

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

Writ Petition No.3013 of 2022

Shri Ashok S/O Madhukar Zoting And Others

Vs

Gitabai Uttamrao Zoting And Others

Office Notes, Office Memoranda of
Coram, appearances, Court's Orders
or directions and Registrar's order

Court's or Judge's Order

Shri K.B. Zinjarde, Advocate for the Petitioners

CORAM : ANIL S. KILOR, J.

DATED : 10th April 2023

1. Heard.

2. In this petition, the order dated 10.12.2021 passed by Civil Judge Junior Division, Ralegaon, partly allowing the application Exh. 60 for framing of additional issues, is under challenge to the extent that the learned trial Court refused to frame additional issue Nos.5 and 5A, which read thus:

“6. ...

“5. Whether the present plaintiffs were required to get them transposed as plaintiff under order 23 Rule 1A of C.P.C. in Rcs. no.114 of 1984 ?

5-A. If yes what is the effect on present suit ? ...”

3. The learned counsel for the petitioners submits that in view of paragraph 8 of the application Exh.60, the petitioners sought to frame additional issues Nos.5 and 5A. The paragraph 8 of the application Exh.60 reads thus:

“8. It is submitted that from the above defendants in their W.S. in para 12, 19, 20, 21, 23, 24 and 25 have made the following pleading and other pleadings as pleaded in W.S.:-

“Reply as to paras 6 and 7 of plaint: - The pleadings of para 6 in respect of filing of suit No.114 of 1984 and the compromise is concerned, the same is matter of record and needs no reply, but it is denied that the said suit was filed by defendant No.4, the said suit was filed by Damodar s/o Ganpatrao. It is further submitted that the defendants No.2 and 3 had filed their written statement in that suit and in that W.S. they had submitted all facts as to how the Gangubai became owner of suit land and how in her absolute right of ownership she sold the suit lands to defendants No.2 and 3 by registered sale deeds. It is also submitted that all the pleadings of Damodar in that suit were firmly denied by defendant No.2 and 3. It was also denied that any of the heirs of deceased Ganpatrao is having any share in suit property. It was also claimed in that W.S. that Gangubai was absolute owner of suit field and in her such right she executed the sale deeds of suit lands in favour of present defendants No.2 and 3 and thereby they have become absolute owner suit lands. Therefore, it submitted that the pleadings made by Damodar in that suit cannot be made applicable on defendants No.2 and 3 in this suit and in any other proceedings as they are already denied in that suit itself and Damodar did not chose to contest that suit. It is further submitted that the Learned District Judge in para 4 of the judgment of Misc. Civil Appeal No.2 of 1993 has mentioned that “It appears that the suit was contested by all the defendants”. It is also undisputed that the present plaintiff No.1 have not challenged the above observation of Learned District Court and hence the same has attained the finality and hence the same is binding on plaintiff No.1 and creating a res-judicata against plaintiffNo.1. It is also submitted that the present plaintiff No.1 was entitle to appear in that suit in her own capacity and also as guardian of present plaintiffs No.2 to 6 as they were minor at that time but the present plaintiff No.1 failed to exercised her

such right and hence the Nazir of Civil Court Kelapur was appointed as guardian of present plaintiffs No.2 to 6 in that suit. It is submitted that as the present plaintiff No.1 was contesting party in that suit, she was having all right to submit her written statement challenging the claim of present defendants No.2 and 3 by filing her own separate written statement as in a suit for partition every plaintiff and defendant can transpose himself as plaintiff or defendants. It is admitted that no such written statement was filed by present plaintiff No.1 challenging the claim of present defendants No.2 and 3 by making an application for transposition of them as plaintiffs and hence the same has remained in that suit as unchallenged and therefore, now the present plaintiff No.1 is not entitled to challenged the same by saying the same as false and concocted because the same is creating an estoppels against her for want of timely action and behavior. It is firmly denied that present plaintiffs were not having any opportunity to take appropriate action in that suit. In this connection it submitted that the Hon'ble High Court in judgment dated 7/11/2006 of W.P. No.569 of 2005 in para 3 has held that "The petitioner could have approached the court by seeking transposition as a plaintiff and such course would have been permissible, since in partition suit every person having interest in the property can seek partition and therefore, can transpose as a plaintiff. ..."

4. The learned trial Court, while rejecting the application Exh.60, to the extent of issue Nos.5 and 5A, has observed thus:

"6. ... The above proposed issues are not happily worded. The defendant no.1 and 2 (i.e.) defendant no.2 & 3 in instant suit) in said previous suit have not raised any such transposition of parties. Therefore, it is improper to raise any such objection in instant suit that too in respect of the previous suit. It is not expected to law to frame and decide any presumptive issue regarding dispute in previous suit and to decide its effect on instant suit. The vague issues suggested in a

mechanical way, can not be framed. The above prayed issue is not necessary to resolve real controversy in dispute. Instead it will create complications and ambiguity. It is settled law that, in the suit of partition the plaintiffs and defendants are standing on same footing.”

5. After going through the reasons recorded by the learned trial Court in the order below Exh.60 and the application Exh.60, more particularly paragraph 8, I am of the opinion that the contentions raised in paragraph 8 of Exh.60 to justify framing of issue Nos.5 and 5A, the said argument is otherwise also available to the petitioners and there is no need to frame issue Nos.5 and 5A for the said purpose. The learned trial Court has rightly observed that the said issues are in respect of earlier RCS No.114 of 1984 which was decided long back.

6. In the circumstances, as the legal argument on the said issues is available to be made by the petitioners, for that purpose, there is no need to frame additional issues and accordingly, the learned trial Court has rightly rejected the application Exh.60. Hence, the writ petition is **dismissed**.

[ANIL S. KILOR, J.]