

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION No.9015 OF 2015

Smt.Asha Haribhau Jagdale

...Petitioner

Versus

Sopan Dhondiba Jagdale & Ors.

...Respondents

.....

Mr. Ajay A. Joshi for the Petitioner.

Mr. Ashutosh M. Kulkarni for Respondent No. 8.

.....

**CORAM: MRS.MRIDULA BHATKAR, J.
DATED: JULY 11, 2018**

P.C. :

1. Rule. Rule made returnable forthwith. By consent of the parties, the Petition is heard finally and disposed of at the stage of admission.

2. This Petition invoking the Writ Jurisdiction of this Court under Article 227 of the Constitution of India is filed wherein the order dated 24th August, 2015 passed by the learned Civil Judge, Junior Division, Madha thereby allowing the application below exhibit 129 is challenged.

3. The petitioner and respondent No. 30 are the original plaintiffs. They have filed a Regular Civil Suit No. 89 of 2009 for partition against their brothers and other family members. Defendant No. 8, who is respondent No. 8 in the present Petition, has filed a pursis under Order 12 Rule 6 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the C.P.C."). Defendant No. 8 has admitted the claim of the plaintiffs and requested the trial Court to decree the suit accordingly. However, other defendants have filed written statement and contested the suit. The issues were framed by the trial Court. During the cross-examination of the plaintiffs, defendant No.2, who is a brother of the plaintiffs, has produced a Will dated 20th April, 1976 as a last Will of Dhondiba, wherein Dhondiba has bequeathed property to defendant No. 8 and other defendants. After coming across the said Will, defendant No. 8 has filed an application seeking permission to file written statement and counter claim under Order 8 Rule 1 and Order 8 Rule 6A of the C.P.C. The learned Judge of the trial Court has allowed the said application and imposed the costs of Rs. 500/- on defendant No. 8. Hence, this Writ Petition.

4. The learned Counsel for the petitioner has opposed the impugned order mainly on the ground that counter claim can be filed before the defence is waived. He has submitted that in view of the strict compliance of Order 8 Rule 6A of the C.P.C., the said application is not sustainable in the law. He has further submitted that respondent No.8 had no knowledge of the Will dated 20th April, 1976, as he had filed some proceedings before Revenue Authority on 20th January, 2001. He has further submitted that the learned Judge of the trial Court ought to have taken into account that once the defendant has taken a stand under Order 12 Rule 6 of the C.P.C., and waived his right of defence, he cannot be again be allowed to file written statement and counter claim and allowed to contest the suit.

5. The learned Counsel for respondent No. 8 while opposing this Petition, has supported the order passed by the learned Judge of the trial Court. He has further submitted that defendant No. 8 never opened evidence and he was not aware about the said Will when he gave application under Order 12 Rule 6 of the C.P.C.

6. Heard submissions. Perused the impugned order. Also perused relevant documents. It is a fact that Will dated 20th April, 1976 was not on record when defendant No.8 gave pursis and waived off his right of defence under Order 12 Rule 6 of the C.P.C. However, as the Will is produced during the course of cross-examination of the plaintiff, and when he realized that some property is bequeathed in his favour naturally he wanted to contest the suit and claim property, which is bequeathed to him. The proceeding before Tahsildar discloses that defendant No. 8 has opposed mutation entries and has said that Will dated 20th April, 1976 is bogus. Defendant No.8 has mentioned that *prima facie*, the said Will was not produced. Thus, it appears that without having knowledge of the contents of the said Will, defendant No. 8 opposed that Will before the Tahsildar. Whether defendant No. 8 had knowledge of the contents of the Will dated 20th April, 1976 is a matter of evidence before the trial Court though the right of defence was waived off earlier. In view of peculiar circumstances and subsequent developments, which are taken in the course of evidence, I am of the view that the order dated 24th August, 2015 passed by learned Civil Judge, Junior Division, Madha is correct. Defendant No. 8 has rightly re-accrued when he came across the

Will, which was produced by defendant No.2. No illegality is found in the order dated 24th August, 2015 passed by the learned Civil Judge, Junior Division, Madha. Defendant No. 8 is entitled to file written statement and counter claim in the Court of Civil Judge, Junior Division, Madha. Writ Petition is dismissed. Rule is charged.

(MRIDULA BHATKAR, J.)