

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.10701 OF 2022

Latif Karim Sahab Shaikh

Age : 61 years, Occu : Labour,

R/o. Mandai Peth, Momin Galli, Paranda,

Tq. Paranda, Dist. Osmanabad

.. Petitioner

Versus

1. Md. Yusuf Karimsahab Shaikh
Age : 78 years, Occu : Retired Teacher & Agriculture,
R/o. Bhotra Road, Paranda,
Tq. Paranda, Dist. Osmanabad.
2. Rashid Karim Sahab Shaikh
Age : 71 years, Occu : Private Service,
R/o. Bhotra Road, Paranda,
Tq. Paranda, Dist. Osmanabad.
At present R/o. Pune.
3. Ajij Karimsahab Shaikh
Age : 65 years, Occ : Driver,
R/o. Nanded, CIDCO, Near LIC Office,
Tq. & Dist. Nanded
4. Bismillabi w/o. Chandsahab Pathan
Age : 81 years, Occu : Household,
R/o. Near Zilla Parishad School, Paranda,
Tq. Paranda, Dist. Osmanabad
5. Noorjaha w/o. Jabbar Pathan
Age : 69 years, Occu : household,
R/o. Momin Galli, Paranda,
Tq. Paranda, Dist. Osmanabad
6. Afsar w/o. Umar Hamshan
Age : 73 years, Occu : Household,
R/o. Devnar Gawandi, Shivaji Nagar, Mumbai

7. Madina w/o. Khaja Pathan
Age : 65 years, Occu : Household,
R/o. Momin Galli, Paranda,
Tq. Paranda, Dist. Osmanabad. .. Respondents

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Advocate for Petitioner : Mr. S.G. Chapalgaonkar
Advocate for Respondent Nos.1 to 3 : Mr. Shrikrashna B. Solanke

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CORAM : SANDEEP V. MARNE, J.

DATE : 15-11-2022

ORAL JUDGMENT :

. Rule. Rule is made returnable forthwith.
Mr. Shrikrashna B. Solanke, learned counsel waives service for respondent nos.1 to 3. At the joint request of the parties, heard finally at the stage of admission.

2. By this petition, petitioner has challenged the order dated 09.06.2022 passed by the Adhoc District Judge-2, Bhoom thereby rejecting his application at Exh.23 in R.C.A. No. 63 of 2019 filed under the provisions of Order-41, Rule-25 of the Code of Civil Procedure (hereinafter referred to as the 'CPC') for framing of issue relating to limitation.

3. Considering the narrow controversy involved in the present petition, it is not necessary to narrate the detailed facts leading to the filing of the suit. Suffice it to state that suit was

instituted by respondents herein for partition of the house property. The defendant (petitioner herein) filed his written-statement raising various defences. One of the defences raised by the defendant was that the suit was barred by limitation. Despite such plea of limitation being raised, apparently issue with regard to limitation was not framed by the trial Court which proceeded to decree the suit by its judgment and order dated 25.09.2019. Petitioner has filed appeal bearing RCA No.63 of 2019 challenging the judgment and decree passed by the trial Court. He moved application (Exh.23) under Order-41, Rule-25 of the CPC for framing additional issue of limitation on the ground that specific pleadings about suit being barred by limitation were raised in the written-statement. The application was opposed by respondents. The District Court has proceeded to reject the application by order dated 09.06.2022.

