

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.20 OF 2018
WITH CA/2029/2018 IN AO/20/2018

1. Laxman s/o. Dada Gangurde,
Age 65 years, Occu. Agril.,
2. Sukhdeo s/o. Dada Gangurde,
Age 60 years, Occu. Agril.,
3. Subhash s/o. Dada Gangurde,
Age 46 years, Occu. Agril.,
4. Chandrabhaga Dhondiba Borse,
Age 75 years, Occu. Agril.,

All R/o. Kakdi, Taluka Kopargaon,
District Ahmednagar

.. Appellants
(Original Defendants No.5 to 8)

Versus

1. Baban S/o. Punja Gangurde,
Age 55 years, Occu. Agril.,
R/o. Aurangpur, Tq. Sangamner,
District Ahmednagar
2. Dada Kisan Gangurde (Deceased)
3. Damu Kisan Gangurde (Deceased)
4. Fakkad Punja Gangurde,
Age 58 years, Occu. Agril.,
R/o. Aurangpur, Tq. Sangamner,
District Ahmednagar
5. Smt. Sunderabai More,
Age 80 years, Occu. Agril.,
R/o. Panchale, Tq. Kopargaon,
District Ahmednagar

.. (Respondent No.1 /
Original plaintiff)

.. Respondents
(Respondents No. 2 to 5 /
Original Defendants No.1 to 4)

Mr. Abasaheb D. Shinde, Advocate for Appellants;
Mr. Amol S. Gandhi, Advocate for Respondent No.1

CORAM : S. G. MEHARE, J.

DATE : 28-11-2023

ORAL JUDGMENT :-

1. Heard the learned counsels for the respective parties. Admit.
2. The following questions of law arise in the present appeal;
 - i) Would the plaintiff be deprived of his right to have a share in the joint family property forever for non-joinder of the necessary party?
 - ii) Is the impugned judgment and decree of the first Appellate Court bad in the eye of the law?
3. A short question has been involved in the case. Hence, with the consent of both sides, the matter is finally heard at the admission stage.
4. Respondent No.1 was the original plaintiff, and the appellants were original defendants No.5 to 8.
5. The plaintiff had filed a suit for partition. However, the suit was dismissed for non-joinder of necessary parties. The plaintiff had preferred the appeal against the judgment and decree of the Court of first instance. In appeal, he applied to join the necessary parties to the suit. The Learned First Appellate Court considered the application, allowed the appeal and remanded the matter to the Learned Trial Court for a fresh trial. Against the said judgment and decree of the learned District Judge-1, Kopergaon, the defendants are before this Court.

6. Admittedly, the plaintiff did not join his brothers and sisters as the parties to the suit for partition.

7. The learned counsel for the appellants heavily relied on the judgment of the Hon'ble Supreme Court in the case of - (i) **Kanakarathanammal Versus V.S.Loganatha Mudaliar, 1965 AIR (SC) 271** and (ii) **Savitribai Gunwant Waghmare & Anr. Versus Deorao Amrutrao Waghmare & Anr., 2011(3) Mh.L.J. 794.**

8. He has vehemently argued that the Hon'ble Supreme Court has taken the view that the non-joinder of necessary parties is an incurable defect. In a suit for partition, without the legal heirs the suit cannot be decided as they are necessary parties. He would submit that the Hon'ble Supreme Court has taken the clear view that in the event of non-joinder of necessary parties, the suit is liable to be dismissed. Similarly, he referred to the judgment of this Court in the case of **Savitribai** (*supra*), in which the case of **Kanakarathanammal** (*supra*) has been referred and took the view that non-joinder of necessary party results in dismissal of the suit.

9. He submitted that considering the ratio laid down by the Hon'ble Supreme Court in the above cases, the impugned judgment and decree of the first Appellate Court is bad in law and liable to be set aside.

