

MHGA010003332016



Exhibit No.1

IN THE COURT OF PRINCIPAL DISTRICT JUDGE, GADCHIROLI
(Presided over by U.B. Shukla)

Regular Civil Appeal No.28/2016

Smt. Sitadevi Harivansha Bhattad,
Aged about 70 years, Occ. : Household,
R/o.Kurkheda, Tahsil : Kurkheda,
District : Gadchiroli

.. Appellant
(Org. Defendant)

..versus..

- 1] **Shewantabai w/o Kachru Khobragade,**
Aged about 77 years, Occ.: Household,
R/o.Kurkheda, Tahsil : Kurkheda,
District : Gadchiroli
- 2] **Suryabhan Kachru Khobragade,**
Aged about 59 years, Occ.: labour,
R/o.Kurkheda, Tahsil : Kurkheda,
District : Gadchiroli
Presently R/o. Gongaon, Tahsil
and District : Gadchiroli
- 3] **Dayaram Kachruji Khobragade,**
Aged about 57 years, Occ.: Labour,
R/o.Kurkheda, Tahsil : Kurkheda,
District : Gadchiroli

- 4] **Jijabai d/o Kachruji Khobragade,**
Aged about 57 years, Occ.: Household,
R/o.Azad Ward, Kurkheda, Tah.: Kurkheda,
District : Gadchiroli
- 5] **Mangala d/o Kachruji Khobragade,**
Aged about 55 years, Occ.: Service,
R/o.Kurkheda, Tahsil : Kurkheda,
District : Gadchiroli
Presently R/o. Anandnagar, Semana
Road, Complex, Gadchiroli,
Tahsil and District : Gadchiroli .. **Respondents**
(Org. Plaintiffs)

Shri P.C. Khajanchi, Learned Advocate for the Appellants
Shri B.D. Uke, Learned Advocate for the Respondents

**APPEAL UNDER SECTION 96 OF THE CODE OF CIVIL
PROCEDURE**

O R D E R (Below Exh.1)

(Delivered on this 21st day of December 2022)

1] This is an appeal filed under Section 96 of the Code of Civil Procedure challenging the judgment and decree passed by the learned Civil Judge Junior Division, Kurkheda in Regular Civil Suit No.16/2008 dated 26.9.2014 by the original defendant.

2] When this appeal came up for hearing, this Court passed order below Exh.1 on 10th October 2017 framing specific two issues and remanding the matter to the Trial Court for

trying the said issues and record findings thereon. The said order for the purpose of convenience is reproduced as follows :-

1] The present appeal is preferred under Section 96 of the Civil Procedure Code against the judgment and decree passed by the learned Civil Judge, Jr.Dn. Kurkheda in R.C.S.no. 16/2008, dated 26-09-2014 by defeated defendant.

2] The plaintiffs have filed a suit for declaration and permanent injunction that the sale deed dated 11-8-1980 is null, void and not binding on them and for issue of permanent injunction from obstructing their possession over the suit fields.

3] The defendant has also filed counter claim for the possession of suit property as well as for the damages.

4] The case of the plaintiff, in brief, is that the suit pertains to the plot no.162 arising out of Gaothan Sheet no. 5, measuring 157-47 sq.meters of mouza Kurkheda, which is referred to as the "suit property" hereinafter. The suit property was owned by Kacharu Khobragade, the husband of plaintiff no. 1 and father of plaintiff no. 2 and 3. After his death, the name of plaintiff no.1 to 3 and one Chandrabhan Khobragade were mutated in the record of right. Chandrabhan Khobragade was died on 15-7-1992. However, the record is not corrected. Hence, his name is recorded in record of right. Since the plaintiff no. 2 was small at the time of death of Kacharu, hence, his name was also not inserted in record of right.

5] Defendant runs the grocery shop at Kurkheda. He has no concern with the suit property. They learnt from the notice of Advocate Shri K.S. Akhade, dated 31-12-2001 that the suit property is purchased by the defendant on registered sale deed dated 18-08-1980. The said notice was replied on 9-1-

2002. The suit property was nowhere sold by anybody to defendant no. 2 any way. Since 1980 the said transaction was kept secret nor any record of right is corrected. Since the said transaction is illegal, it is not binding on them.

