

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

WRIT PETITION NO. 2056 OF 2018

Ramesh Kondaji Raut
Age: 45 years, Occu: Agril.,
R/o Kolhar (Bk), Tq. Rahata,
Dist. Ahmednagar

... PETITIONER
(Orig. Deft.No.3)

Versus

1. Sonubai Baburao Waditke
64 years, Occu: Household & Agri.,
R/o C/o Ashok Sitaram Tamnar,
Tamnar Akhada, Tq. Rahuri,
Dist. Ahmednagar
2. Chandrabhaga Baburao Waditke
Age: Major, Occu: Household,
R/o. At Post Ozar, Tq. Sangamner,
Dist. Ahmednagar
3. Gangubai Baburao Waditke
Age: Major, Occu. Household,
R/o C/o Sabaji Dagdu Mane,
At Post Khirdi, Tq. Shrirampur,
Dist. Ahmednagar

... RESPONDENTS
[Resp No.1 Orig.Plaintiff.
No.2 & 3 Orig.Deft.Nos.
1 & 2]

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Mr. R. A. Tambe, Advocate for petitioner.
Mr. N. B. Jadhav, Advocate for respondent No.1.
Mrs. Manjushri Shendage-Narwade, Advocate for respondent No.3.

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CORAM : R. G. AVACHAT, J.

Date of reserving Judgment : 03rd OCTOBER, 2019
Date of pronouncing Judgment : 05th NOVEMBER, 2019

J U D G M E N T :-

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

2. The challenge in this writ petition is to the order dated 17.01.2018 passed by the Court of Civil Judge, Senior Division, Shrirampur, on application Exh.100 in Regular Civil Suit No.100/2013. By the impugned order, the application preferred by the petitioner-defendant No.1 (Plaintiff in counter claim) for amendment of the plaint in the counter claim, came to be rejected.

3. The petitioner-plaintiff in the counter claim moved application for amendment of his plaint. By the proposed amendment, the petitioner wants to bring on record the following matter :

- (i) The petitioner/plaintiff in the counter claim, is ready and willing to pay the balance amount of consideration or ready to deposit the same in the Court, if so directed.*
- (ii) Prayer clause "B" is sought to be amended as :
If the sale-deeds executed by defendant Nos. 2 and 3 in his favour are set aside, respondent No.1-defendant No.1 in the counter claim be directed to execute the sale-deed in respect of the land comprised in both the sale-deeds, in favour of the petitioner-plaintiff in the counter claim.*

4. Learned counsel for the petitioner would submit that if the sale-deeds are cancelled, the petitioner would be entitled to a relief of specific performance of the oral agreement for sale. In view of the learned Counsel, the proposed amendment is very much necessary for deciding the real question in controversy. He, therefore, urged for allowing the writ petition.

5. Learned counsel for the respondents would, on the other hand, supports the impugned order.

6. Factual matrix :

Respondent No.1-plaintiff filed suit, being Regular Civil Suit No.100/2013, for declaration to the effect that the sale-deeds executed by respondent Nos.2 and 3 (defendant Nos. 1 and 2) in favour of the petitioner-defendant No.3, are not binding on her. Relief of perpetual injunction, restraining the petitioner and respondent Nos. 2 and 3 from obstructing her possession over the suit land, has also been asked for.

7. The agricultural land, comprised in *Gut* No.65 belonged to late Baburao Waditke. He passed away on 14.09.2007. He was survived by his mother and three women, who claimed to be his widows. They are respondent Nos. 1 to 3 herein. It appears that, names of these respondents have been recorded in the revenue record of the said land

by virtue of succession as widows of late Baburao. It is nobody's case that late Baburao had married three wives before 1956.

8. The petitioner-defendant No.1 claimed that late Baburao had agreed to sell him the land comprised in *Gut* No.65. It was an oral agreement. In his last days, Baburao was not keeping well, the petitioner had therefore paid him Rs.1,90,000/- to meet medical expenditure and day to day needs as well. Respondent Nos. 1 to 3 acknowledged the transactions between late Baburao and the petitioner and therefore, respondent Nos. 1 and 3 agreed to sell their share in the land *Gut* No.65 to the petitioner. Agreement for sale was therefore executed on 04.09.2007. A separate possession receipt has also been executed handing over possession of the suit land to the petitioner. Respondent No.2 executed sale-deed on 27.07.2011 and transferred her right, title and interest in the land *Gut* No.65 to the petitioner. Similarly, Gangubai-respondent No.3 executed sale-deed of her share in the said land in favour of petitioner on 22.08.2011.

9. The petitioner filed counter claim for specific performance of agreement for sale dated 04.09.2007 executed by the plaintiff-respondent No.1 in petitioner's favour. Necessarily, the counter claim pertained to respondent No.1's share in the land *Gut* No.65.

10. The trial Court rejected the application, on the ground that the matter is pending since long for cross examination of the plaintiff. Application is silent to state that as to despite due diligence defendant could not file the application for amendment. In absence for reasons for delay, this Court has no jurisdiction to entertain it at this stage. Even otherwise, already defendant No.3 has made a counter claim for specific performance. Nothing new is sought to be added. If application is allowed, it will defeat the purpose of the suit.

