



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO. 14 OF 2023
WITH
CIVIL APPLICATION NO. 2263 OF 2023
IN AO/14/2023

BHAULAL RAMDAS PATIL (BARI) AND OTHERS
VERSUS
MATHURABAI BHASKAR BARI THR HER POWER OF
ATTORNEY HOLDER GOPAL BHASKAR BARI AND OTHERS

...
Advocate for Appellants : Mr. Girish S. Rane.
Advocate for Respondents : Mr. Bolkar Yogesh B.
...

CORAM : SHAILESH P. BRAHME, J.

RESERVED ON : 30.01.2026
PRONOUNCED ON : 06.02.2026

FINAL ORDER :

1. Taken up for final disposal with consent of the parties.
2. The appellants who are original defendants are questioning order of remand passed by Appellate Court in Regular Civil Appeal No.19 of 2017 for not impleading necessary parties to the suit and for not bringing all properties in common hotchpot.
3. Respondent is the original plaintiff who had filed

Regular Civil Suit No.113 of 2012 for partition and possession. A genealogy which is at running page No.12 of the paper book has not been disputed. Parties are stated to be members of undivided joint family. The grievance of the plaintiff is that his father Latakan has a share in the property on partition who is excluded.

4. Appellants/defendants contested suit on various counts. A specific plea has been raised regarding non-joinder of necessary parties and for not including Survey No.186/2 in the subject matter which is stated to have been allotted by Tanu Nago Bari to plaintiff's father Latakan. The said land is stated to have been further alienated to the third person on 06.09.1961. It is further pleaded that plaintiff and his father relinquished their share by mutation entries.

5. Both parties adduced oral and documentary evidence. Trial Court dismissed the suit vide judgment dated 11.04.2017. Being aggrieved Regular Civil Appeal No.19 of 2017 was preferred by the respondent/plaintiff. By impugned order, matter is remanded to the Trial Court to extend opportunity to parties.

6. Learned counsel for the appellants Mr. Girish Rane submits that order of remand is casual and patently illegal. It is further submitted that the respondents did not file any application before Lower Appellate Court either seeking addition of parties or bringing left out properties in common hotchpot. It is submitted that the Lower Appellate Court has ample power under Order 41 Rule 24 and 33 of Civil Procedure Code to decide the matter on merits.

7. The submissions of the appellants are repelled by learned counsel Mr. Bolkar. It is submitted that Appellate Court is justified in remanding the matter so as to extend opportunity to both sides. It is submitted that even the Appellate Court has suo motu powers directing to implead the necessary party. It is submitted that the purport of order of remand is to have effective adjudication of the controversy.

8. Both learned counsels advanced their submissions in pursuance of substantial questions of law framed by this Court which are as follows :

i) Whether the learned First Appellate Court is justified in allowing the appeal and remanding the matter without considering the aspect that the suit was dismissed on the

ground of non maintainability of the suit on account of non joinder of necessary parties and bringing all ancestral properties in the suit ?

ii) Whether the learned First Appellate Court is justified in passing the order of remand de-hors the provisions of Rule 23, 23-A and 25 of Order XLI of the C. P. C. and also when at nowhere the findings of the Trial Court are discussed, considered and held to be perverse or bad in law ?

9. In written statement, specific defence was taken regarding non-joinder of necessary parties and not bringing all the ancestral properties in common hotchpot. In pursuance of that Trial Court formulated issue Nos.3 and 4. The findings are recorded against the plaintiff for those issues which are evident from judgment of the Trial Court.

10. Respondents/plaintiffs was aware of the specific pleas raised by the appellants in written statement. Even issues to that effect are also framed, but no endeavour has been made by her to implead the necessary parties or to bring Survey No.186/2 in common hotchpot. No steps are taken to even implead the purchasers. In Appellate Court also no remedial measures are taken by the respondent/plaintiff. On the contrary, grounds of objection Nos.9 and 10 of the appeal

memo indicate that findings recorded to issue Nos.3 and 4 of the Trial Court are challenged.