4. Mr. Chapalgaonkar, the learned Counsel for petitioner submits that the scheme of the provision of the Order-41, Rule-25 of the CPC is such that the Appellate Court, upon being satisfied that the trial Court has omitted to frame an issue, the Appellate Court itself can frame an issue and refer the same to the trial Court with a direction to take additional evidence, if required. He further submits

that the trial Court is then expected to conduct trial of such additional issue and shall return the evidence along with its finding on the additional issue to the Appellate Court. Mr. Chapalgaonkar then refers to the provisions of the Order-41, Rule-26 of the CPC to contend that once the evidence and finding on additional issue is received from the trial Court, the party who is aggrieved by such finding is entitled to file a memorandum of objection to such finding before the Appellate Court. Mr. Chapalgaonkar therefore submits that the Appellate Court has erred in rejecting the application on the ground that the parties cannot insist for framing of additional issue before the Appellate Court in absence of the Appellate Court coming to a conclusion about omission on the part of the lower Court. Mr. Chapalgaonkar further submits that the issue of limitation goes to the root of the matter and that therefore the Appellate Court ought to have allowed the application.

5. Per contra, Mr. Solanke, the learned counsel appearing for respondents opposes the petition and supports the order passed by the Appellate Court. Inviting my attention to the findings recorded in the para-7 of the order, Mr. Solanke submits that despite having repeated opportunities before the trial Court, petitioner failed

to make any application to the trial Court for framing of additional issue of limitation. He submits that the objection as to the limitation was taken in a casual manner in the written-statement and same was never pressed before the trial Court. Mr. Solanke further submits that the application for framing of additional issue was filed only when the appeal was taken up for final hearing so to prolong the hearing as interim order of stay to the operation of the decree is running in his favour. In support of his contention, Mr. Solanke relies upon decision of this Court in **Ramdas and Ors vs. Kalawati and Ors.** MANU/MH/0505/21.

6. After hearing the learned counsel for the parties, it is apparent that the objection as to the limitation was specifically raised in para nos.1 and 4 of the written-statement filed by the original defendant / petitioner. It is also apparent that the trial Court omitted to frame issue as to limitation despite the same being raised in the written-statement. True it is that the original defendant / petitioner never made any attempt before trial Court for framing of issue with regard to limitation and possibly did not even lead any evidence for advancing any arguments with regard to limitation. The application for framing of additional issue with regard to limitation came to be filed only on 23.03.2022 in appeal which has been pending since the

year 2015. The Appellate Court has already observed that the appeal had been fixed for final hearing with the consent of advocates of both the parties. The Appellate Court has accused petitioner of filing the application for framing of additional issue with an intention to delay decision of the appeal.

7. Though in ordinary circumstances petitioner's conduct has been such that this Court would be justified in interfering in the order passed by the District Court, however the findings recorded by the District Court in para no.6 of its order do not appear to depict correct position of law with regard to the provisions of Order-41, Rules-25 and 26. From the findings recorded in para-6 of the order, it appears that the District Court was under an impression that satisfaction as omission on the part of the trial Court to frame an issue can be reached only when the appeal is taken up for final hearing. In short, the District Court has presumed that such a satisfaction cannot be reached before the appeal is taken up for final hearing. Another error which appears to have crept in para-6 of the order of the District Court is that it has recorded a finding as if the parties cannot file an application for insisting framing of an additional issue.

8. To examine the correctness of the findings recorded by the District Court in para-6 of its order, it would be necessary to reproduce the provisions of Rules-25 and 26 of the Order-41, which read thus:

‘25. Where Appellate Court may frame issues and refer them for trial to Court whose decree appealed from.-

Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, or to determine any question of fact, which appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall return the evidence to the Appellate Court together with its findings thereon and the reasons therefor [within such time as may be fixed by the Appellate Court or extended by it from time to time].

26. Findings and evidence to be put on record.

Objections to finding. - (1) Such evidence and findings shall form part of the record in the suit; and either party may, within a time to be fixed by the Appellate Court, present a memorandum of objections to any finding.

(2) **Determination of appeal.**- After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall proceed to determine the appeal.’

