

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

**WRIT PETITION NO.3978 OF 2023
WITH WRIT PETITION NO.2328 OF 2023**

**PRASHANT CHINDHU GOSAVI
VERSUS
GANESH CHINDHU GOSAVI AND OTHERS**

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Advocate for Petitioner : Mr. Rushikesh P. Totala
Advocate for Respondent No.1 : Mr. V.R. Dhorde
Advocate for Respondent No.2 : Mr. Deelip Patil Bankar, Advocate
h/f Mr. A. D. Patil
Advocate for Respondent No.5 : Mr. A.P. Bhandari

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CORAM : NITIN B. SURYAWANSHI, J.

DATE : 07th AUGUST, 2023

PER COURT :

1. Since both these petitions raise similar question of law and facts, they were heard together and are being decided by this common order.
2. In Writ Petition No.3978/2023, petitioner/defendant No.1 has challenged the order dated 02/02/2023, passed by learned Joint Civil Judge, Junior Division, Pachora, below Exhibit- 234 in Regular Civil Suit No.09/2009. In Writ Petition No.2328/2023, petitioner/defendant No.5 is challenging orders dated 02/02/2023, passed by learned Joint Civil Judge, Junior Division, Pachora, below Exhibits- 234 and 235, in the same suit. For the sake of convenience facts in Writ Petition No.3978/2023 are taken into consideration.

3. Plaintiff/respondent No.1 has filed the suit for partition and permanent injunction, claiming 1/4th share in the suit property. Defendants appeared and resisted the claim by filing written statement. Trial Court framed issues at Exhibit-47 as follows:

- "1. Does the plaintiff prove that he has right of 1/4th share in the suit property?
2. Is the plaintiff entitled for partition and separate possession?
3. Is the plaintiff entitled for mense profit?
4. What order and decree?"

Thereafter, on 22/11/2021, additional issue is framed as follows:

- "5. Whether defendant prove that the suit properties were already partitioned and accordingly entry No.40 was executed on 27/10/1976?"

4. Petitioner/defendant No.1, thereafter filed application Exhibit-234 for framing following additional issues,

- "Whether plaintiff proves that present suit filed by him is well within time?" and
"Whether plaintiff proves that he filed suit on sufficient stamp paper?".

5. By filing application Exhibit-235, defendant No.5 prayed for return of the plaint as the correct valuation of suit exceeds jurisdiction of the Trial Court. Plaintiff opposed both these applications, by filing detail say. By the impugned order, Trial Court has rejected both the applications. Hence the present petitions.

6. Heard learned advocate for petitioner, learned advocate

for respondent No.1, learned advocate for respondent No.2 and learned advocate for respondent No.5. Perused the writ petition memos, annexures thereto, the impugned orders, affidavit-in-reply filed by respondent No.1 and the citations relied upon by the learned advocates for respective parties.

7. Perusal of the additional written statement shows that partition of the suit property in terms of Section 85 of the Maharashtra Land Revenue Code, 1966, has already taken place in the year 1976 and accordingly names of plaintiff and defendants were mutated to the suit property. Since plaintiff or defendants have not challenged the partition on attaining age of majority, within the period of limitation, the suit is barred by limitation and the same is liable to be dismissed. This averment is ignored by the Trial Court while rejecting application Exhibit-234.

8. Trial Court has held that in additional issue No.5, contention of defendant in respect of limitation is already covered. The said finding is erroneous as there is no reference of limitation in the additional issue No.5. Trial Court while rejecting application Exhibit-234 has ignored settled legal position that issue of limitation being legal issue, can be raised at any stage of proceedings.

9. Taking into consideration pleadings of the parties and the facts of the present case, this Court is of the opinion that it is necessary to frame issue of limitation.

10. Application Exhibit-235 is not pressed by learned advocate for petitioner in view of the order passed by this Court on 27/02/2023 in Writ Petition No.2328/2023.

11. In the result, following order:-

ORDER

- (I) Writ Petition No.3978/2023 is allowed.
- (II) Impugned order dated 02/02/2023, passed by learned Joint Civil Judge, Junior Division, Pachora, below Exhibit-234 in Regular Civil Suit No.09/2009, is hereby quashed and set aside. Application Exhibit-234 is allowed to the extent of framing of issue of limitation.
- (III) Trial Court shall frame issue of limitation within a period of two weeks from the date of receipt of writ of this order. Hearing of the suit is expedited.
- (IV) Writ Petition No.2328/2023 is disposed of as not pressed.

(NITIN B. SURYAWANSHI, J.)