

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

906 WRIT PETITION NO.4256 OF 2007
WITH
CIVIL APPLICATION NO. 5486 OF 2012

1. Vaijnath S/o Gurubasappa Patil
Age 50 Years,
Occupation agriculture,
R/o Village Takli (Walandi)
Taluka Deoni, District Latur.

2. Ramesh S/o Gurubasappa Patil
Age 50 years,
Occupation agriculture,
R/o Takli (Walandi),
Taluka Deoni, District Latur.

... Petitioners
(original defendants)

versus

Kashinath S/o Gurubasappa Patil
Age 55 years,
Occupation agriculture,
R/o Village Takli (Walandi)
Taluka Deoni, District Latur.

... Respondent
(original plaintiff)

.....
Advocate for Petitioners : Mr. H. B. Nandagavale h/f Mr. V. G. Sakolkar
Advocate for Respondent : Mr. M. L. Dharashive h/f Mr. Y. S. Dharashive
.....

CORAM : V. K. JADHAV, J.
DATED : 13th MARCH, 2020

ORAL JUDGMENT:-

1. Heard both sides.

2. The petitioners are the original defendants in Regular Civil Suit No. 260 of 2003 instituted for declaration of ownership and permanent injunction. The said declaration seems to have been sought on the basis of partition. In the pending suit, the petitioners

have filed a written statement and also filed their counter claim under Order VIII Rule 6 of C.P.C. The petitioners filed an application Exh.49 under Order VI Rule 17 of C.P.C. for amendment in the counter claim. The respondent-plaintiff strongly resisted the said application by filing say. The trial court, by the impugned order dated 20.3.2007 below Exh.49 in R.C.S. No. 260 of 2003, rejected the said application.

3. Learned counsel for the petitioners submits that the respondent-plaintiff had filed an application Exh.33 for leave to withdraw the suit on condition to file a fresh suit on the same cause of action. By order dated 15.6.2005, the trial court has allowed the application Exh.33 permitting the respondent-plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action and further directed that the counter claim of the petitioners-defendants will remain in force. Learned counsel submits that application Exh.49 came to be filed after withdrawal of the suit. Learned counsel submits that the proposed amendment in para 2(A) of the application is clarificatory in nature and it would not change the nature of the counter claim in any manner. Learned counsel submits that the trial court has rejected the application mainly on the ground that the application under Order VI Rule 17 of C.P.C. came to be filed belatedly. Learned counsel submits that apart from this, the trial court has also considered merits of the said application which is unnecessary at the stage when the application has been filed

seeking amendment in the counter claim. Learned counsel submits that though the application Exh.49 came to be filed belatedly, however, it is observed in para 3 of the impugned order itself that the respondent-plaintiff has not filed any written statement to the counter claim nor the trial of the suit has been commenced. Learned counsel submits that though the respondent-plaintiff has thereafter instituted a fresh suit on the same cause of action, however, the proposed amendment is necessary for just disposal of the counter claim. However, the trial court has not considered the same.

4. Learned counsel appearing for the respondent-plaintiff submits that the proposed amendment would change the nature of the counter claim in its entirety and as such the trial court has rightly rejected the application Exh.49. There is no substance in the writ petition. The writ petition is liable to be dismissed.

5. On perusal of the contents of application Exh.49 so also the impugned order passed by the trial court, I find that the proposed amendment in para 2(A) is clarificatory in nature. It is not necessary to consider the merits and the consequences of the said amendment during the course of the trial of the counter claim. Even though the application came to be filed belatedly though the petitioners-defendants were having knowledge about the said transaction as incorporated in the said para 2(A), however, the trial court till passing of the order was not proceeded with the suit and even the other side

had not filed any written statement to the counter claim. Thus, considering the entire aspects of the case, I am inclined to allow this writ petition. It further appears that the counter claim is still pending because of the interim order passed by this Court. In view of the above, it is also necessary to give directions to the trial court to dispose of the counter claim in expeditious manner. Hence, I proceed to pass the following order:-

O R D E R

- I. Writ petition is hereby allowed.
- II. The impugned order dated 20.03.2007 passed by the 2nd Joint Civil Judge, Junior Division, Udgir below Exh.49 in R.C.S. No. 260 of 203 is hereby quashed and set aside.
- III. The application Exh.49, in terms of its prayer clauses in its entirety, is allowed.
- IV. The trial court shall dispose of the counter claim as expeditiously as possible, preferably within a period of six months from today.
- V. The writ petition is accordingly disposed of. Rule made absolute in the above terms.
- VI. Pending civil application No. 5486 of 2012 is also disposed of.

(V. K. JADHAV, J.)