9. From the plain reading of the provisions of Rule-25 of Order-41, it is clear that there is no specific prohibition on the Appellate Court from framing issues, if necessary, and refer the same for trial to the Court from whose decree the appeal is preferred, before the appeal is taken up for final hearing. Rule-25 does not

specifically provide that the satisfaction as to omission on the part of the trial Court to frame any issue can be reached only after the appeal is taken up for hearing. In fact, as rightly submitted by Mr. Chapalgaonkar the scheme of Rules-25 and 26 is such that the Appellate Court, upon being satisfied that there has been an omission on the part of the trial Court to frame any issue, is required to frame such an additional issue and remit the matter to the trial Court for recording of evidence, if necessary and a finding on such additional issue. A party aggrieved by such finding has a right to file memorandum of objection against that finding in pending appeal before the Appellate Court. With this scheme of the provisions of Rules-25 and 26, it is difficult to accept that the satisfaction as to omission on the part of trial court to frame an additional issue can be reached only during course of final hearing of the appeal or only after it is heard. In fact if such an interpretation is given to the provisions of Rules-25 and 26, it would prolong hearing of the appeal. The appeal will have to be completely heard and after completion of hearing of the appeal, if the Appellate Court comes to a conclusion that there has been an omission on the part of the trial Court to frame any issue, the Appellate Court, instead of pronouncing its judgment, will have to first frame an additional issue and then remit the matter to the trial Court for evidence and for recording a

finding thereon. Though in a given case, the Appellate Court can reach such a satisfaction after hearing of appeal also, it cannot be said that such a satisfaction can never be reached before the appeal is taken up for final hearing.

10. The finding of the District Court that a party cannot insist on framing of an additional issue also appears to be erroneous. In my opinion, it would be always open to a party to file or move an appropriate application for inviting attention of the Appellate Court to the fact that there has been an omission on the part of the trial court to frame additional issue based on the pleadings filed before it. In the present case, there was a specific pleading with regard to suit being barred by limitation and admittedly no issue with regard to limitation was framed by the trial Court. In such circumstances, in my opinion, the appellant / petitioner cannot be blamed for filing application under Order-41, Rule 25 of the CPC and bring this factum to the notice of the Appellate Court. By doing so, valuable time of the Appellate Court is saved as the Appellate Court would be in a position to have evidence and findings on such additional issue before the appeal is taken up for final hearing.

11. Coming to the issue of conduct of petitioner, Mr. Solanke is justified in submitting that petitioner had repeated opportunities of

moving the trial Court for framing of the additional issues. The appeal has been pending since the year 2015 and the application appears to have been moved only on 22.03.2022 when the appeal was to be taken up for final hearing. In that view of the matter, ends of justice would meet if petitioner is saddled with costs for his conduct.

12. What remains now to deal with the judgment in **Ramdas** (*supra*) relied upon by Mr. Solanke. After having gone through the judgment, I am of the view that the same has no application to the facts of this case. In that judgment, the Appellate Court had remanded the suit for effecting amendments to the pleadings and to adduce evidence in support of the amendments effected in the plaint. The direction for framing of additional issues was in the light of the amendment that was directed to be effected in the pleading before the trial Court. The issue in **Ramdas** (*supra*) is thus entirely different and the same has no application to the present case. I therefore proceed to pass the following order.

ORDER

- (i) The order dated 09.06.2022 passed by Adhoc District Judge - 2, Bhoom on application below Exh.23 is set aside.
- (ii) The application at Exh.23 filed by the appellant /

petitioner stands allowed in terms of the prayers made therein.

(iii) The Appellate Court shall frame an additional issue with regard to limitation within a period of four weeks and remit the matter to the trial Court for recording of evidence, if required, on the issue of limitation and for further recording its finding on that issue. The Trial Court shall do so within a period of three months from the date of receipt of the order of remand so as to prevent any further delay in the matter.

(iv) Upon receipt of evidence, if any, along with finding of the trial Court on the additional issue of limitation, the Appellate Court shall make an endeavour to hear and decide the appeal as expeditiously as possible.

(v) Petitioner to pay costs of Rs.10,000/- to respondents within a period of four weeks from today.

13. Writ petition is accordingly allowed. Rule is made absolute.

(SANDEEP V. MARNE, J.)