6] The defendant resisted the suit by filing written statement Exh.38 and denied all the adverse allegations made against her. She has denied the ownership of plaintiff over the suit property. It is her specific defence that she is residing at Kurkheda with her husband since last 40 years. Her husband died on 9-1-2003. The legal-heirs of Kacharu i.e. plaintiff no. 1 and 2 and Chandrabhan were inserted in record of right and the said heirs have executed registered sale deed on 11-8-1980 in her favour and the possession was also given to her. She was keeping the bricks, stones on the suit property and thereby confirmed her ownership and possession. She got the suit land measured on 19-9-1999 and confirmed the boundaries. Her name was also mutated in Village Panchayat record and she is paying the taxes thereof. Her application for correction of the record of right dated 24-12-2001 and 27-12-2001 are pending before the T.I.L.R. She has applied for the permission of construction with Village Panchayat, Kurkheda on 18-1-2002 on the suit plot and it was obtained accordingly on 5-2-2002. She has brought the construction material on the plot, however, plaintiff no. 1 and her daughter Jija broke open the lock of the gate and deliberately erected the hut and started residing there. The report of the incident was lodged. In her counter claim she has claimed the possession from the plaintiff along with mesne profit.

7] After going through the plaint as well as written statement of the defendant as well as reply to the counter claim, it reveals that the issue of limitation was raised.

8] The learned counsel Shri Borawar for the

applicant has vehemently argued that though the limitation issue was raised, the learned court of first instance ignored to frame the said issue. Therefore, the issue of limitation needs to be framed.

9] Perusal of the impugned judgment and decree reveals that the issue as regards to the limitation have been omitted to frame which were essential to the right decision of the suit on merit. The issue of limitation is a mixed question of facts and law and that goes to the root of the case. Therefore, this court is of the view that the issues to that regard is necessary. Therefore, the issues are framed as below :-

- 1] Does defendant prove that the suit of the plaintiff is barred by limitation?
- 2] Do plaintiffs prove that claim of the possession of defendant is barred by limitation?

10] In view of the framing of the above issues, these issues needs to be referred to the court of first instance for trial with liberty to both the parties to take the additional evidence if required. Hence, in exercise of the powers under Order 41 Rule 25 of Code of Civil Procedure, the following order is passed.

ORDER

- 1] The Court of first instance is directed to try the issues framed by this court with liberty to both the parties to lead the evidence if required.
- 2] After trying the above issues, the learned trial court is directed to return the evidence to this court with its findings thereon and reasons therefor within three months from the receipt of this order.
- 3] R & P be sent to the court of first instance for the purpose of the trial of the issues framed by this court.
- 4] The court of first instance after complying with the directions to send the R & P back to this court.

5] Till the receipt of the findings of the above issues, the present appeal is postponed.

Gadchiroli.
Date: 10-10-2017

Sd/-
(**S.G. Mehare**)
Principal District Judge,
Gadchiroli.

3] After remand of the matter, the learned Civil Judge Junior Division, Kurkheda recorded findings with reasons on the issues framed by this Court and returned the record and proceedings. The learned Trial Judge answered the additional issue no.1 framed by this Court in the affirmative holding that the suit is barred by limitation and further negating that the claim of possession of the defendant is barred by limitation. While the matter was remanded to the Trial Court for recording its findings on the newly framed issues, the defendant preferred an application (Exh.231) seeking amendment in the written statement. The said application was preferred on 11.1.2018. The said application however was rejected by the learned Trial Judge by passing order below Exh.231 which is reproduced as follows :-

1. This is an application under order VI rule 17 of Code of Civil Procedure for amendment in Written Statement.
2. Perused the application and say thereon. Heard learned Advocate Shri G M Nagamoti for Defendant and learned Adv. Shri B.D. Uike for the plaintiffs.
3. The advocate for the defendant submitted that the

defendant has filed her written statement vide Exh.38 and stated that the suit is barred by limitation. But this court has not framed the issue on the point of limitation and in the appeal the Hon'ble Principal District Judge has framed the issues on the point of limitation and remand the matter for trying the newly framed issues with liberty to both the parties to lead the evidence if any. The defendant for proving the newly framed issues wants to amend her written statement by adding the proposed amendment. Hence, filed the present application.

4. The advocate for plaintiffs denied the proposed amendment and strongly opposed the present application and submitted that the proposed amendment is beyond the scope of the direction of Hon'ble Appellate court. He further submitted that it also changes the nature of the suit as demand for partition has no connection in the question of limitation and it is entirely new prayer beyond the scope of the matter for which it is remanded. The proposed amendment is beyond the jurisdiction vested on this court. He further submitted that all these prayers, in case, the defendant was entitled for as alleged ought to have been made before Hon'ble Appellate Court as the appeal is pending.