11. Neither of the parties made any application to implead any person as a necessary party nor is there any submission by them that the evidence on record is inadequate to decide the controversy. It is not case that either of the parties is denied opportunity to lead evidence. In such situation, the order of remand is absolutely unwarranted. The reasons for remand are unsustainable.

12. The Appellate Court is deciding claim for partition and separate possession. The repercussions for not impleading necessary parties or not bringing all the properties in common hotchpot is settled by law. It could have exercised the jurisdiction under Order 41 Rule 24 and 33 of CPC. No case is made out that for effective adjudication of the controversy, the matter is required to be remitted to the Trial Court.

13. Learned counsel Mr. Bolkar has adverted my attention to Order 1 Rule 10 of CPC to buttress that the suit shall not be defeated by non-joinder of necessary parties. The powers of the Court provided by Rule 10 have also been pressed into

service. In the present case, none of the parties wanted to implead any person as a necessary party or to bring in common hotchpot a left out common ancestral property. In such a case, the Appellate Court should have decided the matters on merits.

14. Learned counsel Mr. Rane has relied on the judgment of five Judges Bench of the Supreme Court in ***Kanakarathanammal Vs. V. S. Loganatha Mudaliar and another; AIR 1965 Supreme Court 271***. It is apposite to refer following extract :

“14. We do not think there is any justification for allowing the appellant to amend her plaint by adding her brothers at this late stage. We have already noticed that the plea of non-joinder had been expressly taken by respondents 1 and 2 in the trial Court and a clear and specific issue had been framed in respect of this contention. While the suit was being tried, the appellant might have applied to the trial Court to add her brothers, but no such application was made. Even after the suit was dismissed by the trial Court on this ground, it does not appear that the appellant moved the High Court and prayed that she should be allowed to join her brothers even at the appellate stage, and so, the High Court had no occasion to consider the said point. The fact that the High Court came to the contrary conclusion, on the question of title does not matter, because if the appellant wanted to cure the infirmity in her plaint, she should have presented an application in that behalf at the hearing of the

appeal itself. In fact, no such application was made even to this Court until the appeal was allowed to stand over after it was heard. Under the circumstances, we do not think it would be possible for us to entertain the said application. In the result, the application for amendment is rejected.

15. *It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two, brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under s. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under O. 1 R. 9 of the Code of Civil Procedure no suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under O. 1 R. 10, sub-rule 2 direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by their mother, the present suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceeding with the suit on the basis*

that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In Naba Kumar Hazra & Anr. v. Radheshyam Mahish & Ors. AIR 1931 PC 229, the Privy Council had to deal with a similar situation, In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of O. 1 R. 9 of the Code. In rejecting the said prayer, Sir George Lowndes, who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

The above principles are still intact and aptly applied to the present case.

15. Further reliance is placed on the judgment of ***Kenchegowda (since Deceased) by Legal Representatives Vs. Siddegowda @ Motegowda ; (1994) 4 Supreme Court Cases 294.*** I have gone through paragraph No.16 but these principles can be made applicable when the Appellate Court will consider

the case on merits.

16. He has further cited following judgments which describe the scope of powers under Order 41 Rule 23-A of the Specific Relief Act.

- (a) *Balkrishna Dattatraya Bhutte and others Vs. Dattatraya Shankar Mohite and others ; 1997, BCI 53.*
- (b) *P. Purushottam Reddy and another Vs. M/s Pratap Steels Ltd.; AIR 2002 SC 771.*
- (c) *Ashwinkumar K. Patel Vs. Upendra J. Patel and others ; AIR 1999 SC 1125.*
- (d) *Vishnu Dashrath Chavan Vs. Pundalik Dashrath Chavan ; 2017 (5) Mh.L.J. 163.*

Following principles can be culled down from the above judgments :

- (i) The findings recorded by the Trial Court needs to be considered by the Appellate Court and if found necessary then only order of remand can be passed.
- (ii) The retrial of the matter can be considered in case some additional evidence is required to be

produced.

