

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

**WRIT PETITION NO.12529 OF 2018**

Hausaji s/o. Baliram Jadhav,  
Age : 53 years, Occ. Agri.,  
r/o. Karla, Tq. Umri,  
Dist. Nanded

..Petitioner

Vs.

1. Saraswatibai s/o. Gangadharrao  
Sonawne (since deceased notice  
not necessary)
2. Govind s/o. Baliram Jadhav,  
Age : 62 years, Occ. Agri.,  
r/o. Karla, Tq.Umri,  
Dist. Nanded
3. Balaji s/o. Govind Jadhav,  
Age : 62 years, Occ. Agri.,  
r/o. Karla, Tq. Umri,  
Dist. Nanded
4. Dattaram s/o. Sambhaji Jadhav,  
Age : 55 years, Occ. Agri.,  
r/o. Karla, Tq. Umri,  
Dist. Nanded

..Respondents

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Mr. G.R.Syed, Advocate for petitioner

Mr. A.A.Mukhedkar, Advocate for respondent no.4

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**CORAM : R.G. AVACHAT, J.  
RESERVED ON : SEPTEMBER 19, 2019  
PRONOUNCED ON : OCTOBER 10, 2019**

**ORDER :-**

The challenge in this Writ Petition is to the order dated 26.09.2018 passed by learned Civil Judge, Junior Division, Umri, allowing application (Exh.63) in a suit, being Regular Civil Suit No.51 of 2013, moved by respondent no.4 herein, asking for transposing him as a plaintiff to the said suit. Original defendant no.1 has, therefore, preferred the present Writ Petition.

2. Heard Mr.Syed, learned Counsel for the petitioner and Mr.Mukhedkar, learned Counsel for respondent no.4.

3. The suit (R.C.S. No.51/2013) was filed by one Saraswatibai for partition and separate possession of her share in the agricultural land, described in paragraph 1 of the plaint. She died pending the suit. Paragraph 2 of the plaint contained genealogy. Deceased – Baliram was a common ancestor.

Harnabai was his wife. She pre-deceased Bariram. Baliram too passed away. The original plaintiff - Saraswatibai, defendant no.1 - Hausaji and defendant no.2 - Govind are children of deceased - Baliram and Harnabai. Respondent no.3 (original defendant no.3) is son of respondent no.2 - Govind. Respondent no.4 - Dattaram had moved application (Exh.63) for impleading him as defendant in the suit. The trial Court after hearing the parties to the suit, allowed Dattaram's application and impleaded him as defendant no.4.

4. Pending the suit, original plaintiff - Saraswatibai passed away. She was sole plaintiff. Since she did not have a child, her husband could not be brought on record of the suit, as her legal representative. Respondent no.4 preferred the application (Exh.63) for transposing him as a plaintiff to the suit. The Trial Court allowed the said application.

5. Learned Counsel for the petitioner would submit that the provisions of Order XXIII Rule 1-A of the Code of Civil Procedure ("the Code", for short) have no application to the facts of the present case. Respondent no.4 was given in adoption to one Sambhaji Jadhav. He, therefore, can not claim right, title and interest in the property left behind by Baliram. Respondent no.4 got himself impleaded as a defendant in the suit with collusion of the plaintiff. Since the sole plaintiff passed away, the suit stands abated. The trial Court erred in allowing the application moved by respondent no.4 for transposing him as plaintiff to the suit.

6. Learned Counsel for respondent no.4 supported the impugned order.

7. Baliram (deceased) was a common ancestor. He was survived by two sons - Govind and Hausaji and a daughter namely, Saraswatibai. Saraswatibai filed the suit for partition and separate possession of her

share in the agricultural land. She passed away, pending the suit. Since she did not have a child, her husband was not brought on record as her legal representative to continue with the suit. Pending the suit, respondent no.4 applied for his impleadment as a defendant to the suit. His application was allowed. He appears to have claimed share in the suit land and therefore, urged for partition and separate possession thereof. Admittedly, respondent no.4 is the real brother of the deceased – plaintiff and defendant nos.1 and 2. He is said to have been given in adoption to one Sambhaji Jadhav. He is, therefore, said to have no right, title and interest in the suit land. On his adoption, his ties with family of his his natural parents would cease. He would not inherit any property of his natural parents post his adoption.

8. Section 12 of the Hindu Adoptions and Maintenance Act, 1956, speaks of adoption, which reads thus :-

**Section 12. Effect of adoption.** - *An adopted child shall be deemed to be the child of his or her adoptive father or mother for all purposes with effect from the date of the adoption and from such date all the ties of the child in the family of his or her birth shall be deemed to be severed and replaced by those created by the adoption in the adoptive family: Provided that—*

*Provided that -*

*(a) the child cannot marry any person whom he or she could not have married if he or she had continued in the family of his or her birth;*

*(b) any property which vested in the adopted child before the adoption shall continue to vest in such person subject to the obligations, if any, attaching to the ownership of such property, including the obligation to maintain relatives in the family of his or her birth;*

*(c) the adopted child shall not divest any person of any estate which vested in him or her before the adoption.*

9. In paragraph 14 of the plaint, it has been averred that the suit property was ancestral property of the plaintiff and the defendants. From the pleadings, it is not clear, whether the suit property originally belong to Baliram exclusively. The question is, if the suit property is ancestral property of the parties to the suit, whether the

defendant no.4 would have share therein. Making any observation in this regard may amount to expressing a view about merits of the suit. In case of an ancestral property, a son gets right by birth.

10. Order XX Rule 18 of the Code mandates that in case of a decree for partition of the property or for separate possession of share therein, the decree shall declare rights of the several parties interested in the property. When a decree for partition becomes final, the defendant to the suit whose rights are declared, is entitled to have his share partitioned and separated by making an application in this regard. As such, in a suit for partition, all the parties to the suit are plaintiffs, so to say.

11. It is true that the provisions of Order XXIII Rule 1-A of the Code may not be strictly applicable to the facts and circumstances of the present case since it speaks about transposition of

defendant as plaintiff in case of a suit being withdrawn or abandoned.

Section 151 of the Code is, however, there to pass an order regarding transposition in the facts and circumstance of a case.

12. The Trial Court found respondent no.4 to have an identity of interest along with the deceased/ plaintiff as against other defendants. Whether respondent no.4 has any right, title and interest in the suit land, could only be decided on trial of the suit. The suit dates back to the year 2013. If the impugned order is set aside, respondent no.4 has every right to come with a fresh suit. It may amount to multiplicity of proceedings coupled with delay in deciding the rights of the parties. The trial Court has given sound reasons for allowing the application (Exh.63).

13. For the reasons herein above, no interference is called for in the impugned order.

The Writ Petition, therefore, fails. The same is dismissed.

**[R.G. AVACHAT, J.]**

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