

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

WRIT PETITION NO. 2673 OF 2016

Irfan Gulab Shaikh	... Petitioner
Versus	
Hasan Fattubhai Shaikh and others	... Respondents

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Mr. Z. M. Pathan, Advocate for petitioner.
Mr. C. K. Shinde, Advocate for respondent Nos. 1 to 4.

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CORAM : R. G. AVACHAT, J.

ORDER RESERVED ON	: 9th SEPTEMBER, 2019
ORDER PRONOUNCED ON	: 5th NOVEMBER, 2019

ORDER :-

1. Heard.
2. The challenge in this writ petition is to the orders passed by the Court of 3rd Joint Civil Judge, Junior Division, Newasa, District Ahmednagar, on applications Exh.42 and Exh.56 in Regular Civil Suit No.274 of 2012.
3. By order dated 26.04.2014, application Exh.42 moved by the defendants for striking off plaintiff No.4 from the array of the plaint came to be allowed, while, by the order dated 26.11.2015, application

Exh.56 moved for review of the order passed below Exh.42, came to be rejected. The original plaintiff No.4 is therefore before this Court.

4. Facts :

The suit (R.C.S. No.274 of 2012) has been filed for removal of encroachment made on the agricultural land comprised in *Gut* No.117. There are, in all, four plaintiffs. It is the case of the plaintiffs that the land *Gut* No.117 is owned and possessed by plaintiff Nos. 1 to 3, the brothers *inter se*. Plaintiff No.4 is the son of plaintiff No.3. It has been averred in the plaint that plaintiff No.3 is old. Plaintiff No.4 therefore cultivates the land *Gut* No.117 for and on behalf of his father – plaintiff No.3. Defendant Nos. 1 to 4 are the holders of the adjoining land. They have encroached upon the land *Gut* No.117. The suit has therefore been filed for removal of encroachment.

5. The defendants appeared in the suit and filed their written statement. Issues were framed. Plaintiff No.4 filed his affidavit in lieu of evidence. The defendants sought for adjournments for cross examining plaintiff No.4. Thereafter, the defendants moved application Exh.42, contending that plaintiff No.4 has no concern with the suit land. He has been improperly joined as plaintiff in the suit. The prayer was therefore made for striking off his name from the array of the plaint.

6. The petitioner-plaintiff No.4 resisted the application. On hearing the parties, the trial Court observed that the petitioner-plaintiff No.4 has been improperly joined as plaintiff. The trial Court was therefore pleased to allow the application. It has been observed that the power under Order 1 Rule 10 of the Code of Civil Procedure can be exercised at any stage of the proceeding. The affidavit of examination-in-chief filed by plaintiff No.4 is directed to be taken off the record. It has further been observed that the plaintiff Nos. 1 to 3 are at liberty to examine him (plaintiff No.4) as their witness, if they so desire.

7. Submissions :

Shri Pathan, learned counsel for the petitioner would submit that the plaintiffs are the *dominus litis*. The averments in the plaint would indicate that plaintiff No.4 has direct interest in the subject matter of the suit. In support of his submissions the learned counsel has relied on the following authorities.

- (i) ***Clarinda D'souza vs. McCann Erickson India Limited*** reported in ***2003(2) Mh.L.J. 373***.
- (ii) ***Baban Kundlik Karale vs. Mahendra Yelnath Karale and another*** reported in ***2008(3) Mh.L.J. 222***.
- (iii) ***Sau. Saroj s/o Tulsi Sugandh and another vs. Shri Harish s/o Ishwardas Amesar and another*** reported in ***2017(3) ALL MR 813***.

Learned counsel for the petitioner, has ultimately urged for allowing the petition.

8. Mr. C.K. Shinde, learned counsel for the respondents, would, on the other hand submit that the parties to the suit are governed by the Muslim Personal Law. The petitioner – Plaintiff No.4, during the life time of his father, do not have right, title and interest in the subject matter of the suit. The trial Court, has therefore, rightly allowed application Exhibit-42.

9. Order 1 Rule 10 of the Code of Civil Procedure reads thus:

“10. Suit in name of wrong plaintiff. (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3).....

(4).....

.....”

When right to relief in respect of, or arising out of an Act or transaction or series or Act of transactions is alleged to exist in a person, he may file suit to vindicate his right, unless there is a right, there is no remedy. As such, a person coming before the Court as a plaintiff must show that there exists some right in him and the same has been violated by the defendant.

10. It is true that the plaintiff is the *dominus litis* and it is his right to steer proceeding as per his wish and desire, the defendants cannot dictate terms for proceeding with the suit.

11. I have carefully perused the authorities relied upon by the petitioner. The authorities are quite distinguishable on the fact. In the case of *Baban Kundlik Karale* (supra), the plaintiff therein claimed to have owned and possessed the suit land, so is not the case here. While the facts of *Clarinda D'souza's* case (supra) indicate that the application was moved for striking out the name of the defendant on the ground that the plaintiff did not disclose the cause of action against him.

12. It is necessary to find whether plaintiff No.4 has any right, title and interest in the subject matter of the suit. It is reiterated that the suit is for removal of encroachment made on the agricultural land. The

averments in the plaint are to the effect that the land comprised in *Gut* No.117 is owned and possessed by plaintiff Nos. 1 to 3 – brothers *inter se*. Plaintiff No.3 being old, the petitioner, the son of plaintiff No.3, cultivates the suit land for and on behalf of plaintiff No.3.

As such, the plaint averments undoubtedly indicate that the suit land is owned and possessed by plaintiff Nos. 1 to 3. Plaintiff No.4 claims to be an agent of plaintiff No.3. Plaintiff Nos. 1 to 3 are very much before the Court. The parties are governed by the Muslim Personal Law. Plaintiff No.4, thus, do not have right in the subject matter of the suit. His presence before the Court was therefore not necessary in order to enable the Court to effectively and completely adjudicate upon the issues involved in the suit. The trial Court has therefore rightly rejected application Exh.56. In exercise of writ jurisdiction under Article 227 of the Constitution of India, interference is not called for with the impugned orders.

13. In the result, the writ petition fails, the same is therefore, dismissed.

[R. G. AVACHAT, J.]

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