

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 60 OF 2016

Tulsabai Gyanba Shinde
Age : 78 years, Occu. Household, ...Appellant
R/o Sakla Plot, Parbhani.

Versus

- 1] Shriram Bapurao Kurhe,
Age : 70 years, Occu. Nil
- 2] Ganpat Bapurao Kurhe,
Age : 65 years, Occu. Agri.
- 3] Pandurang Bapurao Kurhe,
Age : 60 years, Occu. Agri.
- 4] Rangnath Bapurao Kurhe,
Age : 58 years, Occu. Agri.
- 5] Keshav Ganpat Kurhe,
Age : 40 years, Occu. Agri.
- 6] Madhav Ganpat Kurhe,
Age : 65 years, Occu. Agri.
- 7] Datta Rangnath Kurhe,
Age : 20 years, Occu. Agri.
- 8] Bapurao Rangnath Kurhe,
Age : 18 years, Occu. Agri.

All R/o Digras Tq. Palam,
District Parbhani. ...Respondents

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Mr. A. S. Deshmukh, Advocate for Appellant.
Mr. R. I. Vakade, Advocate for Respondents No. 1 to
8.

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 04-03-2019.

JUDGMENT :

01. Present appeal has been filed by the original plaintiff No. 2 challenging the Judgment and decree in R. C. A. No. 19 of 2012 by District Judge-1, Gangakhed dated 20th November 2014, whereby the appeal filed by the present respondents came to be allowed. In the said appeal, the present respondents had challenged the Judgment and decree passed in R. C. S. No. 60 of 2009 (old R. C. S. No. 9 of 2005) by learned Civil Judge Junior Division, Palam, Dist. Parbhani dated 21.3.2012.

02. The present appellant as well as one more plaintiff had filed the said suit for partition and separate possession. Defendants No. 1 to 4 were the cousin brothers of plaintiff No. 1 and they are the real brothers *inter se*. Defendants No. 5 and 6 were also the cousin brothers of plaintiff No. 1 and they were the real brothers *inter se*. Defendants No. 7 and 8 are the sons of defendant No. 4. Plaintiffs had come with a case that agricultural lands bearing Survey No. 36/1 admeasuring 1 H 11 R, Survey No. 36/3 admeasuring 1 H 61 R and Survey No. 36/4 admeasuring 2 H 17 R situated in village Digras, Tq. Palam are the ancestral properties of plaintiffs and defendants. Naroji Bapurao Kurhe was the father of plaintiff No. 1 and husband of plaintiff No. 2. He was

the brother of defendants No. 1 to 4. He expired in 1978. He was also having one son by name Maruti. Maruti had expired in 1984. It is stated that after Naroji expired, plaintiffs were driven out of the house and therefore, both the plaintiffs started residing with the brother of plaintiff No. 2 at Karegaon, Tq. Parbhani. It is also stated that plaintiff No. 2 has performed second marriage. According to the plaintiffs, they have 1/5 th share in the suit properties. Defendants No. 1 to 4 have created third party interest in the suit properties. However, that will not affect the rights of the plaintiffs. It is also stated that there were 3 sisters of defendants No. 1 to 4. The marriage expenses of those sisters has been borne by Naroji and therefore, they have not been added as a party to the suit. Plaintiffs had demanded their share to be separated. However, defendants avoided on one or the other pretext and therefore, suit for partition was filed.

03. All the defendants have filed collective written statement and denied the claim of the plaintiffs. It was stated that plaintiff No. 1 is not related to them. They have also raised question in respect of plaintiff No. 2 regarding her alleged second marriage. It also appears that the contention was raised by them that Naroji had performed the marriage about 42 years ago with Tulsabai.

But, after death of Naroji, Tulsabai sold the house and left the village. Bapurao, who was the father of Naroji and defendants No. 1 to 4, had effected partition amongst the 4 sons i.e. defendants No. 1 to 4 and in view of the said partition, each one of them possess their respective share in the suit properties. It is also contended that the land survey No. 36/3 is not the ancestral property, but, it has been purchased by them after the partition. It is also stated that one Uddhav, who is the son of defendant No. 2 has not been made as a party to the suit. He had purchased 39R land out of Survey No. 36/4. They have contended that since the partition is already effected and accordingly, mutation entries have been carried out, the suit is not maintainable.

04. Taking into consideration the rival contentions, issues came to be framed. Parties have led oral as well as documentary evidence on record. Taking into consideration the evidence as well as hearing both the sides, the suit came to be partly decreed. Plaintiff No. 2 has been given 1/8 th share in land Survey No. 36/1 and Survey No. 36/4. The suit was dismissed in respect of land Survey No. 36/3. The suit was also dismissed as against plaintiff No. 1.

