

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

WRIT PETITION NO.12854 OF 2017

1] Sakhubai w/o Machindra Gungule
Age : 53 years, occu : Household,

2] Bakubai w/o Subhash Gungule
Age : 50 years, Occu : Household,
Both R/o Madhameshwar Nagar,
Newasa (Kh.) Tq. Newasa,
Dist. Ahmednagar.

...PETITIONERS

(Orig. Defendant Nos. 5 and 6)

VERSUS

1] Tarabai w/o Ganpat Gahire
Age : 73 years, Occu : Agril

2] Niraj Suraj Gadire
Age : 30 years, Occu : Agril.
Both R/o. Newasa Phata,
Tq. Newasa, Dist. Ahmednagar.

3] Prabhakar s/o Hari Kahar (Parsayya)
Age : 55 years, Occu : Agril .

4] Pandit s/o Hari Kahar (Parsayya)
Age : 50 years, Occu : Agril.

5] Smt. Tolabai w/o Hari Kahar (Parsayya)
Age : 83 years, Occu : Agril.
All R/o. Narali Bag, Aurangabad.
Near Anjali Talkies.

6] Smt. Leelabai w/o Bhagirath Balayya
Age : 58 years, Occu : Household.
R/o : Shelad, Tq. Sangamner,
Dist. Ahmednagar.

..RESPONDENTS

**(Nos. 1 and 2 Orig.
plaintiffs and others are
orig. defendants)**

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Advocate for the Petitioners : Shri V. S. Bedre
Advocate for Respondent Nos. 1 and 2 : Shri R. R. Karpe
Advocate for Respondent Nos. 3 to 6 : Shri B. S. Chondekar

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CORAM : RAVINDRA V. GHUGE, J.
DATED : 04th DECEMBER, 2018.

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ORAL JUDGMENT :

1. The petitioners are granted leave to assail the order below Exhibit 122. Addition be carried out to prayer clause-B forthwith.
2. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
3. The petitioners, who are original defendants, are aggrieved by the orders passed by the Trial Court below Exhibits 117, 121 and 122.
4. I have considered the submissions of the learned Advocates for the petitioners and the respondents, who are the original plaintiffs, in RCS No. 68/2015 (Old No. 315/2010).
5. The plaintiffs have filed the suit seeking perpetual injunction with regard to the property at Survey No. 53. It is specifically pleaded that it is an ancestral property. The

defendants filed their reply and claimed a share in the said property as it was admitted to be an ancestral property. A counter claim was also filed declaring the share in the said property. The parties are unaware as to what was the stand taken by the plaintiffs in their written statement to the counter claim.

6. Insofar as the order dated 04/05/2017 below Exhibit 117 is concerned, the plaintiffs had sought an amendment that Sy.No.53 be declared as a self-acquired property by Hari Lala Kahar purchased from his own earnings on 29/08/1967 for Rs. 6,000/-. However, while seeking this amendment, the earlier statement that Sy.No.53 is an ancestral property is sought to be deleted. The Trial Court has allowed the said application.

7. It appears from the record that the plaintiffs had specifically taken a stand about the said property Sy.No. 53, which was erroneously typed as 54, that it is an ancestral property. The entire case was built up on such pleadings. The counter claim of the defendants indicates a stand that Sy.No.53 is an ancestral property.

8. Though an amendment can be permitted, I am of the view that a litigant cannot be permitted to delete decisive pleadings and replace them, through an amendment, with a completely different stand only after noticing the defence taken by the defendants as against the said admission. The Trial Court, therefore, erred in permitting the plaintiffs to delete the pleadings that Sy.No. 53 was an ancestral property, to be replaced by the contention that it is a self-acquired property by Hari Lala Kahar.

9. The learned Advocate for the plaintiffs, therefore, submits that his amendment may be permitted to the extent of putting forth the said contention that it is a self-acquired property and he would then prove the said contention. The learned Advocate for the defendants does not oppose subject to leave to file an additional written statement to contradict the amended portion of the plaint.

10. As such, the impugned order dated 04/05/2017 below Exhibit 117 is modified. Exhibit 117 is allowed to the extent of correcting Sy. Nos. 54 to 53 and for putting forth the

contention that the said property is a self-acquired property. The prayer to delete the portion that Sy.No.53 is an ancestral property, is refused and the amendment to that extent only is disallowed.

11. The Trial Court has framed the issues on 14/02/2013 below Exhibit 63 and has added five issues by order dated 11/11/2016 below Exhibit 65.

12. Insofar as the grievance of the petitioners with regard to the order below Exhibit 121, by which, the prayer for framing an additional issue was rejected by the impugned order dated 04/05/2017, is concerned, it appears that the claim of the plaintiffs is based on a will deed executed by Hari Lala Kahar. The defendants have taken the stand that the said will deed is bogus. The issue cast at Sr.No.3a) is "*Do defendants No. 5 and 6 prove the will as illegal ?*"

13. It requires no debate that on the one hand, the plaintiffs will have to prove the said will and since the defendants have taken the stand that the will is bogus, they will have to prove

their allegations I do not find that any injustice would be caused by framing issue No.3a). The Trial Court would note that the plaintiffs will have to prove the will and the defendants will have to disprove the claim of the plaintiffs by proving that the will is illegal and bogus. Hence, no interference is called for in the order below Exhibit 121.

14. Insofar as the order dated 04/05/2017 below Exhibit 122 is concerned, the Trial Court has directed plaintiff No.1 to produce the will. If she fails, the defendants will have to prove the will by leading secondary evidence.

15. I find that this order is passed without proper application of mind. The defendants have consistently taken a stand that the will, as is claimed by the plaintiffs, is a bogus will and that there is no such will in existence. Plaintiff No.1 claims that the will is executed by her brother Hari Lala. As such, the 'will' will have to be produced only by plaintiff No.1. It would be a weird situation created by the Trial Court, by which, it directs the defendants to prove the will through secondary evidence when the defendants have taken a stand

consistently that there is no such will in existence.

16. Needless to state, the said order to the extent of directing the defendant to lead secondary evidence and prove the will, is perverse and erroneous. As such, the said order dated 04/05/2017 below Exhibit 122 is quashed and set aside to the extent of the direction to the defendants to prove the will by leading secondary evidence. The direction that plaintiff No.1 will produce the will is sustained.

17. This Writ Petition is, therefore, partly allowed, in view of the conclusions drawn with regard to the impugned orders sequencewise hereinabove. Rule is made partly absolute in the above terms.

18. Since I find that the suit is actually lodged in 2010, the Trial Court would endeavour to decide the same as expeditiously as possible and in any case before 30/09/2019.

(RAVINDRA V. GHUGE, J.)

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