5. I have perused the record. It appears that the defendant has preferred the appeal vide R.C.A. No.28/2016 against the judgment and decree passed by this court in R.C.S. No.16/2008 dated 26.9.2014 in the court of Hon'ble Principal District Judge Gadchiroli and the Hon'ble Principal District Judge has framed the issues on the point of limitation in appeal. Accordingly the present matter is remanded by the Hon'ble Principal District Judge with specific direction to try the issues framed by the Hon'ble Principal District Judge with liberty to both the parties to lead the evidence if required and after trying the issues this Trial Court is also directed to return the evidence to the court of Hon'ble Principal District Judge with the findings thereon and reasons thereof. Therefore, the scope of this court is only limited. This court has only jurisdiction to decide the issues framed and as directed by the court of Hon'ble Principal District Judge. The appeal is pending in the court

of Hon'ble Principal District Judge, Gadchiroli. Therefore, the present application for amendment is beyond the scope of matter for which it is remanded and hence, it is liable to be rejected. Accordingly, I pass following order :

ORDER

“The present amendment application (Exh.231) is rejected.”

15.1.2018

sd/-
(M.R. Bagde)
Civil Judge (Jr.Dn.), Kurkheda

4] When the matter again came up for hearing before this Court, the appellant preferred an application under Rule 2 of Order 41 seeking leave to urge additional grounds of appeal. The additional grounds of appeal mentioned in the application are reproduced as follows :-

1. The learned Trial Court committed error of law and jurisdiction in rejecting the Application (Exh.231) for amendment.
2. The learned Trial Court out to have seen that Trial Court was in *seisin* of the whole suit, though the remand was for limited purpose and as such it was not denuded of jurisdiction to consider the application for amendment of pleadings.
3. When the remand is for trying issues and also for giving findings, it is implied that the Trial Court had to consider relevant facts and as such also to give opportunity to the parties to plead relevant material facts even by amending the pleadings.
4. In any event, the amendment to plead material facts relevant for decision on issues on limitation could not have been thrown out on the ground that it is beyond the scope of jurisdiction after remand.

5. The order below Exh.231 was otherwise erroneous and illegal.

5] The said application was allowed by this Court permitting leave to urge additional grounds. The appellant amended the appeal memo by adding grounds no.17 to 21 accordingly.

6] At the time of making final arguments again in the matter, the main bone of contention of the appellant is that after remand of the matter for deciding issue of limitation, the learned Trial Judge ought to have considered that the amendment sought was necessary for the purpose of deciding the issues framed by the Appellate Court and send back to the Trial Court for its decision on merits. It is submitted on behalf of the appellant that once the issues as to limitation are framed and the Trial Court is directed to allow the parties to lead evidence for decision on those specific issues, the direction of the Appellate Court included a direction that in case of any prayer for amendment in the pleading by the parties limited to the question on which the matter is remanded, such amendment should be allowed.

7] Learned Advocate for the respondents on the other hand urged that the judgment was not set-aside by the learned Appellate Court and the matter was remanded for the limited purpose of recording evidence on the point of limitation and

therefore the learned Trial Judge has rightly rejected the application of the defendant.

8] I have gone through the application (Exh.231) filed by the appellant/original defendant. The defendant has sought amendment in the written statement in order to make specific pleading as to how the suit is barred by limitation. As per the application, it is the contention of the appellant/defendant that the defendant is a lady residing in the remote village and she had lost her husband before filing of the written statement and therefore she could not give proper instructions for framing of the written statement and therefore the additional issues sought needs to be added to the written statement sympathetically. It is further contention of the defendant that the original suit was filed before the amendment in the Civil Procedure Code was effected and therefore the amendment in Rule 17 of Order 6 of the Civil Procedure Code would not get attracted to the present case.

9] After going through the order passed by this Court by which the matter was remanded to the Trial Court, it is clear that the whole exercise was done only with a view that the issue on bar of limitation which is vital to the decision of the dispute between the parties should be decided on merits by affording appropriate opportunity to both the parties. Though the eventuality of the parties applying for amendment in the pleading after its remand was not considered by this Court

while passing the order dated 10.10.2017, it can very well be considered on perusal of the order that the whole exercise was done since it was found essential for the right decision of the suit on merits. This Court has also specifically observed that the issue of limitation is mixed question of facts and law and that goes to the root of the case and therefore the remand of the matter was found necessary on framing of following to Issues :-

1]	Does defendant prove that the suit of the plaintiff is barred by limitation?
2]	Do plaintiffs prove that claim of the possession of defendant is barred by limitation?

