

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11270 OF 2018

BABURAO KASHINATH KAMTHE AND ANOTHER
VERSUS
RAJU KASHINATH KAMTHE AND OTHERS

...
Advocate for Respondents : Shri Ashtekar R.K.

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CORAM : RAVINDRA V. GHUGE, J.
Dated: February 11, 2019

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PER COURT :-

1. None for the petitioners.
2. While issuing notice on 31.10.2018, I had passed the following order:-

"1 *The petitioners / original defendants are aggrieved by the order dated 9.7.2018 passed by the trial Court, thereby, rejecting application Exhibit 43, filed by these petitioners seeking recasting of the issues.*

2 *I have extensively heard the learned Advocates for the petitioners, have gone through the issues cast on 19.6.2017 and have gone through Exhibit 43, in which, the said defendants have proposed framing of four more issues.*

3 *I find that the trial Court has rightly concluded in the impugned order that the three issues proposed by the defendants are covered by issue Nos. 1, 2, 4 and 5.*

4 *Prima facie, I, however, would not agree with the trial Court's view that the issue of limitation on the basis of the pleading that there was earlier a partition of the ancestral property, thereby giving rise to the issue of limitation, would be covered by issue No.6 as to whether the plaintiff is entitled to the reliefs sought. I am, therefore, entertaining this petition only to the extent of framing of an issue with regard to limitation, subject to hearing the other side.*

5 *As such, issue notice to the respondents, returnable on 10.12.2018. The respondents shall show cause, as to why, an issue of limitation should not be added to the list of issues cast on 19.6.2017.*

6 *Until the next date the trial Court shall adjourn hearing of RCS No.46 of 2016.*

7 *Copies of the paper book for issuance of notice shall be supplied on/or before 13.11.2018, failing which the ad-interim relief granted today shall stand vacated without reference to the Court on 14.11.2018."*

3. The learned Advocate for the appearing respondents has opposed this petition and submits that the petition be dismissed. He further submits that the trial Court has rightly considered that the issue of limitation, though not framed, can be considered while deciding issue No.6, which is, "Whether plaintiff is entitled to reliefs as sought?"

4. I find that the trial Court has completely mis-directed itself. In the event the suit is barred by limitation, which would result in the dismissal of the suit, an issue to that extent will have to be specifically framed.

5. Considering the above, this petition is allowed. The impugned order dated 9.7.2018 is quashed and set aside and the trial Court shall frame an issue as to, **"Whether original defendants 1 and 2 have proved that the suit is barred by limitation?"**

(RAVINDRA V. GHUGE, J.)

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akl/d