

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 1448/2019

Shri Lahuji S/o Vithobaji Nikhare
..VS..
Shri Rajesh S/o Gajanan Nikhare

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri N. R. Bhisikar, Advocate for the petitioner
Shri R. P. Dharmadhikar, Advocate for the respondent

CORAM : Z.A.HAQ, J.
DATED : 06/06/2019

Heard.

2] By the impugned order, trial Court has allowed the application (Exh. No. 25) filed by the defendant Nos. 1 to 5 and has directed the parties to lead evidence on the issue of limitation, treating that issue as preliminary issue.

2] The submission made on behalf of the plaintiff is that the issue of limitation is mixed issue of law and fact and therefore, it will have to be tried alongwith other issues and cannot be tried as preliminary issue. To support the submission, reliance is placed on the judgment given in the case of ***Ramesh B. Desai & Ors. .v/s. Bipin Vadilal Mehta and Ors.*** reported in ***AIR 2006 S.C. 3672.***

3] The relevant facts are discussed by the learned trial Judge in paragraph No.5 of the impugned order. Learned trial Judge has recorded that, as per the judgment delivered in Reg. Civil Suit No. 15 of 1982, shares of the parties were carved out in 1986 in the proceedings before the Superintendent of Land Records. It is recorded that the judgment passed in Reg. Civil Suit No. 15 of 1982 is not challenged and the order passed by the Superintendent of Land Records on 28th February 1986, carving out the shares of the respective parties has also attained finality. These facts weighed with the learned trial Judge, and observing that the civil suit is filed after almost 32 years of these events, learned trial judge has directed that the issue of limitation should be considered as preliminary issue.

4] Learned advocate for the petitioner submitted that the plaintiff was not party to Reg. Civil Suit No. 15 of 1982 and therefore, passing of decree in that civil suit and the consequential order passed by the Superintendent of Land Records, carving out the share of the parties to that civil suit, cannot affect the right of the present plaintiff.

5] The question at this stage is not whether the judgment and decree passed in Reg. Civil Suit No. 15 of 1982 takes away the right of the plaintiff to file the civil suit praying for decree for partition and separate possession of the property. The question is whether the

civil suit filed after 32 years after the parties to Reg. Civil Suit No. 15 of 1982 were put in possession of their respective shares can be said to be within limitation.

In my view, learned trial Judge has not committed any error of jurisdiction by directing that the issue of limitation be tried as preliminary issue. The facts on which the learned trial judge has relied, while passing the impugned order, are relevant and cannot be overlooked. The proposition of law laid down in the judgment relied upon by the learned advocate for the petitioner is well settled, however, considering the facts in the present case, the judgment does not support the petitioner/plaintiff. I see no reason to interfere with the impugned order.

The writ petition is **dismissed**. In the circumstances the parties to bear their own costs.

(Z.A.HAQ, J.)