10] This order though does not specifically mention that the parties may be permitted to amend the pleadings for deciding the above referred issues, such a direction is part of the order and it must be read as a part of order. Unfortunately, the learned Trial Judge while passing order below Exh.231 has taken a technical approach by observing that since the remand is only for the purpose of recording evidence, the Trial Court has only jurisdiction to decide the issues framed as ordered by this Court and the application seeking amendment in the pleadings was beyond scope of the remand. It is thus clear that the learned Trial Judge did not touch merits of the application filed by the defendant seeking amendment in the written

statement and has rejected the application on the technical ground. I feel that the purpose of deciding the issues framed by this Court for which the matter was remanded to the Trial Court it was implied in the order that for better answering of the issues, if the parties seek amendment in the pleadings it should be considered by the Court for the purpose of deciding the issues on merits finally.

11] The option before this Court is to remand the matter requiring the Trial Court to decide the application (Exh.231) on merits or decide the application (Exh.231) in this appeal itself and consider the consequences. I find that once this Court forms an opinion that the amendment is necessary, it is futile to require the Trial Court to consider the merits of the application rather than requiring the Trial Court to permit the amendment.

12] After going through the application (Exh.231), I find that the defendant intends to insert specific pleading so as to elaborate the claim as to bar of limitation. The amendment to the Code of Civil Procedure by the Amendment Act of 1999 is brought in the force from 1st July 2002. The original plaint was presented before the Trial Court on 27th March 2002 i.e. prior to coming into force of the Amendment Act 1999 to the Code of Civil Procedure. As such, technically the amendment provision of addition to the proviso (2) Rule 17 of Order 6 of the Code of Civil Procedure may not apply to the present case and on the date of filing of the suit since the original provisions of Code of

Civil Procedure were applicable it may be said that the amendment in Rule 17 may not have retrospective effect.

13] Apart from it, as per the general principles applicable to the law of amendment to the pleadings, the amendment to the pleadings can be allowed to either of the parties at any stage of the proceeding in such a manner and on such terms as may be just. All such amendments made as may be necessary for the purpose of determining the real questions in controversy between the parties. Even if the proviso added is considered the said proviso keeps a scope for considering the due diligence of the parties. As per the defendant, the husband of the defendant was not available when the written statement was drafted and the defendant lady was resident of remote village and there is substance in the submission that she could not be expected to be smart enough to give proper instructions on the history of the facts for the purpose of pleadings on bar of limitation. The amendment sought is not barred by any provisions of law. It will adversely affect the claim of the adversary. Once the Court finds that the issue of bar of limitation to the claim is vital for determining the real questions in controversy between the parties, it necessarily means that if the amendment be needed for that purpose, the parties should be permitted to make necessary amendments in the pleadings to bring clarity in the pleadings for the purpose of deciding the issue of bar of limitation. I therefore find that the order passed

by the learned Trial Judge in rejecting the application (Exh.231) is not just and proper and it is therefore desirable to set-aside the said order. As a consequence though unfortunate the matter needs to be remanded to the Trial Court for permitting the defendant to amend the written statement in terms of application (Exh.231). Hence, I proceed to pass following order.

O R D E R

- 1] The order passed below Exh.231 by the learned Civil Judge Junior Division, Kurkheda on 15.1.2018 in Regular Civil Suit no.16/2008 is hereby set-aside.
- 2] The application of the defendant dated 1.1.2018 seeking amendment in the written statement is allowed.
- 3] The Trial Court is directed to permit the amendment in the written statement in terms of the application (Exh.231) to the defendant.
- 4] The learned Trial Judge may also permit the plaintiffs to amend the pleadings if the plaintiffs desire to do so.
- 5] Upon amendment to the pleadings, the learned Trial Judge shall permit the parties to lead evidence on the specific issues framed in the order of this Court dated 10th October 2017.
- 6] After trying the above issues, the learned Trial Court to return the evidence to this Court with its findings thereon

and reasons therefor within a period of four months from receipt of this order.

- 7] Record and Proceedings be sent to the Trial Court for the purpose of the trial on the issues framed by this Court.
- 8] The Trial Court after complying with the directions shall send the record and proceedings back to this Court.
- 9] The parties are directed to remain present before the Trial Court on **24th January, 2023.**
- 10] Till receipt of the findings on above issues, the present appeal is kept in abeyance.
- 11] Inform the trial Court accordingly.
- 12] The R and P be sent back immediately to the Trial Court.
- 13] The order is dictated and pronounced in open Court.

Gadchiroli
Date: 21-12-2022

(U. B. Shukla)
Principal District Judge,
Gadchiroli