such can be struck down and the effect of the finding in the earlier suits will have to be gone into at the trial, for which the issue has to be there on record.

8. I have considered the rival circumstances and the submissions made.

9. Under Rule 5(2) of Order XIV of Code of Civil Procedure, the Court can at any time before passing a decree, strike out any issue that appears to it to be wrongly framed or introduced. It is trite that an issue arises where a material fact is asserted by one party and is denied by the adversary. In the present case, the petitioners are

claiming to be the owners and to be in possession of the property bearing Survey Nos.264/1 to 264/5, which is denied by the respondents. Although the property bearing Survey No.264/2 to 264/5 is referred to in the earlier suits, none of the earlier suits or Land Acquisition Cases refer to the property bearing Survey No.264/1. In that view of the matter, at this stage, it cannot be said that the property bearing Survey No.264/1 was involved or was subject matter of dispute in earlier two suits or Land Acquisition Case.

10. In so far as the parties to the earlier suits are concerned, indeed it appears that the plaintiff no.1 Arun Devari was a party being plaintiff No.1(h) (as L.R. of Balkrishna Devari) in RCS No.38/1976. Plaintiff no.9 Dinanath Devari in the said earlier suit is said to be the father of plaintiff no.3 in the present suit. The plaintiff no.3 in the said earlier suit is Ladu @ Valkhilya Devari, who on the basis of the family tree, is shown to be the grandfather of the plaintiff no.2 Anand Devari in the present suit. The learned Counsel for the respondent nos.1 and 2 submits that this aspect is also disputed. The question is whether in such circumstances, the Court could have struck down the issue at the threshold on the ground that it does not arise in the matter or is wrongly introduced. In my opinion, the answer has to be in the negative. At the stage of framing of issues, the Court is required to look into the rival pleadings and then consider the controversy involved, which has to be reflected in the issues framed. The

appreciation of the material, including the documentary evidence, is not expected at the stage of framing of issues much less a detailed appreciation of the evidence or documentary evidence on record. In such circumstances, I do not find that any exception can be taken to the impugned order as the same does not demonstrate any jurisdictional error. It is needless to mention that this Court has not expressed any opinion on the rival contentions of the parties, which will have to be necessarily gone into at the trial. The consideration is limited to the determination of the question, whether the issue no.1 as framed needs to be deleted or struck down. I do not find that any case for interference is made out.

11. In the result, the Writ Petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

SMA