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

**CIVIL APPLICATION NO. 9610 OF 2008  
WITH  
CIVIL APPLICATION NO. 9611 OF 2008  
IN/WITH  
SECOND APPEAL NO. 869 OF 2006**

Godavaribai W/o Daulat Pawar  
age 36 years occupation household  
R/o Avhal Taluka Purna Dist. Parbhani

... APPLICANT.  
(Original plaintiff)

**VERSUS**

1. Bapurao S/o Tukaram Pawar,  
age 63 years occupation agriculture  
(Died), through legal representatives  
i.e. respondents No.2 to 4.
2. Gangadhar s/o Bapurao Pawar,  
age 33 years occupation agriculture  
R/o Avhai Taluka Purna Dist. Prabhani.
3. Achyut S/o Bapurao Pawar,  
age 28 years occupation and R/o as above.
4. Saraswatibai W/o Bapurao Pawar,  
age 53 years occupation & R/o as above.
5. Salubai D/o Bapurao Pawar,  
age 35 years occupation household  
R/o Avhai Taluka Purna Dist. Parbhani  
(Added as per order dated 04/04/2014)

...RESPONDENTS.

Mr S.G. Chapalgaonkar, Advocate for Applicant,

Mr S.B. Ghatol Patil , Advocate for respondents No. 2 to 4.

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**CORAM : N.W. SAMBRE, J.**

**DATE : 3<sup>rd</sup> July, 2017**

**ORAL ORDER**

This application is for seeking permission to amend the plaint for addition of party.

2. Respondent No.5 is added in this appeal being sister of husband of original plaintiff, vide order dated 4<sup>th</sup> April 2014. Said respondent no.5 is sought to be added as defendant no.5 to Regular Civil Suit No. 18/2000 for partition.

3. The application is objected by the learned Counsel for the respondents/original defendants on the ground that at this stage, the Court should not permit addition of party, particularly, in view of the fact that rights of the parties are already adjudicated and objection raised for non-joinder of necessary party, was within the knowledge of present applicant. Support is drawn from the Judgment of the Apex Court in the matter of **Kanakarathanammal Vs. V.S. Loganatha Mudaliar and another, reported in (1964) 6 SCR page 1**, paragraph 15 of which reads thus:

*“ 15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her*

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*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 [Section 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 Order. 1 Rule 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 Order 1 Rule 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 &***

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**Ors.(1)** *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 Order 1 Rule 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."*

4. At the outset, it is required to be noted that applicant in context of the suit, submitted a proposition that he should be permitted to be added as party at any stage of suit or appeal. According to him, same could be borne out of the provisions of the Code of Civil Procedure. Reliance is placed on the provision of Order I and Rule 10 (2) of the Code of Civil Procedure to that effect.

5. It is then to be noted that the suit for partition filed by the present appellant/applicant came to be decreed, wherein issue of non-joinder of

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necessary party i.e. defendant No.5, was raised, and answered in favour of the present appellant. In appeal, at the behest of defendants/respondents, the Appellate Court dismissed the suit on the ground that the same suffers from non-joinder of necessary party. As such, this second appeal.

6. The fact remains that the First Court has answered said issue in favour of appellant, whereas Appellate Court reversed the finding, and after filing of the Second Appeal, application is moved for adding defendant No.5 as respondent.

7. In the aforesaid backdrop, the right of Hindu Women, accrued by virtue of 1994 State Amendment to the ancestral property, is required to be appreciated. Apart from above, the suit being for partition and separate possession, the status of parties therein is of co-plaintiffs, who are claiming share. As such judgment in the matter of **Kanakarathanammal, (AIR 1`965 SC 271)**, cited supra, will be hardly any applicability.

8. Considering the aforesaid factual matrix, though the claim for amendment is opposed, in my opinion, the same needs to be allowed. Appellant/applicant is permitted to amend the plaint forthwith, subject to

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cost of Rs. 10,000/- (Rs. Ten thousand only), to be deposited before the Trial Court, within a period of three months from today.

9. In the aforesaid backdrop, the appeal is taken out for final disposal with consent of parties.

10. The Appellate Court reversed the judgment and decree of the Trial Court only on the count that one of the brothers was necessary party, who was not added as defendant to the suit, and as such, it was held by the Appellate Court that the suit is bad for non-joinder of necessary party. The said aspect being defect in the matter is already cured by adding sister of husband of appellant/applicant, namely, Salubai, as a party to the suit in question by virtue of Order 1 Rule 10 of the Civil Procedure Code, to that effect.

11. The aforesaid background prompts for remanding the matter, as claimed by learned Counsel for the appellant for deciding the suit afresh.

12. The learned Counsel for the respondents/defendants opposed the same on the ground that in an earlier round the appellant has already lost his claim.

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13. Having considered rival submissions, this Court having already permitted present appellant/plaintiff to amend the the suit and permitted addition of a party as defendant No.5 to the suit, the defect in the suit, as was noticed by the first Appellate Court, already stood cured. Once the said defect is cured by the appellant, in my opinion, the appellant, the widow, is entitled for re-establishing her right for partition of the suit property.

14. In view thereof, the judgments and decrees passed by the Civil Judge (J.D.), Purna, District Parbhani in Regular civil suit No. 18/2000, and by the I Ad hoc Additional District Judge, Parbhani, are hereby quashed and set aside.

15. The aforesaid suit stands restored to the file of the Court of learned Civil Judge (J.D.), Purna, before whom the parties to the appeal including newly added defendant No.5 undertake to appear on 7<sup>th</sup> of August 2017.

16. The Trial Court is expected to decide the same expeditiously, and in any case, within a period of one year from the date of appearance of the parties.

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17. It is further clarified that if the appellant/plaintiff fails to deposit cost within a period of three months from today, the application for amendment moved by the present appellant shall be considered to be rejected, as a consequences whereof the Second Appeal shall also be deemed to be dismissed, without further reference to the Court.

18. Costs deposited will be given to the defendants to the suit. this Court has not examined the merits of the matter.

19. In view of aforesaid backdrop, as Second Appeal No. 869/2006 is finally disposed of, Civil Application No. 9610/2008 and Civil Application No. 9611/2008 stand disposed of.

**( N.W. SAMBRE, J.)**

pjm