

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8637 OF 2014

Raghunath s/o Kashinath Kusmude,
Age-67 years, Occu-Agriculture,
R/o Dawle Vasti, Wambori,
Tal.Rahuri, Dist.Ahmednagar

– PETITIONER

VERSUS

1. Mukinda Dangu Kusmude,
(Deceased)
 2. Bhanudas Dagdu Kusmude,
Since Deceased, through LR's
 - 2A) Laxmaibai Bhanudas Kusmude,
Age-51 years, Occu-Agriculture,
 - 2B) Arjun Bhanudas Kusmude,
Age-14 years,
Both are r/o Wadar Galli, Wambori,
Tal. Rahuri, Dist.Ahmednagar,
Minor u/g of respondent No.2A
 3. Narayan Dagadu Kusmude,
Age-48 years, Occu-Agriculturist,
R/o Wadar Galli, Wambori,
Tal.Rahuri, Dist.Ahmednagar,
 4. Chandrabhaga Dagadu Kusmude,
Abated (in view of order below Exh.68
in RCS No.217/2003)
 5. Baijabai Dnyandeo Lapkare,
Age-43 years, Occu-Agriculturist,
R/o Wadar Galli, Wambori,
Tal.Rahuri, Dist.Ahmednagar
- RESPONDENTS

Mr.A.P.Bhandari, Advocate for the petitioner.
Mr.R.R.Karpe, Advocate for respondent Nos.2A, 3 and 5.

CORAM : RAVINDRA V. GHUGE, J.)

DATE : 12/12/2017

ORAL JUDGMENT :

1. I have heard the submissions of the learned Advocate for the petitioner and respondent Nos. 2A, 3 and 5. Though served, respondent No.2-B has not entered an appearance through an Advocate.

2. The petitioner is aggrieved by the order passed by the Trial Court dated 05/09/2014 by which Exh.96 filed by the petitioner seeking framing of an additional issue in RCS No.217/2003 has been rejected.

3. The grievance of the petitioner is that he has taken a specific defence in his written statement dated 13/12/2005 stating that he has part performed the contract dated 11/05/1973. Because of the part performance of the contract, he is entitled to the defence of Section 53-A of the Transfer of the Property Act. However, specific issue as to whether the defendant proves the part performance of the contract and his eligibility to the protection of Section 53-A, has not been specifically cast by the Trial Court.

4. It is further submitted that the issues were cast by the Trial Court upon considering the pleadings of the parties. As a specific issue was not framed, the petitioner /defendant had no option but to move an application for recasting of the issues. Though the Trial Court observes in paragraph No.5 of the impugned order dated 05/09/2014 that the petitioner has taken the defence of Section 53-A, the Trial Court has refused to frame an issue. It is vehemently submitted that in such circumstances, the Law is settled that the defendant, while taking shelter of Section 53-A, can use Section 53-A as a shield in defence and not as a sword.

5. Mr.Karpe, learned Advocate for the respondents submits that this petition deserves to be dismissed with heavy costs for the following reasons :-

- [a] The issues were earlier cast in the 2003 suit.
- [b] The petitioner preferred an application Exh.37 seeking recasting of the issues.
- [c] By order dated 09/12/2013, the issues were re-cast as per the request of the petitioner.
- [d] Exh.96 is an application again filed for the same cause for which application Exh.63 was filed.
- [e] Order below Exh.63 dated 09/12/2013 declining to frame an issue u/s 53-A has not been challenged.

6. I find from the record available and in the light of the submissions of the learned Advocates that the petitioner had in fact moved an application Exh.63. He had sought framing of an issue with regard to whether he has part performed the contract dated 11/05/1973 and 09/05/1974. By a reasoned order, the Trial Court has noted that though the petitioner/ defendant has put forth the defence u/s 53-A, the burden lies on the plaintiff to prove that they are entitled for redemption.

7. Exh.96 in my view, is an application which is re-worded in order to create a picture that it is not a repetition of the request of the defendant put forth in Exh.63. While rejecting Exh.96 by the impugned order, the Trial Court has noted that the defendant has taken the defence of Section 53-A.

8. Though the Law does not mandate that an issue be framed with regard to every provision or section invoked by a litigating sides, the issues need to be cast on the basis of the pleadings put forth by the litigating sides. As the defendant did not challenge the order dated 09/12/2013 by which the Trial Court has refused to frame the issue as to whether the defendant has part performed the contract, the same request by Exh.96 cannot be entertained as Exh.63 has

been adjudicated upon with a detailed order is passed, which has attained finality. This petition, therefore, has to fail.

9. There is no dispute between the parties that the defendant has led evidence as to how he has part performed the contract. Law need not be pleaded. If the pleadings are available and if evidence in support of the pleadings are on record, it is for the Trial Court to consider the merits of the said pleadings and evidence under a specific provision, which has been invoked by the litigating sides.

10. As such, I do not find that the Trial Court would not consider the pleadings of the parties and the evidence led while dealing with their contentions and since the claim of the plaintiffs for redemption is controverted by the defence of the defendant that he has part performed the contract, the Trial Court would consider all these aspects while dealing with the reliefs sought by the plaintiffs.

11. With the above observations, this petition, being devoid of merit, is therefore dismissed. Rule is discharged.

(RAVINDRA V. GHUGE, J.)