

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

**922 APPEAL FROM ORDER NO.7 OF 2017  
WITH CA/832/2017 IN AO/7/2017**

- . Yuvraj s/o Sidramappa Birajdar  
Age: 49 years, Occu.: Agri.,  
R/o.Lohgaon, Tq.Tuljapur,  
Dist.Osmanabad. ..Appellant

VERSUS

1. Sidramappa s/o Pirappa Birajdar  
Died Through his LRs
- 1A. Kalawati s/o Suryakant Angdikar,  
Died Through her LR
- Shivanand s/o Suryakant Angdikar (Patil)  
Age: 55 years, Occu.: Agri.  
R/o.Kini-Bhangar, Tq.Akkalkot,  
Dist.Solapur.
- 1B. Shridevi w/o Mallinath Angdikar (Patil)  
Age: 60 years, Occu.: Household,  
R/o.: Kini-Bhangar, Tq.Akkalkot,  
Dist.Solapur.
- 1C. Indumati w/o. Gorakhnath Wagdare  
Age: 65 years, Occu.: Labour,  
R/o.Karjat-Gundga, Tq.Karjat,  
Dist.Raigad  
At.Present  
R/o.Gholasgaon, Tq.Akkalkot,  
Dist.Solapur.
- 1D. Mahadevi w/o. Gurupadappa Patil

Age: 55 years, Occu.: Household,  
R/o.Rodgi, Tq.Indi, Dist.Vaijapur,  
(State of Karnataka)

- 1E. Jagdevi w/o Virbassapa Nivargi  
Age: 64 years, Occu.: Household,  
R/o.Singadgaon, Tq.North Solapur,  
Dist.Solapur.
2. Shivshankar s/o Sidramappa Birajdar  
Age: 65 years, Occu.: Driver,  
R/o.: B & C Office, Sangola,  
Tq.Sangola, Dist.Solapur.
3. Basawraj s/o Sidramappa Birajdar  
Age: 60 years, Occu.: Agri.,  
R/o.Lohgaon, Tq.Tuljapur,  
Dist.Osmanabad.
4. Gangadhar s/o Basawraj Birajdar  
Age: 24 years, Occu.: Agri.,  
R/o.Lohgaon, Tq.Tuljapur,  
Dist.Osmanabad.

..Respondents.

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Advocate for Appellant : Mr.K.K.Kulkarni  
Advocate for Respondent Nos.2 to 4: Mr.B.R.Sontakke Patil

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**CORAM : M.S.SONAK, J.**  
**DATE : 23<sup>rd</sup> JANUARY 2018**

**ORAL JUDGMENT:-**

- 1) Heard Mr.K.K.Kulkarni learned counsel for the  
appellant and Mr.B.R.Sontakke Patil for respondent Nos.2

to 4. The record indicates that the remaining respondents are also served.

2) Taking into consideration the narrow issue involved in this matter, this appeal is being disposed of.

3) Challenge in this appeal is to the order dated 6.10.2006 by which the Appeal Court has remanded Regular Civil Suit No.20 of 1997 to the Trial Court basically on the following two grounds:-

(a) That on the demise of the original defendant No.1, the plaintiff brought on record only five out of his six daughters. Therefore, the Appeal Court has reasoned that the Suit was bad for non-joinder of necessary party and has granted opportunity to the plaintiff to bring on record sixth daughter in the Suit. Since this sixth daughter is to be granted opportunity of defence, matter has been remanded to the Trial Court.

(b) That the evidence on record indicates that Land Block No.306 of Village Lohagaon was partitioned between plaintiff and defendant Nos.2 and 3 equally, the Appeal Court holds that this means that the said property was also joint family property required in the common hotchpotch. Since, this property was not included in common hotchpotch, opportunity to be granted for including the same by amending the Suit and this is the second reason for remand.

