

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

WRIT PETITION NO. 11407 OF 2017

MANGALABAI BHAIKAS PATIL
VERSUS
BHALCHANDRA SITARAM PATIL AND OTHERS

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Advocate for the Petitioner : Shri Rane Girish S..

Advocate for Respondent 1 : Shri S.S.Patil.

AGP for Respondents 2 to 4 : Shri S.K.Tambe.

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CORAM: RAVINDRA V. GHUGE, J.

DATE :- 27th June, 2018

Per Court:

1 All the Respondents have been served. Shri Patil, learned Advocate appears only on behalf of Respondent No.1 and the learned AGP appears on behalf of Respondent Nos.2 to 4. Rest of the Respondents have not caused an appearance.

2 While issuing notice, I have considered the submissions of the Petitioner and had recorded them in the order dated 20.09.2017, which reads as under :-

- "1. The petitioner/original defendant No. 4 is aggrieved by the order dated 16/06/2017, passed by the Trial Court vide which application Exhibit 43 has been rejected and the Trial Court has declined to frame two issues with regard to res judicata and limitation.
2. I have considered the submissions of learned advocate for the petitioner.
3. I find that when an application was filed for framing of primary issues, if the Trial Court was not convinced

that some issues could be tried peremptorily, it could have so observed in the impugned order. Needless to state, issues are framed on the basis of the pleadings of the parties and the documents and material available on record at the stage of framing of the issues. When the defendant has specifically canvassed the point of res judicata and limitation, prima facie, it appears that the Trial Court could have considered the same. Whether or not such an issue could be decided peremptorily was a different aspect. Grievance of the petitioner is that even an issue has not been cast and it is not observed in the impugned order that the said issues would be cast at the appropriate stage.

- 4. Considering the above, I am inclined to issue notices to the respondents, only to assess as to whether the issues with regard to res judicata and limitation could be framed or not.*
- 5. Issue notice before admission to the respondents, returnable on 10/11/2017. In the meanwhile, the Trial Court would adjourn R.C.S. No. 32/2016.*
- 6. Copies of the petition paper book shall be supplied on/or before 29/09/2017, for issuing notices, failing which this petition shall stand disposed without reference to the Court on 30/09/2017.*
- 7. Learned AGP waives service for respondent Nos. 2 to 4."*

3 The learned Advocate for Respondent No.1 has strenuously defended the impugned order. He has drawn my attention to the pleadings in the plaint in RCS No.32/2016. He also points out that a specific defence has been taken by the Plaintiff with regard to the earlier judgment and decree dated 15.12.2001 in RCS No.18/1999 that it was obtained by fraud.

4 The learned Advocate for the Petitioner submits that the said

decree was sustained upto the Honourable Supreme Court and the father of the Plaintiff in the present suit was party to the said proceedings. This Plaintiff, therefore, cannot file this suit after the demise of his father ignoring all earlier legal proceedings.

5 I am of the view that an issue of constructive res judicata is seemingly raised by this Petitioner for opposing RCS No.32/2016 and if an issue of limitation has been raised, it would be of assistance to all the parties that they lead evidence on all these issues so as to enable the Trial Court to adjudicate upon the suit in a better way. As such, the issues with regard to limitation and res judicata will have to be proved by the party raising the said defence.

6 As such, this Writ Petition is partly allowed. The impugned order dated 16.06.2017 is quashed and set aside and the application Exhibit 43 is partly allowed by directing the Trial Court to frame the issues with regard to limitation and res judicata as are raised by the Petitioner/ Defendant No.4. Thereafter, the Trial Court would decide all issues together.

7 Considering the request of the litigating sides, the Trial Court is directed to decide RCS No.32/2016 as expeditiously as possible and in any case on or before 31.12.2019.