05. The defendants had challenged the said Judgment

and decree in the aforesaid R. C. A. No. 19/2012 and after hearing both the sides, the learned First Appellate Court though held that the suit properties are ancestral properties of deceased Naroji and defendants No. 1 to 4, the suit was dismissed on the ground of non-joinder of necessary parties. It will not be out of place to mention here that cross objections were filed by both the plaintiffs at Exh. 20 and in the said appeal, the learned District Judge-1 Gangakhed has dismissed the cross objections also and therefore, the said Judgment and decree that is passed in the said appeal is being challenged in this appeal by original plaintiff No. 2.

06. Heard Mr. Arvind Deshmukh, learned Advocate for appellant and Mr. R. I. Vakade, learned Advocate for respondents No. 1 to 8. It has been submitted on behalf of the appellant that the suit was filed to carve out the share of the plaintiffs, which was to the extent of $1/5^{\text{th}}$ together. As per the calculation made by the Trial Court, it is held that the plaintiff No. 2 is entitled to get $1/8^{\text{th}}$ share. While arriving at that calculation, the learned Trial Court has considered the fact that there were 3 sisters to Naroji and defendants No. 1 to 4. In fact, when the Appellate Court dismissed the suit only on the ground that necessary parties were not added to the

suit. The learned First Appellate Court failed to consider that even if, those sisters would have been added as a party, it would not affected the share which plaintiff No. 2 would have got. He relied on the decision in **T. G. Rajamani Mudaliar (Died) by LRs. And others V/s T. G. Ekambara Mudaliar and others, (AIR 2002 Madras 185)** wherein it was held that, "the suit is not liable to be dismissed merely on the ground of non-joinder of two daughters as parties". Further, in **Shubhangi Nandkishor Gaidhani and Others V/s Damodar Govind Gaidhani and others, (2012(2) Mh. L. J. 170)**, almost on the similar facts when the First Appellate Court had remanded the matter, it was observed that the First Appellate Court was not justified in remitting the matter back to the Trial Court in absence of there being any objection by any of the defendants as against non-impleadment of the necessary parties to the suit. The final outcome of the suit is also not likely to be affected as a result of non-inclusion of those left out parties. Learned Advocate for appellants therefore prayed for admitting the matter, since the substantial questions of law are arising.

07. Per contra, the learned Advocate appearing for the respondents submitted that a specific objection was taken in the written statement itself that there are more

necessary parties to the suit, which have not been added as a party. Specific issue was framed by the Trial Court. But, the Trial Court has not taken proper view and it is mainly stated that it will not be proper to dismiss the suit only on the point that the sisters have not been added as party. The learned First Appellate Court has taken a correct view that when those daughters of Bapurao, (father of deceased Naroji and defendants No. 1 to 4) had share in the property, then, they had the right of audience. They could not file their written statement. Under such circumstance, the suit ought not to have proceeded further. The appeal is therefore rightly allowed and the cross objections of the respondents have been rightly dismissed. No substantial questions of law are arising in this matter.

08. The first and the foremost fact that is required to be considered is that the plaintiffs had come with a case that all the 3 suit agricultural lands are ancestral properties of deceased Naroji and defendants No. 1 to 4. That means they intended to say that those properties devolved upon Naroji and his brothers after the demise of Bapurao that is their father. It is not in dispute that there are 3 daughters left by Bapurao also. Now, out of the 3 suit properties, the Trial Court has held that only

2 are the ancestral properties. However, if we consider the points framed by the First Appellate Court, then it is stated that all the 3 suit properties are stated to be the ancestral properties. It will not be further out of place to consider that when the appellants before the First Appellate Court i.e. original defendants had challenged the Judgment and decree passed in R. C. S. No. 60 of 2009. At that time, they had not added plaintiff No. 1 as party to the appeal. The cross objections were filed by both the plaintiffs. In spite of this, while writing the Judgment, the First Appellate Court has not included the name of plaintiff No. 1 in the title of the appeal and further now, in this second appeal, which has been filed by the original plaintiff No. 2, plaintiff No. 1 has not been made as a party to the appeal. In the suit, the plaintiffs had given a reason as to why they have not included the sisters to the suit. It was their contention that the marriage expenses of those sisters was borne by Naroji. This was the only reason given for not including them to the suit. A specific issue in respect of non-joinder of necessary parties was raised. Even, till then there was no attempt on the part of the plaintiffs to join the sisters to the suit. Note is required to be taken of Order I Rule 13 of Code of Civil Procedure, which

