

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 4133 OF 2017

- 1] Sushilabai Ambaji Kotlapure
Age 48 years, Occu. Household,
R/o 1607, Kuchanagar,
Datta Chowk, Solapur
- 2] Ambaji Malhari Kotlapure
Age 59 years, Occu. Business,
R/o 1607, Kuchanagar,
Datta Chowk, Solapur
- 3] Mukul Ambaji Kotlapure
Age 45 years, Occu. Business,
R/o 1607, Kuchanagar,
Datta Chowk, Solapur
- 4] Pravin Ambaji Kotlapure
Age 40 years, Occu. Business,
R/o 1607, Kuchanagar,
Datta Chowk, Solapur

(Petitioner No.1, 3 and 4 are
represented through GPA i.e.
Petitioner No.2)

Versus

.. Petitioners
(Orig. Plaintiffs)

- 1] Dattatraya Gokul Jadhav
Age 50 years, Occu. Agri.,
R/o Tamalwadi, Tq. Tuljapur,
District Osmanabad
- 2] Shankarrao Ramnathsa Bakale
Age 60 years, Occu. Business,
R/o 387, Jodbhavi Peth, Solapur,
Ta. and District Solapur

.. Respondents
(Orig. Defendants)

...
Mr. A.V. Indrale Patil, Advocate for petitioners
Mr. K.K. Kulkarni, Advocate for respondent no. 1
Mr. D.B. Rode, Advocate for respondent no. 2
...

CORAM : SUNIL P. DESHMUKH, J.
DATE : 15-10-2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the parties finally, by consent.
2. Petitioners are plaintiffs in regular civil suit no. 71 of 2001 filed before joint civil judge junior division, Tuljaur against present respondents, who are defendants in the same, seeking injunction and declaration in respect of land admeasuring 1 *Hectare* and 62 *Are*.
3. Respondent no.1, earlier on, had instituted special civil suit no. 67 of 2001 before civil judge, senior division, Osmanabad against petitioners seeking declaration that sale deeds executed by his mother Bhamabai through general power of attorney, be declared to be illegal and null and void and not binding on him. The said suit is still pending. Present suit i.e. regular civil suit no. 71 of 2001 has been decreed and appeal therefrom has been preferred by respondent no.1 which is pending bearing regular civil appeal no. 62 of 2013, before district court, Osmanabad.

4. During the pendency of appeal, district judge had framed an issue, as to whether plaintiffs prove that Bhamabai had executed power of attorney to sell suit property and had directed trial court to decide the issue, keeping appeal pending and to send the findings recorded on the issue. During the pendency of proceedings for decision on remitted issue, present respondent no.1 moved an application at Exhibit – 290 in regular civil suit no. 71 of 2001 seeking amendment to written statement filed by respondent no.1. The application, despite resistance by present petitioners, has been allowed and, as such, present writ petition.

5. Learned counsel for the petitioners submits that the suit has been decreed and the decree has been challenged in regular civil appeal which is pending. Appellate court had framed only the issue and has remitted the same to trial court for giving finding on the specific issue so framed and refer back finding thereon. Appellate court has control over the entire proceedings including the amendments to the pleadings. The scope of remand has been confined specifically giving finding on the issue after taking evidence. No further delegation of authority under the remand order had ever been made. He, therefore, urges to indulge into the request being made under writ petition.

6. On the other hand, Mr. Kulkarni, learned counsel appearing for respondent no.1 i.e. defendant no.1 submits that amendments to pleadings would be largely governed by order 6, rule 17 of the code of civil procedure which uses the term 'the Court' and since the matter is pending adjudication before trial court, the trial court would be "the Court" and, as such, would have power to allow amendment. He further points out that the suit being prior to 2002 amendment to the code of civil procedure, proviso to order 6 rule 17 would not be applicable. He, therefore, submits that while it is the court which has dealt with application and same may not be interfered with.

7. In the aforesaid scenario, it is discernible, the matter has been resting with appellate court and it has seisin over same. It is under its powers that the court has framed an issue and has remitted same for giving finding after taking evidence thereon. No further direction has been given by appellate court, as would emerge from the proceedings. In such a case, it appears that trial court has transgressed limits set out in the remand order, rendering the same unsustainable and, therefore, impugned order is liable to be set aside.

8. Impugned order dated 06-02-2017 passed by learned joint civil judge, junior division, Tuljapur, District – Osmanabad

below Exhibit – 290 in regular civil suit no. 71 of 2011 is set aside, leaving it open for defendant no.1 – respondent no.1 to take up appropriate proceedings for amendment before the appropriate forum, as may be available.

9. Needless to refer to that this court's observations are specifically for decision in the writ petition and are confined to decision in the same and shall not have any influential efficacy any further.

10. Writ petition is disposed of. Rule made absolute accordingly.

[SUNIL P. DESHMUKH]
JUDGE

arp/