

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 126 OF 2017**

Shri Sampat Dattu Salunkhe and
Anr.

..Petitioners

Vs

Shri Ganpat Dattu Salunkhe and
Ors.

.. Respondents

Mr. Sandeep M. Pathak, Advocate for Petitioners.

Mr. Vivek V. Salunkhe, Advocate for Respondents no.1 and 2.

CORAM : R.G.KETKAR,J.

DATE : 10/01/2017

PC:

1. Heard Mr.Sandeep Pathak, learned counsel for the petitioners and Mr.Vivek Salunkhe, learned counsel for respondents no.1 and 2 at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'defendants no.3 and 4', have challenged the Judgment and order dated 21.4.2016 passed by the learned 9th Jt.Civil Judge, Senior Division, Pune below Exhibits- 69 and 164 in Spl.Civil Suit No.128 of 2016. By that order, the learned trial Judge rejected the applications at Exhibit-69 filed by defendant no.3 and Exhibit-164 filed by defendant no.4 for reviewing the order dated 12.8.2013 passed below Exhibit-48 thereby permitting respondent no.1, hereinafter referred to as 'plaintiff', to withdraw the suit in respect of property described in paragraph 1A of the plaint.

3. In support of this petition, Mr. Pathak submitted that the

learned trial Judge rejected the applications on the ground that the application at Exh.69 was filed on 28.1.2015 and application at Exhibit-164 was filed on 6.1.2016 for reviewing the order dated 12.8.2013 without praying for condonation of delay in filing those applications. He submitted that respondent no.1-plaintiff had filed suit, inter alia, praying for partition and separate possession of the property described in paragraph 1A of the plaint on the ground that the plaintiff and defendant no.1 have half share each and same shall be separated by metes and bounds, among other prayers. He has taken me through averments made in the plaint and in particular paragraph 6 thereof. Plaintiff and defendant no.1 filed joint purshis on 20.7.2013 wherein they accepted that the plaintiff and defendant no.1 have half share in the property described in paragraph 1A. The learned trial Judge passed order on 12.8.2013 to the following effect.

“No say filed when called till 4.20 pm. Perused the purshis. Heard both sides. Consequently, the plaintiff is permitted to withdraw from the suit to the extent of property described in para 1 (A) of the plaint. Parties to note.”

4. He submitted that as no say was filed on that purshis, after hearing both sides, the trial Court permitted the plaintiff to withdraw from the suit the property described in paragrapg 1A of the plaint. He further submitted that defendants 3 and 5 have filed written statements as also have set up counter claim claiming partition in respect of the property described in

paragraph 1A of the plaint. The learned trial Judge was not justified in passing the impugned order as basically the order dated 12.8.2013 was passed in the absence of defendants no. 3 and 4. He, therefore, submitted that the impugned order deserves to be set aside thereby including the property in paragraph 1A in the suit as it is a joint family property of plaintiff and defendants.

5. On the other hand, Mr Salunkhe submitted that the learned trial Judge, apart from rejecting the applications on the ground that no prayer for condonation of delay is made, has considered that the defendants no. 3 and 5 have included property in paragraph 1A in their counter claim. In other words, even if the plaintiff has withdrawn suit, qua property 1A, in view of Order VIII, Rule 6A(2) the counter claim set up by defendants no. 3 and 5 has to be treated as cross suits and the trial Court will have to pronounce a final judgment even on the counter claim.

6. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Following facts are not in dispute.

(i) The plaintiff has averred that the property described in paragraph 1A was jointly purchased by the plaintiff and his son Dilip and defendant no.1 and his son Manoj on 23.1.1986. The plaintiff has asserted that the plaintiff and defendant no.1 have equal shares. Consistent with these averments, by prayer 1, the

plaintiff has prayed for partition of half share each of plaintiff and defendant no.1 by metes and bounds,

(ii) plaintiff and defendant no.1 filed joint purshis on 20.7.2013,

(iii) On 12.8.2013 the learned trial Judge permitted plaintiff to withdraw suit in respect of property in paragraph 1A,

7. Defendants 3 and 5 have, in addition to filing written statements, have set up counter claims on the ground that the property 1A is joint family property and accordingly have claimed partition even in respect of this property. Order VIII, Rule 6A(2) reads thus:

“6A. Counter claim by defendant.-

(1) xxx xxx

(2) Such counter claim shall have the same effect as a cross suit so as to enable the court to pronounce a final judgment in the same suit, both on the original claim and on the counter claim.”

8. In view thereof, even if the plaintiff has withdrawn property 1A from the suit, nonetheless, in view of the counter claims set up by defendants no.3 and 5, the learned trial Judge will have to pronounce a final judgment in the suit instituted by the plaintiff in respect of the counter claim as per Order VIII, Rule 6A(2). Hence, no case is made out under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)