prescribes for objections as to non-joinder or mis-joinder. It is prescribed that all objections on the ground of non-joinder or mis-joinder of the parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before that settlement, unless the ground objection has subsequently arisen and any such objection not so taken shall be deemed to have been waived. Thus, in this case, it can be seen that the objection as regards non-joinder of necessary parties was taken before the settlement of issues. As aforesaid the said defect, if at all it was, was not tried to be cured by the plaintiff before adducing evidence. The learned Trial Court has observed that the reason given by the plaintiff for non-including those sisters as party is not convincing and not legal also and therefore, a positive statement was made that those sisters have share in the suit lands. Taking into consideration their share also, it was held that plaintiff No. 2 has 1/8 th share in the suit lands. However, as regards the reasons given for not dismissing the suit on the point of non-joinder of necessary parties, it is merely stated that, merely on the point that those sisters have not been added as a party, it will not be proper to dismiss the suit. Order I Rule 9 of Code of Civil Procedure prescribes for mis-joinder or

non-joinder and it provides no suit shall be defeated by reason of mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy, so far as regards the rights and interest of the parties actually before it, provided that nothing in this rule shall apply to non-joinder of a necessary party. Therefore, when the sisters were considered by the learned Trial Court as a necessary party, in a way the Trial Court was not justified in taking help of Order I Rule 9 of Code of Civil Procedure and then proceeding to carve out the share of plaintiff No. 2 only. Though, in the suit the plaintiffs had prayed for separation of their share, it was the boundant duty of the learned Trial Court to declare the shares of each of the sharers in the suit properties. That exercise has not been done.

09. Now, it is also to be noted that another way was available to the learned Trial Court. An opportunity could have been given to the plaintiff to add those sisters as party by giving a specific direction and in case the plaintiffs would have failed to carry out that direction then the result would have been considered. Even, at the appellate stage, the appellate Court could have given an opportunity to the plaintiffs to add those sisters to the suit. It also appears from the written

statement that defendant No. 2 has son by name Uddhav and it was stated that he has purchased 39 R land out of Survey No. 36/4. It ought to have been considered that as to whether he was also necessary party to the suit or not. But, as regards the appeal is concerned, it has been allowed and the suit has been dismissed only on the ground that the sisters have not been made as party. However, as aforesaid, at the cost of repetition, the learned First Appellate Court did not see that all the parties before the Trial Court are before him in appeal and when in para No. 5 of the cross objections it was agitated by the original plaintiffs that the learned Trial Court went wrong in carving out the share of the daughters, then it could have given a direction in the appeal to the plaintiffs i.e. the respondent in the appeal and the cross objection of cross objectionist to add those sisters to the appeal also. Under such circumstance, when both the Courts have committed error, it is necessary to correct the said error by giving an opportunity to the plaintiffs to add the necessary parties, because though the parties may have not taken any action, the Courts ought to have given an opportunity by passing a specific order to that effect. The matter deserves remand.

10. The decision in **(AIR 2002 Madras 185)** will not

be applicable here, because only statement on the fact has been made. Further, as regards (2012(2) Mh. L. J. 170) is concerned, in that case the other side had not raised any objection in respect of non-impleadment of the necessary parties. Here, since beginning i.e. before the settlement of issues, there is specific objection then an opportunity ought to have been given to the plaintiffs to add those necessary parties to the suit. In order to do substantial justice, Courts may exercise their powers. In fact, suo motu powers are also given to the Courts to add or delete any party from any proceeding. A large picture should be considered by the Courts. Therefore, with these observations, following order is passed.

ORDER

- 1.The second appeal is hereby partly allowed.
- 2.The Judgment and decree passed by learned District Judge-1, Gangakhed in R. C. A. No. 19 of 2012 dated 20.11.2014 and Judgment and decree in R. C. S. No. 60 of 2009 (Old R. C. S. No. 9 of 2005) passed by learned Civil Judge Junior Division, Palam, Dist. Parbhani dated 21.3.2012 are hereby set aside.
3. The R. C. S. No. 60 of 2009 is hereby

restored on the file of learned Civil Judge, Junior Division, Palam, Dist. Parbhani.

4.The learned Civil Judge, Junior Division, Palam is directed to give an opportunity to the plaintiffs to add necessary parties to the suit and thereafter, after giving opportunity to both the sides, to putforth their say, lead the evidence (including the additional evidence to decide the suit afresh).

5.Both the parties are directed to remain present before the Trial Court on 8.4.2019.

6.Since originally the suit was filed in 2005, the learned Civil Judge, Junior Division, Palam, Dist. Parbhani is directed to expedite the proceedings of the suit and dispose it of on merits by the end of the year.

7.Parties to act on authenticate copy.

8.No order as to costs.

[SMT. VIBHA KANKANWADI]

JUDGE

Dahibhate/-