

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 9774 OF 2017

Bhagwan S/o Anandrao Solanke
Aged 30 years, Occu : Agriculture
R/o Kamangaon, Tq. Bhokar,
District Nanded

.. Petitioner

Versus

- 1] Anandrao S/o Narayanrao Solanke
Aged 64 years, Occu : Pensioner
R/o Kamangaon, Tq. Bhokar,
District Nanded
- 2] Panchaphulabai W/o Anandrao Solanke
Aged 60 years, Occu : Household
R/o Kamangaon, Tq. Bhokar,
District Nanded
- 3] Rukhminibai W/o Anandrao Solanke
Aged 57 years, Occu : Household,
R/o Ramtirtha Tq. Biloli,
District Nanded
- 4] Venkat S/o Anandrao Solanke
Aged 40 years, Occu : Service
At present R/o Babanagar,
Near Mahatma Phule High School,
Babanagar, Tq. And Dist. Nanded
- 5] Madhav W/o Anandrao Solanke
Aged 35 years, Occu : Service
R/o Kamangaon, Tq. Bhokar,
District Nanded
- 6] Lalita W/o Anilkumar Jagdambe
Aged 33 years, Occu : Household
R/o Kamangaon, Tq. Bhokar,
District Nanded

7] Anita D/o Anandrao Solane
Aged 26 years, Occu : Student
R/o Kamangaon, Tq. Bhokar,
District Nanded

.. Respondents

...
Mr. V.D. Gunale, Advocate for petitioner
Mr. N.V. Bhavthankar, Advocate for respondent no.4
Respondent no.3 served - absent
Notice to respondents no. 1, 2 and 5 to 7 – not issued
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CORAM : SUNIL P. DESHMUKH, J.
DATE : 10-09-2018

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard learned counsel for the appearing parties finally, by consent.

2. The petition is taking exception to order dated 14-06-2017 passed by civil judge senior division, Bhokar on Exhibit – 194 in special civil suit no. 7 of 2012.

3. After hearing learned counsel for parties, it transpires that special civil suit no. 7 of 2012 has been instituted by present petitioner, seeking partition and separate possession of properties referred to in plaint against the respondents claiming that defendant no. 2 - Panchaphulabai is his mother and first wife of defendant no.1 his father. Defendant no. 3 - Rukhminibai is second wife married to his father in 1970. The family had been

possessed of adequate properties enabling additions to the properties. Several properties were purchased in the name of Rukhiminibai and her son – defendant no.4 begotten from defendant no.1. Those properties were purchased from joint family funds. These contentions were resisted by filing written statement on behalf of defendants no. 3 and 4 denying the status of Rukhiminibai to be that of second wife and additions to the property being with the aid of joint family funds. It had additionally being referred to that a few persons and properties had not been included in the suit. Valuation of the suit property has been claimed to be defective and it has further been contended that the suit was not tenable.

4. With reference to aforesaid, initially issues were cast in 2012, as to whether plaintiff proves that suit properties are joint family properties, whether he has 1/6th share and whether he is entitled to separate possession of 1/6th share.

5. Learned counsel Mr. Gunale for petitioner – plaintiff vehemently submits that having regard to those issues cast in 2012, the parties on either side had led evidence. Evidence close *pursis* on either side had been submitted. As a matter of fact, the matter has been practically fully heard and suddenly Exhibit – 194, for recasting issues has been filed, to have the issues, as to

whether plaintiff proves that Panchphulabai - defendant no. 2, to be the first wife of defendant no.1, whether suit is hit by misjoinder of properties and parties, whether the plaintiff proves that the properties in the name of defendants no. 3 and 4 are purchased from joint family funds and whether defendant no. 5 proves that he is joint family member and whether the suit is properly valued by the plaintiff.

6. Learned counsel for petitioner submits that the application had been moved deliberately, in order to further procrastinate the proceedings which are instituted by petitioner for partition and separate possession of property. He submits that having regard to recasting of issues, the lacunae in the evidence of defendants no. 3 and 4 is being sought to be cured. He submits that the attempt is to start the proceedings all over again. He, therefore, submits that application at such a belated stage is not tenable which is malafide and is moved with a view to procrastinate the proceedings. He, in the alternative, submits that if in case the court is not inclined to grant the request made under the writ petition, trial court be directed to expedite the suit.

7. On the other hand, learned counsel Mr. Bhavthankar appearing for defendants no. 3 and 4 purports to advert to pleadings in the plaint and pleadings in the written statement.

He submits that having regard to Order 14, Rule 1 of the Code of Civil Procedure, it is incumbent that for each proposition of law and fact, claimed by one party and denied by the other, an issue should arise. He submits that accordingly request had been made under Exhibit – 194, since it had been found that concerned issues had not been framed. He submits that it cannot be said that issues referred to in Exhibit – 194 do not arise at all. He submits that although parties have led evidence and, in the circumstances, if any party wants to lead further evidence having regard to the issues, the learned judge has taken ample care to keep it open for the parties to adduce further evidence. He, therefore, submits that framing of the issues under the impugned order could not be faulted with. In fact, according to his estimate, whatever deficiency in trial would have otherwise been subsisting, has been done away with by allowing Exhibit – 194.

8. Perusal of the impugned order shows that learned judge has considered plaintiff has asserted that Panchaphulabai is first wife of Anandrao and same is denied by defendants no. 3 and 4 and the issue, as to whether Panchaphulabai is the first wife of Anandrao, arises. The learned judge has also adverted to that defendants no. 3 and 4 in their pleadings in written statement, have contended that all the properties are not included in the suit

properties and suit for partition is not maintainable. As such, the other two issues have arisen with respect to the same. Learned judge has further referred to pleading by defendants no. 3 and 4 as parties and properties are mis-joined by plaintiff and the suit is thus hit by mis-joinder and thus, the issue has also arisen.

9. Having regard to the observations as are appearing in the impugned order, and particularly, having regard to that learned Judge has given liberty to the parties to lead evidence on additional issues, in the circumstances, while it would not be a case that the issues framed do not arise from the pleadings of parties and liberty has been given to the parties to adduce evidence in respect of the same, it is not a case wherein meddlesome approach shall be adopted under discretionary powers of this court. The petition is not entertained and is dismissed.

10. Rule is discharged.

11. The learned judge of trial court, however, is requested to proceed ahead in the suit, as expeditiously as possible and dispose of the same preferably within a period of six months from the date of receipt of writ of this order. It is expected that the parties to suit would co-operate in disposal of the suit

expeditiously. It is further made clear that observations made in this order, have efficacy only to the extent of decision in the writ petition and not further.

[SUNIL P. DESHMUKH]
JUDGE

arp/