

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

SECOND APPEAL NO. 84 OF 2018

Dharma Motiram Chavan
Age: 54 years, Occu.: Service & Agri.
R/o. Khadaki Bk. Tal. Chalisgaon,
Dist. Jalgaon

**...Appellant
(Orig. Deft.)**

VERSUS

1. Adhar Motiram Chavan
Age: 60 years, Occu.-Agriculture & Service,
R/o. Khadaki Bk. Tal. Chalisgaon,
Dist. Jalgaon

...Orig. Plaintiff

2. Motiram Anna Chavan
(Deceased through LRs.)

3. Devkabai Dasharath Bhalerao
Age : 65 years, Occu.:Household,
R/o. C/o. Dasharath Baburao Bhalerao
Jail road, people's colony, Govnd Apartment
C-13, Nashik Road, Dist. Nashik

4. Guntabai Motiram Chavan
Deleted as per order below Exh.51

...Respondents

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Mr. A.G.Talhar h/f Mr.Chavan Pravin P., Advocate for Appellant;

Mr. P.B.Patil, Advocate for respondent no.1.

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CORAM: P.R. BORA, J.

DATE : 13/06/2018

ORAL JUDGMENT :

1. Heard finally with consent of the learned Counsel appearing for the parties.

2. Present respondent no.1 had filed Regular Civil Suit No.156/1993 seeking partition of the joint family property against his father and the step brother. In the aforesaid suit, a specific objection was raised by the present appellant that the suit was liable to be dismissed only on the count of non joinder of necessary parties. It was the contention of the appellant that mother of the original plaintiff was the necessary party to the suit before the trial Court and for non joining her as respondent, the suit filed seeking partition was liable to be dismissed. The trial Court though held that plaintiff is entitled to one fourth share in the suit property, ultimately dismissed the suit by upholding the objections raised by the present appellant as about non joinder of necessary party. Aggrieved by the judgment and decree passed by the trial Court, the present respondent no.1 preferred Civil Appeal No.67/1996 before the learned District Judge at Jalgaon. Learned District Judge, after hearing the parties and considering the evidence on record, and analyzing the legal provisions, set aside the judgment and decree passed by the Civil Court and allowed the appeal filed by the present respondent no.1 i.e. original plaintiff. Aggrieved thereby, respondent no.2 in the said appeal has preferred the present Second Appeal.

3. It was the contention of learned Counsel Shri Talhar that in view of Order I Rule 13 of Code of Civil Procedure, the trial Court was right in dismissing the suit filed by the plaintiff and the first appellate Court has wrongly invoked Rule 10(2) of the said Order I in setting aside the said judgment and decree. I am, however, not convinced with the argument so made. The first appellate Court in paragraph No.14, 15 and 16 has analyzed the position in context with the facts involved in the

present case. I deem it appropriate to reproduce the said paragraph hereinbelow:

"14. The suit is for partition and separate possession of the ancestral joint family properties and, therefore, for the just decision of the dispute between the parties and for settling all the questions involved in the suit, the Court has all the powers to strike out, or add, parties unless, of course, the suit itself is bad for non-joinder of necessary party. In a suit for partition, all the sharers are the interested parties and are essentially to be joined. In this regard, a useful reference can be made to the provisions of Order I Rule 10(2) of the Civil Procedure Code, which reads as under:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

It is clear that the plaintiff is entitled to a share in the property, but then, such a right of the plaintiff could not have been denied to him for the technical defect of non-joining of Guntabai as a party to suit. The learned Trial Court could well have exercised its powers under ORDER I Rule 10(2) of C.P.C. for settling the questions involved in the suit, by directing the plaintiff to join Guntabai as a party. I, therefore, hold that the learned Trial Court was in error in dismissing the suit for the non-joinder of Guntabai as a party. Point No.1 is accordingly answered in negative.

15. At the time the suit was dismissed and the appeal was filed, the parties as they were before the Trial Court, were all available. However, pending the appeal, the original defendant No.1/respondent No.1 died and because of his death, his legal representatives were brought on record in the form of his widow Guntabai and daughter Devkabai. Further, again, pending the appeal, Guntabai also died and her name was deleted since all her legal representatives were already available on record in the form of the plaintiff/appellant, the respondent No.2 Dharma Motiram and Devkabai W/o

Dasharath.

16. Because of these changes in the circumstances, all the parties are now available when this appeal is being decided. The position, as it stands on the date when the appeal is being decided, has to be considered, because appeal is a continuation of suit."

4. After having gone through the judgment of the learned first appellate Court, it does not appear to me that any error has been committed by the first appellate Court. In the circumstances, it does not appear to me that any interference is required to be made in the order impugned in the present appeal. Hence, Second Appeal (No.84/2018) is dismissed.

(P.R.BORA)
JUDGE

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AGP/84-18SA