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IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5226 OF 2017

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| 1. | Devichand Bharat Tambe
Age - 50 years, Occ - Agriculture | PETITIONERS |
| 2. | Sushila w/o Devichand Tambe
Age - 45 years, Occ - Household | |
| 3. | Sunil s/o Bharat Tambe
Age - 47 years, Occ - Agriculture | |
| 4. | Jyoti w/o Sunil Tambe
Age - 43 years, Occ - Household | |
| 5. | Anil s/o Bharat Tambe
Age - 45 years, Occ - Agriculture | |
| 6. | Swarna w/o Anil Tambe
Age - 40 years, Occ - Household | |
- All R/o Dahad (Bk), Taluka - Rahata
District - Ahmednagar

VERSUS

- | | | |
|----|---|-------------|
| 1. | Gajanan s/o Sitaram Shepal
@ Mohiniraj Gangadhar Kulkarni
Age - Major, Occ - Agriculture
R/o 134, Vasai, "Sabda Brahama Vasai",
Vasai, Mumbai | RESPONDENTS |
| 2. | Santosh s/o Vasant Deshpande
Age - 47 years, Occ - Agriculture
R/o 426, Sadguru Housing Society,
Shivaji Nagar, Manmad
District - Nashik | |
| 3. | Mohiniraj s/o Eknath Kulkarni
Age - Major, Occ - Agriculture
R/o Shriraj, Bungalow No. 20
Modkeshwar Society, | |

Indiranagar, Nashik

4. Nandkumar s/o Vasant Deshpande,
Age - Major, Occ - Agriculture
R/o B-13, Astavinayak Apartment
Ashok Stamb, Behind Dholya Ganpati Temple
Nashik
5. Sanjay Vasant Deshpande
Age - Major, Occ - Agriculture
R/o 426, Sadguru Housing Society,
Shivajinagar, Manmad
District - Nashik
6. Suhas Vasant Deshpande
Age - Major Occ - Agriculture
R/o Building No. 8, Sankalp Sidhi
Plot No. 2, Silver Arch Housing Society
Khadakpada, Kalyan (W)
District - Thane
7. Sau. Smita Satish Kulkarni
Age - Major, Occ - Household
R/o Vanraj Apartment, Halar Road,
Near Bank Colony,
Balchad (Gujrat)
8. Sau Sradha Sunl Shankpal
Age - Major Occ - Household
R/o 2/9, Patel Colony,
Bharucha Road, Dahisar (E)
Mumbai
9. Dattatraya Eknath Bedre
Age - Major, Occ - Agriculture
R/o 3, Sukhkarta Apartment,
Kamodnagar, Nashik
10. Digambar Eknath Bedre
Age - Major, Occ - Agriculture
R/o D/3, Pradhama Cooperative Society
Vijaynagar No.2, Diondori Road
(Meri) Nashik

11. Shashikala Subhash Monde (DELETED)
Age - Major, Occ - Agriculture
R/o 2364, Nehru Chowk,
Sangamner
District - Ahmednagar
12. Shashi Raman Patil
Age - Major, Occ - Household
13. Suman Subhash Patil
Age - Major, Occ - Household
14. Kishor (Bandu) Raman Patil
Age - Major, Occ - Agriculture
15. Bhagwan s/o Raman Patil
Age - Major, Occ - Agriculture
- Resp Nos. 12 to 15 All R/o Patil Vasti
In front of Railway Station,
Shirdi, Taluka - Rahata, District - Ahmednagar
16. Sunanda @ Shakuntala Chandrakant Kulkarni
Age - Major, Occ - Household
R/o Kolpewadi Sugar Mill
Motinagar Colony, Taluka - Kopergaon
District - Ahmednagar
17. Sarla Subhash Kulkarni
Age - Major, Occ - Household
R/o Patil Garden Road, Row House No. 15
In front of Krishna Temple
Indira Nagar, Nashik
18. Shirish Sitaram Shepal
Age - Major, Occ - Agriculture
R/o Venkatesh Clinic,
S. No. 629/6, Nilesh Complex
Bibvewadi, Pune
19. Mangal Makrand Punde,
Age - Major, Occ - Household
R/o Bhambora, Taluka - Karjat
District - Ahmednagar

