

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 3141 OF 2015

SUMANBAI GULABRAO DESHMUKH AND ANOTHER
VERSUS
BALASAHEB WAMANRAO KALYANKAR AND OTHERS

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Advocate for Petitioners : Mr Mukhedkar Amit A.
Advocate for Respondents 2,3 : Mr Deshmukh Arvind
R/1 Deleted Order Dtd. 19/09/2017
R/4 Died.

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CORAM : V.K. JADHAV, J.
Dated: January 04, 2018

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PER COURT :-

1. I do not find any substance in this writ petition.
2. The petitioners/original plaintiffs have challenged the order passed by the trial court below exh.188 in RCS No.66/1999.
3. Petitioners/plaintiffs have instituted the suit for partition and separate possession in respect of the ancestral properties. During the pendency of the suit, defendant no.3 has attained majority and, thus he sought permission from the Court to file written statement. Trial court has not granted said permission,

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however, this court has directed the trial court to grant permission to defendant no.3 to file written statement. Accordingly, defendant no.3 has filed his written statement and in that written statement contended that deceased Wamanrao orally gifted the land admeasuring 69 gunthas comprising gat no.72 and land admeasuring 1H 95 comprising gat no.131. Petitioners/plaintiffs therefore filed an application seeking permission to amend their pleadings by adding relief of declaration that gift in question is false and not binding on the plaintiffs and possession of defendant no.3 over the land which alleged to have been gifted is illegal etc.

4. Learned counsel for the petitioners/plaintiffs submits that, petitioners/plaintiffs are the master of their suit and by amending their pleadings incorporating the relief of declaration about gift-deed in question would not change the nature of the suit. Learned counsel submits that, original defendant no.3 for the first time has brought theory of gift alleged to have been made in his favour by deceased Wamanrao

and as such, petitioners/plaintiffs sought permission to amend their pleadings by adding the relief of declaration. However, the trial court has erroneously rejected the application exh.188.

5. Learned counsel for respondents/original defendants submits that, petitioners/original plaintiffs have instituted the suit for partition and separate possession in respect of the ancestral properties. Defendant no.3 by way of his written statement contends that, deceased Wamanrao orally gifted certain part of the suit property. It is for the respondent/original defendant no.3 to substantiate and prove it before the trial court, and, if he fails, the petitioners/plaintiffs would get the ancestral land partitioned as per their respective shares. Learned counsel submits that, the petitioners/plaintiffs are unnecessarily seeking permission to amend their pleadings by adding the relief of declaration. Same is unwanted and uncalled for.

6. On perusal of copy of the plaint of R.C.S. No.66/1999, the petitioners/plaintiffs are seeking relief of declaration of partition and separate possession of 1/4th share each in the property as detailed in the plaint. Respondent/defendant no.3 in his written statement has contended that his grand father namely Wamanrao partitioned the suit properties and retained the land admeasuring 1A 29 Gunthas comprising gat no.72 and 1H 95 gunthas comprising gat no.131 for him and further orally gifted the said land to him. On the basis of these rival pleadings of the parties to the suit, the learned Judge of the trial court has framed additional issues. In view of the additional issue no.1, burden is on the respondent/defendant no.3 to prove that deceased Wamanrao had gifted the suit agricultural field as detailed in the written statement to defendant no.3 and he is in possession of said field since then. It is needless to say that, if respondent/defendant no.3 fails to prove additional issue no.1, petitioners/plaintiffs would get the suit property partitioned as per their respective shares. In any case, incorporation of the

relief of declaration in respect of the alleged gift by the plaintiffs is unwanted and uncalled for. Learned Judge of the trial court has therefore rightly rejected the application exh.188. I find no merit in this writ petition. Writ Petition is hereby dismissed. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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