4) Mr.Kulkarni learned counsel for the appellant submits that upon the demise of original defendant No.1, since, five out of six daughters were admittedly brought on record, Suit of defendant No.1 was substantially represented. Therefore, there was no reason for Appeal Court to proceed on the basis that the Suit abates or was bad in law for non-joinder of necessary party. He submits that in any case, the plaintiff i.e. the

appellant is prepared to take risk of non-joinder of sixth daughter. Because, the appellant verily believe that sixth daughter have no objection on the said issue. Mr.Kulkarni further submits that there is no pleadings whatsoever in relation to Land Block No.306 of village Lohagaon either in the plaint or written statement. Accordingly, it was not open to the Appeal Court for inclusion of this property in the partition Suit or in common hotchpotch. In any case, Mr.Kulkarni submits that this was clearly not a good ground for remand.

5) Mr.B.R.Sontakke Patil learned counsel for the respondent Nos.2 to 4 submits that it is a fact that the sixth daughter of defendant No.1 was never brought on record. He submits that the issue as to whether the Suit for partition is maintainable or not in the absence of such sixth daughter is required to be kept open, in case, this Court is inclined to set aside the impugned order and remand the matter to the Appeal Court for disposal of

the Appeal on its own merits and in accordance with law. Further, Mr.Sontakke Patil submits that the issue whether the inclusion of Land Block No.306 in the original partition Suit is necessary, is required to be kept open so that respondent Nos.2 to 4 or other contesting respondents in the appeal can urge that non-inclusion of this Land Block No.306 in the original partition Suit was a good ground for the dismissal of the Suit itself. Mr.Sontakke Patil also agrees that the remand was also necessary, but submits that all such issues are to be kept open for consideration of the Appeal Court or observations of this Court ought not to curtail the rights of the respondents in the appeal to raise such contention or defence. He submits that infact, the Trial Court upon detail consideration of the evidence on record, has quite rightly dismissed the Suit.

6) The records have been perused. Upon due consideration of rival contentions, it is clear that it

is not a case where the remand was warranted.

7) There is no dispute that from out of six daughters of defendant No.1, only five were brought on record upon the demise of the defendant No.1 in the partition Suit. It is for the Appeal Court to decide the effect of such omission. Mr.Kulkarni's contention that estate was substantially represented or Mr.Sontakke Patil's contention that the Suit for partition had to fail for non-joinder of necessary party, were the issues, which are required to be decided by the Appeal Court. However, there was no necessity for remand on this point. Further as urged by Mr.Kulkarni, this is a risk, which the appellant/plaintiff has to take. He submits that ultimately, even if, the Suit is decreed, at the highest, such decree may not bind sixth daughter. However, sixth daughter of defendant No.1 has no objection to the partition decree, if and when made. At this stage, it will not be appropriate for the Court to rule out any of

the rival contentions. However, one thing is clear that the Appeal Court was not justified in dealing with these issues and contentions and simply remanded the matter to the Trial Court. Again, on the inclusion of Land Block No.306, it is open to the Appeal Court to consider whether there is reference to such Land Block in the pleadings or whether there is any other evidence on record to suggest that this property was required to be included in common hotchpotch. Further, it is for the Appeal Court to decide whether the non-inclusion was fatal to the Suit. All these questions as suggested by Mr.Sontakke Patil can always be kept open and hereby kept open for determination by Appeal Court itself without remanding the matter to the Trial Court.

8) In the facts and circumstances of the present case, the remand has been ordered to the satisfaction as to whether any of the parameters described under Rule 23, 25, 25-A of Order 41 of the Code of Civil Procedure Code

were satisfied.

9) Accordingly, the order of remand is required to be set aside and hereby set aside.

10) Regular Civil Appeal No.72 of 2014 is restored to the file of the Appeal Court. The Appeal Court shall dispose of the Appeal on merits and in accordance with law.

11) The appeal is allowed to the aforesaid extent. There shall be no order as to costs.

12) It is made clear that this Court has not examined the merits of the matter, since, the only issue before this Court was whether remand was justified or not. Therefore, the observations in this order need not influence the Appeal Court while disposing of the Appeal on its own merits and in accordance with law.

13) As the Appeal from Order is disposed of, Civil Application for stay does not survive and is disposed of.

14) Parties to appear before the Appeal Court on 20.2.2018 at 11:00 a.m. and produce authenticated copy of this order.

**[M.S.SONAK, J.]**