

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 3218 OF 2015

Haribhau Kerba Mangade and
Ors

..Petitioners.

Vs

Shri Bhagwan Nathoba Mangade
and Anr

.. Respondents

Mr. Nitin P. Deshpande i/b Mr. A.V. Borwankar, Advocate for
Petitioners.

Mr. Rajesh S. Jadhav, Advocate for Respondents.

CORAM : R.G.KETKAR,J.

DATE : 13/12/2016

PC:

1. Heard Mr. Nitin Deshpande, learned counsel for the petitioners and Mr. Rajesh Jadhav, learned counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'plaintiffs' have challenged the Judgment and order dated 8.8.2014 passed by the learned 18th Jt. Civil Judge, Jr Dn., Pune below Exhibit-142 in R.C.S.No. 2660 of 1988. By that order, the learned trial Judge rejected the application filed by the plaintiffs under Order VII, Rule 11 (a) and (d) of C.P.C.

3. In support of this petition, Mr. Deshpande strenuously contended that the defendants have filed written statement and also set up counter-claim. In the counter-claim so set up,

defendant no.1 alleged that the sale deeds of the year 1963 and 1978 executed by his father in favour of Abubhau Mangade are hallow. By the counter-claim, defendant no.1 has prayed for cancellation of sale deeds of the years 1963 and 1978. The counter claim is set up in the year 2008 which is clearly barred by limitation. He relied upon Article 59 of the Limitation Act, 1963.

4. Mr. Deshpande further submitted that by order dated 16.12.1989, the learned trial Judge allowed the application Exhibit-5 made by the plaintiff. The learned trial Judge prima facie held that the plaintiffs are in possession of the suit property. He submitted that the contention raised by defendant no.1 in the counter claim that despite execution of the sale deeds of the years 1963 and 1978 they are in possession, cannot be accepted in view of the order passed below Exhibit-5.

5. Mr. Deshpande further submitted that by order dated 3.5.2014, the learned trial Judge held that the counter claim of defendant no.1 stood abated on account of his death. For all these reasons, he submitted that the learned trial Judge should have allowed the application under Order VII, Rule 11 (a) and (d) and dismissed the counter-claim.

6. On the other hand, Mr.Jadhav supported the impugned order. He submitted that after the death of defendant no.1, defendant no.1(a) to 1(c) are brought on record. They have filed

their written statement and the counter-claim at Exhibit 177. He further submitted that in the counter claim, the defendants have specifically averred that they are in possession of the suit land. The learned trial Judge was, therefore, justified in rejecting the application under Order VII, Rule 11(a) and (d). Mr. Jadhav further submitted that application under Order VII, Rule 11(a) and (d) is belatedly filed. He submitted that witness of the plaintiff is under cross examination.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Article 59 reads thus:-

<i>Description of suit</i>	<i>Period of limitation</i>	<i>Time from which period begins to run</i>
59. To cancel or set aside an instrument or decree or for the rescission of a contract.	Three years	When the facts entitling the plaintiff to have the instrument or decree cancelled rescinded first become known to him.

Perusal of the counter-claim shows that defendant no.1 has alleged that notwithstanding execution of sale deeds in the years 1963 and 1978, the defendants are continuously in possession and are cultivating the suit land. It is settled principles of law that while considering the application under Order VII, Rule 11, the averments made only in the plaint are to be considered. The counter claim has to be treated as an independent suit. Thus, while considering the application under Order VII, Rule 11, the only averments in the counter claim are required to be

considered. Perusal of the averments made in the counter claim shows that the defendants have contended that they are in actual physical possession and are continuously cultivating the suit land. In view thereof, it cannot be said that the suit is barred by limitation. The learned trial Judge has observed that the question of limitation is a mixed question of law and fact and the said issue has to be decided after permitting the parties to lead evidence. In other words, objection of limitation is kept open by the learned trial Judge.

8. As far as abatement of the counter-claim is concerned, Order 22, Rule 4(2) lays down that any person who is made party as legal representative is entitled to make any defence appropriate to his character as legal representative of the deceased defendant. In the present case, defendants no. 1(a) to 1(c) are brought on record as legal representative of defendant no.1. They have filed written statement and counter claim at Exhibit 177. Merely because the counter claim at Exhibit 104 filed by defendant no.1 stood abated due to death of defendant no.1, it cannot be said that the counter claim set up by defendants no.1(a) to 1(c) also stood abated. Subject to this, petition fails and the same is dismissed. Liberty is reserved to the parties to apply before the trial Court for disposal of the suit in a time bound manner. If such application is made, the learned trial Judge will dispose of the said application bearing in mind that

the suit is of the year 1998. The learned trial Judge will decide the suit on the basis of evidence on record and in accordance with law uninfluenced by the observations made in the impugned order as also in this order.

(R.G.KETKAR, J.)