11. Order 6 Rule 17 of the Code of Civil Procedure, 1908, reads thus:

“17. Amendment of pleadings – The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

12. It is true that the trial has commenced. The proposed amendment has however a nexus to the root of the case. The original owner of the land (Baburao) was said to have agreed to sell the land in favour of the petitioner. On his demise, respondents claiming his widows acknowledged oral agreement between late Baburao and the

petitioner. In pursuant thereto, the respondent Nos 1 and 3 first executed agreement to sell in petitioner's favour. In the facts and circumstances of the case, the proposed amendment ought to have been allowed, as it appears to be necessary for deciding the real question in controversy between the parties and to avoid multiplicity of proceedings. The land in *Gut* No.65 was owned by late Baburao. He passed away on 14.09.2007. Respondent Nos. 1 to 3 claimed to be widows of late Baburao. They, however, did not claim to have married Baburao before 1956. One of the three, therefore, would only be widow of late Baburao. It is the case of petitioner that late Baburao had orally agreed to sell him the land *Gut* No.65. The petitioner paid Baburao Rs.1,90,000/- to meet his medical expenditure. Respondent Nos. 1 and 3 acknowledge that there was cordial relationships between the petitioner and Baburao. They also admit that late Baburao had orally agreed to sell the land in *Gut* No.65 to the petitioner. Respondent Nos. 1 and 3, therefore, entered into an agreement for sale of their respective shares in the land *Gut* No.65 to the petitioner. Agreement for sale was executed on 04.09.2007. The sale-deed was agreed to be executed within a period of one year therefrom.

13. Chandrabhaga, one of the three, who claimed to be the widow of late Baburao filed the application for recognition of her claim as widow

of late Baburao. Sonabai and Gangubai were parties to the said proceeding. The Court declared that Sonabai was the legally wedded wife of Baburao. On Baburao's demise, Sonabai became his widow. Admittedly, Baburao was survived by his mother. There is nothing further to indicate, whether Baburao's mother is alive. Be that as it may, the finding recorded by the Court in a proceeding for grant of heirship certificate, does not operate as *res judicata*. Who of the three women is a lawful heir of late Baburao can only be decided in the present suit.

14. After execution of the agreement for sale, Gangubai and Chandrabhaga executed two different sale-deeds in favour of the petitioner and transferred their respective share in the land *Gut* No.65. Sonabai (respondent No.1) is said to have not performed her part of the agreement for sale dated 04.09.2007. She filed suit, being Regular Civil Suit No.100/2013 for declaration that sale-deeds executed by defendant Nos. 1 and 2 in favour of defendant No.3 are illegal and not binding on the plaintiff.

15. The petitioner, therefore, filed a counter claim for specific performance of contract for sale executed by respondent No.1.

16. Pending the suit, the petitioner realised that if, sale-deeds executed by Chandrabhaga and Gangubai in his favour, are set aside,

he may be entitled to have the entire land *Gut* No.65 sold to him by Sonabai, if she is declared to be the heir (widow) of late Baburao. The petitioner, therefore, preferred application Exh.100 for amendment/counter claim. It needs no mention that merits of the proposed amendment cannot be gone into. If the claim proposed to be introduced by way of an amendment, is found to be prima-facie barred by limitation, the Court can take care thereof with a direction that the proposed amendment be treated to have been incorporated in the plaint on the day on which application for amendment was moved.

17. The agreement for sale dated 04.09.2007 recognises that late Baburao had orally agreed to sell the land *Gut* No.65 to the petitioner. The agreement for sale was executed by respondent Nos. 1 and 3 on 04.09.2007. Sale-deed was to be executed within a period of one year therefrom i.e. on or before 03.09.2008. Both, Chandrabhaga and Gangubai, assuming themselves to be the widows of late Baburao, sold their right, title and interest in the land *Gut* No.65. The petitioner has filed counter claim for specific performance of contract for sale executed by Sonabai on 04.09.2007. The counter claim has been made on 22.08.2013. The same appears to be barred by limitation. The trial Court would however, not be influenced by these observations.

The application for amendment of counter claim is made with a

view to enlarge the prayer clause and seek specific performance of agreement for sale of land comprised in the sale deeds executed by Gangubai and Chandrabhaga. This application was moved on 13.12.2017 i.e. long after the limitation period for the suit for specific performance of contract, is over. It is, however, observed that on this sole ground, the application for amendment cannot be refused.

18. As has already been observed that the proposed amendment goes to the root of the transaction of agreement for sale, allegedly entered into between late Baburao and the petitioner. The same has been acknowledged by respondent Nos. 1 to 3, who claim to be widows of late Baburao. For deciding the real question in controversy and to avoid multiplicity of proceedings, the application for amendment of counter claim ought to have been allowed by the trial Court. Since, the same has not been allowed, interference with the impugned order is called for. Hence, I pass the following order :

ORDER

- (i) The writ petition is allowed.
- (ii) The impugned order dated 17.01.2018 passed by the learned Civil Judge, Senior Division, Shrirampur, on application below Exh.100 in

Regular Civil Suit No.100/2013, is hereby set aside.

The application (Exhibit-100) for amendment of the counter claim is allowed.

- (iii) It is directed that the proposed amendment in the prayer clause of the counter claim shall be deemed to have been made on the date of application for amendment of counter claim.

19. Rule is made absolute in above terms.

[R. G. AVACHAT, J.]

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