

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

WRIT PETITION NO. 516 OF 2017

Bhau Anna Raskar & Ors.

...Petitioners

Versus

Anantassa Eknathsas Malji & Ors.

...Respondents

.....
Mr.Mahindra Deshmukh for the Petitioners.
Mr.Muralidhar L. Patil for Respondent No.1.

.....
CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: JULY 07, 2017

P.C. :

1. Rule. Rule made returnable forthwith. By consent, petition is heard finally and disposed of at the stage of admission.
2. This petition is directed against the order dated 27.07.2016 passed by the learned Civil Judge, Junior Division, Kadegaon thereby rejecting the application below Exhibit 50 for canceling the preliminary issues in respect of the maintainability of the Suit against respondent no.1 filed by the petitioners/plaintiffs in Regular Civil Suit No. 60 of 2013.
3. The petitioners/plaintiffs had filed a Suit for declaration, fixation of the boundary and injunction in respect of the suit property. The

preliminary issue has been framed by the trial Court on 15.06.2016 and thereafter, immediately on 22.08.2016, respondent no.1/defendant no.1 moved an application for framing preliminary issue on the ground of maintainability due to res-judicata. Pursuant to the said application, only preliminary issue was framed that whether the plaintiffs prove that the suit is maintainable against respondent no.1/defendant no.1. On 27.07.2016, the petitioners/plaintiffs moved an application below Exhibit 50 that the said issue is to be deleted because that issue is not in respect of jurisdiction under Order 14 Rule 2 of the Code of Civil Procedure. The trial Court by an order dated 27.07.2016 rejected the said application and maintained the preliminary issue.

4. The learned counsel for the petitioners submits that the issue is not properly framed and there is no question of res-judicata in the Suit. It is not necessary for the Court to frame such an irrelevant issue.

5. The learned counsel for the respondents supports the order passed by the learned Judge.

6. Heard submissions. Perused the written statement. It appears that in the written statement defendant no.1 has raised issued of res-judicata. Thus the trial Court on the basis of the contentions raised by respondent no.1/defendant no.1 framed the preliminary issue under Order 14 Rule 2 of C.P.C. This cannot be faulted with. However, after

going through the issue, it appears that issue is not properly framed as it is vague and therefore, the issue is to be framed as follows:

Whether respondent no.1/defendant no.1 proves that the Suit of the petitioners/plaintiffs is barred under res-judicata as against him and hence not maintainable.

7. In view of the above, Writ Petition is partly allowed and disposed of accordingly.

(MRIDULA BHATKAR, J.)