

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

**901 SECOND APPEAL NO.743 OF 2012
WITH CA/12898/2012 IN SA/743/2012**

**RASHID KARIM PATHAN AND ANR
VERSUS
SARDAR KARIM PATHAN**

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Advocate for Appellants : Mr. Patni Pramod F.
Advocate for Respondents : Mr. A.S. Bajaj

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**CORAM : M.G. SEWLIKAR, J.
DATE : 20.12.2019**

ORDER :

Heard Shri Patni the learned counsel for the appellants and Shri Bajaj the learned counsel for the respondents.

2. The appellant is the original defendant in a suit for partition governed by Mohammedan law. It is alleged that the suit for partition cannot proceed without impleading all the heirs who are entitled to a share in the partition. Shri Patni the learned counsel for the appellant submitted that sister Kadubee has not been impleaded as a party in the suit and therefore by virtue of Order I Rule 10 of C.P.C., the suit is liable to be dismissed for non joinder of necessary parties. He submitted this point was raised before the trial Court and the First Appellate Court also. He submitted that both the

Courts below failed to exercise the powers Order I Rule 10 of the C.P.C. on the ground that the suit cannot be defeated for mis-joinder or non-joinder of parties under Order I Rule 9 of the C.P.C. He further submitted that Kadubee is the sister of the plaintiff and the defendant no.1. In the cross-examination the plaintiff has admitted that the husband of Kadubee is the brother in law of the plaintiff. This admission has been ignored by both the Courts and have come to an erroneous conclusion that said Kadubee is not the sister of the respondent no.1-plaintiff. He submitted that in Mohammedan law also the suit cannot proceed without impleading all the heirs who are entitled to a share on partition. For this purpose he placed reliance on the case of **Ali Ahmed V/s. Sindhi Ebrahim Kasam and Ors.** reported in **AIR 1983 GUJARAT 156** and **S.K. Sahul Hamid and Anr. V/s. S.M. Sulthan and Ors.** reported in **AIR 1974 MADRAS 287**.

3. Shri Bajaj submitted that in a suit for partition in Mohammedan law it is not necessary to implead all the heirs who are entitled to a share on partition as their shares are distinct and defined. For this purpose he placed reliance on the case of **Ibrahim Ashraf Patel V/s. Jamrood Bee** reported in **2001 (3) Mh.L.J. 886**. He further submitted that the admission given by the respondent no.1 is vague. The plaintiff-respondent no.1 has not examined the sister who is still alive and instead examined her husband. He submitted the

best evidence has been with held from the Court.

4. So far as the question as regards whether Kadubee is the sister of the appellant and the respondent no.1 is concerned it is a question of fact and both the Courts have held that Kadubee is not the sister of the appellant and respondent no.1.

5. I have gone through the alleged admission given by the respondent no.1-plaintiff. The said admission is as vague as it could be. It only says that the respondent no.1 is the brother in law of the appellant. From this vague statement one cannot come to a conclusion that the said Kadubee is the real sister of the appellant and the respondent no.1. Secondly, the defendant no.1 examined the said husband of Kadubee that too on commission. Why Kadubee was not examined is not explained by the defendant no.1. Kadubee is the best person to state whether she is the sister of the appellant and respondent no.1. There is nothing on record to show that the said Kadubee, for health reasons or for any other reason was unable to appear before the Court or was not in a position to be examined on commission either. In view of this, it will have to be held that the respondent no.1 has deliberately not examined the said Kadubee despite she being available for giving evidence. Adverse inference needs to be drawn that had

Kadubee been examined she would not have supported the claim of defendant no.1. Therefore, it cannot be said that the findings of both the Courts below are perverse as regards the relation of Kadubee with the appellant and the respondent no.1.

6. So far as the issue of non-impleadment of an heir in the suit governed by Mohammedan law is concerned it is no longer *res integra*. In the case of **Ibrahim Ashraf** cited supra it has been categorically held that the suit by a Mohammedan heir for partition of share is maintainable even without impleading other heirs who are not in possession. The reason is that the shares of Mohammedan heirs are definite and specified. In the case of **Ali Ahmed** cited supra it is held that all persons entitled to share in property by inheritance are necessary parties. Non impleading any necessary party renders suit liable to be dismissed. On the same point is the authority of Madras High Court in the case of **S.K. Sahul Hamid** cited supra. Since this Court has already held that all the persons who are entitled to share by inheritance are not necessary parties, this appeal cannot be said to be maintainable.

7. Both the Courts below have held that the suit for partition is maintainable despite not impleading Kadubee as a necessary party. Though the finding is correct, reasonings given by the Court for arriving at this conclusion

to say the least are erroneous. The learned First Appellate Court has given the following reasons:-

“ I have also considered the scope of Order I Rule 9 of C.P.C. and on that basis it can be said that no suit shall be defeated by raising the issue of non joinder or mis joinder of necessary parties”.

8. Order I Rule 9 of the C.P.C. says that the suit cannot be defeated on the ground of non-joinder or mis-joinder of parties. However, both the Courts have failed to consider the proviso to Order I Rule 9 of C.P.C. It says that nothing in Order I Rule 9 will apply to non-joinder of necessary parties. Therefore the provision of Order I Rule 9 cannot be pressed into service in case of non joinder of necessary parties.

9. In the result, in the case at hand, it has already been decided in the case of **Ibrahim Ashraf Patel** cited supra that a suit for partition governed by Mohammedan law is maintainable even without impleading other heirs who are not in possession of the property.

10. In view of this the appeal is devoid of any substance. Hence the appeal is dismissed. In view of dismissal of second appeal the civil application also stands disposed of.