10. Per contra, the learned counsel for the plaintiff would submit that the facts of both cases relied upon by the appellants were distinct. The appeal is a continuation of the suit. In a suit for partition, all the parties are at equal status. If the impugned judgment and decree is set aside, the plaintiff would suffer forever. The plaintiff has been fighting for partition since 2007. He submitted that in the case of **Kanakarathanammal** (*supra*), an application for adding the necessary parties was moved till the appeal was disposed of before the Hon'ble Supreme Court. Hence, the Hon'ble Supreme Court denied allowing the parties to join the parties, and in this peculiar circumstance, it was held that the suit was bad for the non-joinder of necessary parties. The facts of the **Savitribai** (*supra*) were also different.

11. To bolster his arguments, the learned counsel for respondent No.1 relied on the judgment in the case of **Alkabai and Others Versus Subhash and Others, 2021 DGLS (Bom.) 1406** and the order of this Court passed in Appeal from Order No.25 of 2015 with Civil Application No.3790 of 2015 in AO/25/2015 (**Tukaram Sakharam Khade Versus Awantikabai Namdeo Khade and Others**), dated 23.07.2015.

12. The law is well settled that the suit is bad for non-joinder of necessary parties. The plaintiff's suit was defective for non-joinder of necessary parties. However, in appeal, the plaintiff filed an

application to join the legal heirs as a party to the suit. The appellate Court deemed it fit and allowed the application. The rights of the legal heirs in a suit for partition are at par. Joining or non-joining of the necessary party does not alter the status of the property. It is always subject to revision. In the case of *Alkabai* (*supra*), this Court held that the suit is bound to fail in the absence of necessary parties. Since it is a suit for partition and separate possession of joint property, the dispute would not end by mere dismissal of the suit. Though the petitioners are indeed lax in prosecuting the suit, the respondents having faced a lot of harassment, it would have been just and proper for the learned Judge to have imposed heavy costs for granting leave to withdraw the suit with permission to file a fresh suit as prayed for, instead of rejecting the application out-rightly. It was the case dealt with under Order XXIII, Rule 1(3) of the Code of Civil Procedure.

13. In the case of ***Tukaram*** (*supra*), the Court relied on various judicial pronouncements and held that all the points need to be considered by the Appellate Court and the consideration of the right of the original plaintiff to bring legal representatives of the deceased defendants on record and also to bring the remaining successor of the deceased predecessor in title also can be considered by the Appellate Court. This was a matter of similar type, which is before the Court.

14. In the case of **Kanakarathanammal** (*supra*), Hon'ble Supreme Court observed in paragraph No.15, 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 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 I, 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 I, 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 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. (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 I, 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."

15. The above ratio is laid down in the facts of the case that till the Hon'ble Supreme Court, the plaintiff did not apply to join the persons interested as necessary parties. To understand the fact and the view taken by the Hon'ble Supreme Court as regards the effect of non-joinder of necessary parties in a suit for partition, paragraph No.14, in the case **Kanakarathanammal** (*supra*), is relevant, which is reproduced thus;

"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 No.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."

16. Each case has its own facts. The view taken by the Hon'ble Supreme Court appears that the prayer to join the necessary party could not be granted at the stage of the appeal before the Hon'ble Supreme Court. However, in this case, after the dismissal of the suit, the plaintiff immediately preferred an appeal with a prayer to

allow him to join the necessary parties. So, it can be said that the defect is tried to be cured immediately. The first appeal is a continuation of the suit. Considering the legal principle, it can be safely said that the plaintiff took immediate steps to cure the defect. No serious prejudice would be caused to the defendants if the necessary parties were allowed to be joined. This was the suit for partition in which the status of the properties is not altered. It would be joint unless partitioned. In view of the facts of the case, the Court is of the view that the cases of **Kanakarathanammal** (*supra*) and **Savitribai** (*supra*) do not assist the appellants.

17. In view of the facts as discussed above, the nature of the suit and the rights of the parties involved in the suit, the Court is of the view that the impugned judgment and decree of the first Appellate Court is legal, correct and proper and there are no reasons to interfere with the same. Therefore, the questions of law framed as aforesaid are answered in negative. Hence, the order:-

ORDER

1. The appeal stands dismissed.
2. No order as to costs.
3. Pending civil application stands disposed of.

(S. G. MEHARE)
JUDGE