

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11895 OF 2013

Shantabai Nivrutti Doke (decd) through heirs
Kusum Uttam Kande and others ... Petitioners
Vs.
Chandrabhaga Haribhau Parandwal and others ... Respondents

WITH

WRIT PETITION NO.447 OF 2014

Gangubai Kisan Ghodekar and others ... Petitioners
Vs.
Chandrabhaga Haribhau Parandwal and others ... Respondents

Ms Jui Nerurkar for Petitioners in both the Petitions.
Ms Sheetal Thakur i/b. Mr. Vikram Chavan for Respondents No.2, 16.1 and 16.2 in Writ Petition No.11895 of 2013 and Respondents No.8, 13.1 and 13.2 in Writ Petition No.447 of 2014.
Mr. Anvil S. Kalekar i/b. Mr. Jaydeep Deo for Respondents No.13 to 15 in Writ Petition No.11895 of 2013.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 10, 2017

P.C. :

Heard Ms Nerurkar, learned Counsel for petitioners, Ms Thakur, learned Counsel for respondents No.2, 16.1 and 16.2 in Writ Petition No.11895 of 2013 and respondents No.8, 13.1 and 13.2 in Writ Petition No.447 of 2014 and Mr. Kalekar, learned Counsel for respondents No.13 to 15 in Writ Petition No.11895 of 2013 at length.

2. Writ Petition No.447 of 2014 is instituted by defendants No.3 to 6. Writ Petition No.11895 of 2013 is instituted by defendants No.21 to 2/7, legal representatives of defendant No.2. Both these Petitions are directed against the judgment and order dated 30.08.2013 passed by the learned Civil Judge, Senior Division, Panvel below exhibits-103 and

109 in Special Civil Suit No.723 of 2007. By these orders, the learned trial Judge rejected the application exhibit-103 made by defendants No.2/1 to 2/7 under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for amending the written statement. The learned trial Judge also rejected the application exhibit-109 made by defendants No.3 to 6 under Order VI, Rule 17 of C.P.C. for amending the written statement.

3. Respondents No.1 to 4, hereinafter referred to as 'plaintiffs', have instituted Suit inter alia praying for partition and separate possession of their 2/3rd share in lands to be allotted in 12.5% scheme; for partition and separate possession of their share, among other reliefs. Defendants No.1 to 6 filed written statement at exhibit-25 inter alia contending that Ramchandra died leaving behind three sons, namely, (i) Narayan Ramchandra, (ii) Haribhau Ramchandra and (iii) Laxman Ramchandra. Plaintiffs No.1 to 7 are the legal representatives of Narayan and Haribhau. Defendants No.1 to 6 are the legal representatives of Laxman. In the written statement filed by defendants No.1 to 6 at exhibit-25, it was contended that plaintiffs have no right, title and interest in the suit property. The suit properties are the self-acquired properties of Laxman and after his death, these properties devolved upon defendants No.1 to 6.

4. Defendants No.2/1 to 2/7 filed application at exhibit-103. Defendants No.3 to 6 filed application at exhibit-109 under Order VI, Rule 17 of C.P.C for amending the written statement exhibit-25. By the proposed amendment, defendants have contended that these are the joint family properties and plaintiffs have 1/3rd share each in the suit properties. By the impugned orders, below exhibit-103 and 109, the learned trial Judge has rejected the applications. It is against these

orders, legal representatives of defendant No.2, namely defendants No.2/1 to 2/7 and defendants No.3 to 6 have instituted these Petitions.

5. In support of these Petitions, Ms Nerurkar strenuously contended that defendants are entitled to take inconsistent pleas in the written statement. The learned trial Judge committed error in holding that the plea proposed to be taken by the defendants is mutually destructive plea. In fact, by the proposed amendment, defendants are giving admissions. The learned trial Judge wrongly held that by the proposed amendment, defendants are withdrawing the admissions. She, therefore, submitted that impugned orders deserve to be set aside.

6. On the other hand, Ms Thakur supported the impugned orders. She submitted that whereas earlier defendants No.1 to 6 filed joint written statement and denied right, title and interest of plaintiffs in the suit property, by the proposed amendment, defendants No.2/1 to 2/7 and 3 to 6 have come with the case that the suit properties are the joint family properties of Haribhau, Narayan and Laxman and that plaintiffs have share in the suit properties. Thus, the plea taken in the proposed amendment application is mutually destructive plea. She, therefore, submitted that no case is made out for interfering with the impugned orders.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. In paragraph 11 of the impugned order, the learned trial Judge has referred to the fact that defendants No.1 to 6 have filed joint written statement at exhibit-25 wherein they have denied rights of the plaintiffs and specifically contended that these are the self-acquired properties of Laxman and after his death, properties devolved upon defendants No.1

to 6. As against this, by the proposed amendment, defendants No.2/1 to 2/7 and 3 to 6 have contended that these are the joint family properties of Haribhau, Narayan and Laxman and that plaintiffs have equal share in the suit property. In paragraph 14, the learned trial Judge has referred to the decision of the Apex Court in ***Shrimoni Gurdwara Committee Vs. Jaswant Singh, (1996) 11 SCC 690***. In that case, respondent had instituted Suit for declaration of his title as also for possession. It was the case of the respondent that he was an adopted son of one Isher Singh and that while he was in possession and enjoyment of the property, petitioner had disputed his title to and interest in the suit land and filed a Suit. In the written statement, petitioner pleaded that Isher Singh had no title over the property and they set up the title in Darbar Sahib and that he had gifted the property in favour of Darbar Sahib. Subsequently, at the end of the trial, petitioner filed application under Order VI, Rule 17 for amendment of the written statement pleading that Isher Singh had gifted the property to Darbar Sahib, Amritsar Shiromani Gurdwara Prabhandhak Committee and it was in possession as a legatee of the property. In paragraph 3, the Apex Court observed that “it is settled law that the defendant can raise mutually inconsistent pleadings in the written statement but they cannot take mutually destructive pleas in the written statement. In the first written statement, they denied title of Isher Singh himself. Subsequently, by the proposed amendment, they set up title in him and pleaded gift made by Isher Singh in favour of the petitioner-Committee.

8. Even in the present case, defendants No.2 to 6 filed joint written statement with defendant No.1 and denied the right and interest of the plaintiffs in the suit properties. By the proposed amendment, they are contending that the suit properties are the joint family properties and Narayan and Haribhau have share along with Laxman. In my opinion,

the learned trial Judge was justified in relying upon the decision of the Apex Court in the case of **Shrimoni Gurdwara Committee** (*supra*). In view thereof, I do not find that the learned trial Judge committed any error in passing the impugned orders. Hence, Petitions fail and the same are dismissed. However, it is made clear that where a decree is challenged by the petitioners, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proceedings as contemplated by Section 105 (1) of C.P.C.

(R. G. KETKAR, J.)

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