

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD.

41 WRIT PETITION NO. 3070 OF 2017

SAU. GANDHARIBAI SHIVAJI SHINDE
VERSUS
MAROTI GANPATRAO GAIKWAD

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Advocate for Petitioners : Mr. Hrishikesh V. Tungar.

Advocate for Respondent : Mr. Aniruddha A. Nimbalkar.

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CORAM : **V. K. JADHAV, J.**

DATE : 15th January, 2018.

ORDER:

. Being aggrieved by the order dated 15th December, 2016 passed below Exhibit 52 in Regular Civil Suit No.325 of 2012, the original Plaintiff has preferred this writ petition.

2 Brief facts giving rise to the present writ petition are as follows:

The Petitioner / original Plaintiff has instituted the suit for a decree of specific performance of contract in respect of the suit property. During the pendency of the suit, after the evidence of both the parties is over, the Petitioner / Plaintiff has filed an application Exhibit 52 for framing of additional issues as detailed in the application Exhibit 52. By impugned order dated 15th December, 2016, the Trial Court has rejected the said application. Hence, this writ petition.

3 The learned counsel for Petitioner submits that the Petitioner has referred two issues to be framed additionally in the suit those are that whether the Plaintiff is in possession of the suit property since 1997 on the basis of agreement with her husband and the same is continued and secondly, whether the Plaintiff proves that she has perfected her title by way of adverse possession. The learned counsel submits that the Petitioner / Plaintiff has approached the Court with a specific pleading that the Plaintiff was put in possession way back in the year 1997 and her possession over the suit property is continuous one. The learned counsel submits that in terms of the pleadings of the Petitioner, the Trial Court should have framed those issues since the contentions raised in the pleadings about the theory of adverse possession have been specifically denied by the other side.

4 The learned counsel for Petitioner in order to substantiate his contentions placed his reliance on the following two cases:

- a) **FGP Ltd. Vs. Saleh Hooseini Doctor**, decided by the Supreme Court on 15th September, 2009 in Civil Appeal No.6257 of 2009 and Civil Leave Appeal (Civil) No.30374 of 2008.

- b) **Krishnamurthy S. Setlur Vs. O. V. Narasimha Setty**, decided by the Supreme Court on 23rd February, 2017 in Appeal (Civil) No.5079 of 2000.

5 The learned counsel for Respondent / original Defendant submits that at the fag end of the trial of the suit, the Petitioner has filed this application. The learned counsel submits that in the given set of facts of the case, the plea of adverse possession is not available to the Petitioner / Plaintiff. The learned counsel submits that even framing of additional issue No.1 also unwarranted and uncalled for as the Petitioner has not claimed any specific relief with regard to the possession in respect of the suit property.

6 So far as framing of additional issue No.2 in respect of adverse possession is concerned, it is needless to mention here that so far as the issue of adverse possession is concerned, the said possession must be without permission, without secrecy, without force and it must be peaceful, hostile and continuous. *Prima-facie*, I do not think that such a plea is available to the Petitioner / Plaintiff when the Petitioner has instituted the suit for specific performance of contract. So far as framing of additional issue No.1 as detailed in the application Exhibit 52 is concerned, though the Petitioner has claimed that she is

in possession of the suit property since 1997, the Petitioner has not sought any relief in respect of the possession as asserted. In view of the same, the Trial Court has rightly rejected the application. I do not find any substance in this writ petition. The writ petition is liable to be dismissed. Hence, the following order:

ORDER

The writ petition is hereby dismissed. No costs.

[V. K. JADHAV, J.]

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