- (iii) No order of remand can be passed for the reasons that reasoning of the Trial Court in some aspect is found to be wrong.
- (iv) If the material is available before the Appellate Court it should decide the matter on merits.
- (v) Lastly, Appellate Court has to be circumspect in ordering the remand as unwarranted order of remand results in protraction of the litigation and that would cause injustice to the litigants.

17. Learned counsel Mr. Bolkar for the respondents has also cited following judgments on point of non-joinder of necessary parties.

- (a) *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and others ; (1992) 2 Supreme Court Cases 524.*
- (b) *State of Himachal Pradesh Vs. Milkhi Ram (Dead) by and others ; (2007) 15 Supreme Court Cases 750.*
- (c) *Richard Lee Vs. Girish Soni and another ; (2017) 3 Supreme Court Cases 194.*

- (d) *Jhabbar Singh (Deceased) Through Legal Heirs and others Vs. Jagtar Singh S/o Darshan Singh ; (2023) 14 Supreme Court Cases 199.*
- (e) *Pandurang Sitaram Pande and others Vs. Avinash Ramkrishna Pande and others ; (2016) 5 Bom CR 304.*
- (f) *Sumitra Anna Aware and others Vs. Anusaya Rajaram Aware and others ; 2012 (3) Mh.L.J. 649.*

18. The principles laid down by five Judges Bench in *Kanakarathanammal* (supra) would prevail. Those are not considered in the judgments of the Supreme Court cited above. But in the matter of *Pandurang Pande* (supra), learned Single Judge referred the judgment. But the distinguishing facts in that case is that the suit for partition was decreed partly albeit necessary parties were not joined. But, in Appellate Court the remedial measure was taken by filing application to join those persons as necessary parties. In those contexts, in paragraph Nos.12 to 17, the observations are recorded. The judgment is distinguishable on facts and it would not enure to the benefit of respondent.

19. In the matter of *Sumitra Aware* (supra) referred above the contents of paragraph Nos.10 to 17 indicate that stumbling

block of non-joining the sisters was removed by making specific application to implead them. In the case at hand no such steps are taken by the respondents. This judgment will not help the respondent.

20. Further reliance is placed on the judgment of ***R. Mahalakshmi Vs. A. V. Anantharaman and others ; (2009) 9 Supreme Court Cases 52.*** It shows that facts are distinguishable. No reference is made to five Judges Bench judgment rendered by the Supreme Court in the case of *Kanakarathanammal* (supra). In that case, initially the matter had reached to the Supreme Court and it was remanded to the Trial Court and after that remand again matter reached Supreme Court. This judgment also will not help the respondents.

21. Further, reliance is placed on the judgment of ***Hiralal Chhaburao Jawale Vs. Nandlal Chhaburao Jawale and others ; 2024 AIR OnLine 2024 Bom 1673.*** This judgment will not help the respondents because the Co-ordinate Bench did not consider five Judges Bench judgment in *Kanakarathanammal* (supra).

22. Respondents have also cited *J. Balaji Singh Vs. Diwakar Cole and others ; (2017) 14 Supreme Court Cases 207* and *Satnam Singh and another Vs. Malook Singh and others ; (2018) 11 Supreme Court Cases 798* on point of scope of Appellate Court in remanding the matter. In those cases, application under Order 41 Rule 27 was submitted and the remand was found necessary for bringing the additional evidence on record. The facts are distinguishable. The principles cannot be made applicable to the present case.

23. For the reasons stated above, I find that the substantial questions of law need to be answered in favour of the appellants and thus appeal succeeds. I, therefore, pass following order :

ORDER

- (i) Appeal from order is allowed.
- (ii) Impugned order passed in Regular Civil Appeal No.19 of 2017 is quashed and set aside.
- (iii) The Appellate Court shall decide appeal on its own merits expeditiously.

- (iv) Both parties shall appear before the Lower Appellate Court on 16.02.2026.
- (v) In view of disposal of first appeal, pending civil application does not survive. Civil application as such is disposed of.

(SHAILESH P. BRAHME, J.)

...

vmk/-