20. Vasumat @ Varsha Vishwas Kale
Age - Major, Occ - Household
R/o Lake View Housing Society
Paranjpe Bungalow, Suksagar Nagar
Katraj, Pune
21. Swati Pradip Vpradas,
Age - Major, Occ - Household
R/o Kulkarni Building,
Swati Jewellers, Suksagar Nagar
Katraj, Pune

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Mr. Rahul A. Tambe, Advocate for the petitioners
Mr. Y. B. Pathan, Advocate for respondents No. 1 to 10, 12 to 21
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[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 8th JANUARY, 2019

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally with consent of learned advocates for the appearing parties.
2. Learned advocate for the petitioners purports to refer to various factual aspects involved in the matter dating back from 1969 and the events occurring thereafter, based on revenue entries and mutations and subsequent events taking place in 1985 and 1988. He submits that in the circumstances, Regular Civil Suit No. 349 of 2015 filed by respondent No. 2 for declaration, partition and separate possession is not maintainable and an application Exhibit-24 had accordingly been

moved to frame following issues -

- “ 1. *Whether this court has jurisdiction to entertain and try the present suit?*
2. *Whether the suit of Plaintiff is within limitation?*
3. *Whether the suit of Plaintiff is maintainable in view of amended provisions of Sec. 6 of Hindu Law (Hindu Succession Act Amendment 2005)?*
4. *Whether suit is maintainable as non inclusion of all suit property belong to joint family property? ”*

3. Learned advocate submits that, however, while deciding application Exhibit-24, trial court has seen the application from the angle of section 9-A of the Civil Procedure Code and has decided the same erroneously. Learned advocate further purports to submit that observations in paragraph No. 5 of the impugned order are inconsequential, since ruling referred to therein has been declared to be not a good law, having regard to decision of the Supreme Court in the case of *“Pandurang Dhondi Chougule V/s Maruti Hari Jadhav” [1966 AIR (SC) 153]*. He submits that other aspects involved in the application about plaintiff claiming to be coparcener is also a question of law, has not been addressed to at all. He submits that the application had been moved specifically referring to Order XIV, Rule 2 of the Civil Procedure Code. However, the trial court has framed only one issue with regard to jurisdiction ignoring other relevant issues,

which would be issues of law. He, therefore, requests to allow the writ petition and direct the trial court to frame issues as requested.

4. On the other hand, Mr. Pathan, learned advocate appearing on behalf of the respondents, vehemently submits that issue of jurisdiction is a preliminary issue would not be a good contention in view of deletion of section 9-A from the Civil Procedure Code under Ordinance issued by State Government in June, 2018. He, therefore, submits that issue of jurisdiction would hardly be considered as preliminary issue, yet the trial court has framed the issue as preliminary issue. He further goes on to submit that issue of limitation is a mixed question of law and facts and requires evidence and, as such, it would not be framed as a preliminary issue and has been rightly so observed by the trial court. He submits that even otherwise, Order XIV, Rule 2 of the Civil Procedure Code also makes reference to that court is expected to pronounce judgment on all the issues. As such, he requests not to indulge into the request made under the writ petition.

5. Perusal of the impugned order shows that the trial court had been overwhelmingly impressed by Section 9-A of the Civil

Procedure Code and has not made reference to Order XIV of the Civil Procedure Code at all. In the circumstances, so far as contention on behalf of the petitioners about framing of preliminary issue pursuant to Order XIV of the Civil Procedure Code is concerned, same goes un-addressed. There does not appear to be any application of mind to the same. The order in this respect is rendered non speaking.

6. In the circumstances, it would be expedient that parties get an opportunity to readdress themselves on application Exhibit-24 filed by the petitioners.

7. Having regard to aforesaid, writ petition is allowed. Impugned order dated 30th October, 2017 passed by Civil Judge Junior Division, Rahata on Exhibit-24 in Regular Civil Suit No. 349 of 2015 is set aside, letting opportunity to the parties to readdress afresh application Exhibit-24. All points are kept open for the parties. Rule is made absolute in aforesaid terms.

**[SUNIL P. DESHMUKH]
JUDGE**