

***IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION***

WRIT PETITION NO. 10152 OF 2018

Mayur Khandu Kathad and ors. ...Petitioners.
vs.
Khandu R. Kathad and ors. ...Respondents.

Mr. S.M.Kamble for the Petitioners.
Mr. S.P. Rajepandhare for the Respondent No.1.
Mr. A.J. Jaibhave for Respondent Nos. 2/1 to 2/5 and 3.

CORAM : REVATI MOHITE DERE, J.
DATE : 05th February, 2020

PC:

1. Heard learned counsel for the parties.
2. By this petition, the petitioners have impugned the order dated 4.7.2018 passed by the learned 6th Joint Civil Judge, S.D, Nashik below Exh.96 in Special Civil Suit No.58 of 2014 by which the respondent Nos. 2 and 3 (original defendant Nos. 2 and 3) application for recasting of issues by deleting Issue No.1 framed below Exh.26 and framing additional issue with respect to limitation was allowed.
3. Learned counsel for the petitioner submits that the learned Judge had erred in deleting Issue No.1 framed by the Court, as mentioned in Exh.26. He submits that the said Issue No.1 goes to the root of the case, inasmuch as, the petitioners (Original plaintiffs) have in their suit prayed for

a declaration that the Agreements to sell dated 13.9.2003 and 22.10.2003 in respect of their 1/5th share are illegal and void and for certain other reliefs on the basis of the alleged Agreements to sell. He further submitted that admittedly the petitioners were not parties to the previous suit, that was between respondent No.1 and Respondent Nos. 2 and 3. He submits that the said Issue No.1 will have to be considered by the Trial Court while deciding the suit.

4. Learned counsel for the respondent Nos. 2 and 3 opposed the petition. He submitted that no interference was warranted in the impugned order. According to the learned counsel, the respondents had filed a suit with respect to the said agreements dated 13.9.2003 and 22.10.2003 and the same has been decreed in favour of the respondent Nos. 2 and 3 and that an appeal is pending against the said Judgment and decree passed by the Trial Court.

5. Perused the papers including the impugned order. The petitioners-original plaintiffs have filed a Special Civil Suit being Special Civil Suit No. No.58 of 2014 and have prayed for a declaration that the Agreements to sell dated 13.9.2003 and 22.10.2003 in respect of their 1/5th share be declared as illegal and void. They have further prayed for a declaration that the respondent Nos. 2 and 3 have no right in the property acquired by them on the basis of the said agreements to sell. The respondent Nos. 2 and 3 appeared in the said suit and filed their written statement on 3.5.2014 and the Trial Court was pleased to frame the following issues.

1. Whether the agreements for sale executed by defendant No.1 in favour of defendants No.2 and 3 in respect of the suit property on 13.9.2003 and 22.10.2003 are not concluded contracts as alleged?
2. Whether the Judgment and Decree dated 18.5.2013 in Special C.S.No.340/2006 is not binding upon the plaintiff as alleged?
3. Whether the defendants are trying to create third party interest in the suit property?
4. Are the plaintiffs entitled to get partition in the suit properties?

If yes, what would be the respective shares of the parties?

5. Whether the plaintiffs are entitled for the relief of declaration?
6. Whether the plaintiffs are entitled for the relief of permanent injunction?
7. What order and decree?

6. It appears that after the oral evidence of the plaintiff was over, the respondent Nos. 2 and 3 filed an application under Order 14 Rule 5 of the C.P.C. for striking out Issue No.1 and for framing an additional issue i.e. whether the suit is filed within limitation. The said application was resisted by the petitioners. The Trial Court after hearing the parties was pleased to allow

the respondent Nos. 2 and 3's application, inasmuch as, the Trial Court deleted Issue No.1 framed below Exh.26 and recasted the issue of limitation, as prayed for, by the respondent Nos. 2 and 3. Hence, this petition.

7. The petitioners are aggrieved only with respect of the deletion of Issue No.1 and not with respect to recasting of the issue on the question of limitation.

8. It is pertinent to note, that there was a previous suit i.e. Special Civil Suit No.340/2006 as against respondent No.1 filed by the respondent Nos. 2 and 3 with respect to the suit property i.e. as respondent No.1 had failed to execute the sale deed pursuant to the Agreements to sell executed on 13.9.2003 and 20.10.2003. The said suit was decreed in favour of respondent Nos. 2 and 3 on the basis of the Agreements to sell dated 13.9.2003 and 22.10.2003 (Visar pavti/Bharana Pavati). It is not in dispute that the respondent No.1 has filed an appeal against the said decree passed in favour of respondent Nos. 2 and 3 and the same is pending before the Appellate Court. The suit being Special Civil Suit No. 58/2014 is filed by the petitioners on the basis of the agreements to sell dated 13.9.2003 and 22.10.2003 contending that they have 1/5th share in the suit property i.e. agreements to sell executed in favour of respondent Nos. 2 and 3. This is the case of the petitioners-original plaintiffs and is pleaded in the plaint. Pursuant thereto, the Trial Court rightly framed the Issue No.1 as reproduced herein above in Para-5. The said issue is necessary in view of the averments made by

the petitioners in the plaint and goes to the root of the case. Learned Judge has ignored the said fact and has struck off the said issue framed under Exh.26.

9. Considering the aforesaid, the impugned order dated 4.7.2018 passed by the learned 6th Joint Civil Judge, S.D. Nashik, only to the extent that it deletes Issue No.1 framed below Exh.26 stands quashed and set aside.

10. Petition is disposed off.

11. Parties to act on an authenticated copy of this order.

REVATI MOHITE DERE, J.