

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 370 OF 1992

1) Hanuman s/o Narayan Mote
..Died through L.Rs.,

1-a Kalavatibai w/o Hanuman Mote,
Age; 32 yrs,

1-b Ashok Hanuman Mote,
Age; 18 years,

1-c Usha d/o Hanuman Mote,
Age; 14 yrs,

1-d Kusum d/o Hanuman Mote,
Age; 12 years,

1-e Manisha d/o Hanuman Mote,
Age; 11 yrs,

1-f Varsha d/o Hanuman Mote,
Age; 2.5 years,

1-g Ashwani d/o Hanuman Mote,
Age; 6 yrs,
R/o; Limba Ruit, Taluka &
District Beed.

2) Sundrabai w/o Narayan Mote,
Age; 40 years, Occ; Agril &
Household,
R/o; Limba Ruit, Taluka and
District Beed,
Now residing at Gadhi,
Taluka Gevrai, Dist; Beed.

..APPELLANTS.
(Original
Plaintiff
Nos.1,2 & 3)

- 1 Narayan s/o Janu Mote,
Age; 45 years, Occ; Agril,
R/o; Limba Ruit, Taluka and
Dist. Beed.
- 2 Namdev s/o Narayan Tengal,
Age; 40 years, Occ; Agril,
R/o; As above.
- 3 Bhagwan s/o Dhondiba Tengal,
Age; 45 years, Occ; Agril,
R/o; As above.

**..RESPONDENTS
(Orig.
Defendant
Nos.1, 2& 3)**

.....
Mrs. M.A. Kulkarni, learned Advocate for the
Appellants
Mr. R.P.Dhase, learned Advocate for the
Respondent No.1
.....

Date of Reserving of Judgment : 19.12.2019
Date of Pronouncement of Judgment : 27.01.2020

This appeal is preferred by the Original Plaintiffs, being aggrieved by the judgment and decree passed by the learned Additional District Judge, Beed, in R.C.A. No. 73 of 1983, dated 26.2.1992, reversing the judgment and decree

passed by the learned IInd Jt. Civil Judge Junior Division, Beed, dated 31.12.1982, in R.C.S. 146 of 1979.

2. Facts giving rise to this appeal are as under :

Appellants (Original Plaintiffs in RCS No. 146 of 1979) filed RCS No. 146/1979 alleging that the suit properties, Survey No. 61/U, 79/AA and 84/E situated at Kalegaon, Pandher and Gawkhar respectively and the house property situated at Limbarui, Tq. & Dist. Beed, are the ancestral properties of the Plaintiffs and Defendant No. 1. Defendant No. 1 is the husband of Plaintiff No.2. They have a son (Plaintiff No.1) out of the wedlock. Since the names of Defendant Nos 2 and 3 appear in the ownership and cultivation column of 7/12 extract, they have been added as parties to the suit.

3. It is further alleged that the Plaintiffs and Defendant No. 1 were living

jointly. Because of the quarrels between Defendant No. 1 and Plaintiff No. 2, the Plaintiffs demanded partition of the suit properties, but the Defendant No. 1 refused to do so, hence the Plaintiffs have filed this suit for partition and separate possession, in respect of their $2/3^{\text{rd}}$ share.

4. Defendant No. 1 filed the written statement at Exh. 21. He admitted the description of the suit properties. He admitted that Plaintiff No. 2 is his wife and Plaintiff No. 1 is the son of the Appellant (in RCA 73/1983) born out of the wedlock. He has contended that the marriage between Plaintiff No. 2 and Defendant No. 1 was solemnized about 30 years ago. After two years of the said marriage, Defendant No. 1 performed second marriage with one Kesharbai, from whom he has two sons and three daughters and their names are, Indubai, Padmabai, Sindhubai, Arjun and Gangaram. He has further contended that Plaintiff No. 2 was leading adulterous life.

Hence suit is bad for non joinder of necessary parties.

5. The learned Trial Court framed issues at Exh. 22. The learned Trial Court held that Kesharbai and her children are the necessary parties to the suit but, despite that the learned Trial Court decreed the suit. The learned Appellate Court reversed the decree holding that the suit is bad for non-joinder of necessary parties as the suit is for partition and without impleading all the necessary parties, the suit for partition cannot proceed. This decree is assailed in this appeal.

6. Heard Mrs. M.A.Kulkarni, learned Counsel for the appellants and Mr. R.P.Dhase, learned Counsel for Respondent No. 1.

7. Mrs. Kulkarni, learned Counsel for the appellants argued that the learned Trial Court has correctly held that the suit suffers for non-

joinder of necessary parties, but non-joinder of parties will not affect the merit of the case as it is a suit for partition. She further argued that even if, parties are not impleaded but when the names of the parties can be identified from the record, suit for partition can be decreed. For that purpose, she placed reliance on the case of **"Kenchegowda (Since deceased) by Legal Representatives Vs. Siddegowda Alias Motegowda - (1994) 4 Supreme Court Cases 294"** .

8. Admittedly, the suit is for partition and separate possession of the suit properties and the house properties. It is the settled principle of law that in a suit for partition, all the properties owned by the joint family have to be included in the suit and all the sharers who are entitled to a share on partition, have to be impleaded. If any of the sharers is left out, the suit for partition cannot proceed. The learned Appellate Court has placed reliance on Article 333 of the Mulla's Hindu Law, in which it

is stated as to which are the parties, who should be impleaded in the suit for partition. It is stated in Article 333 of the Mulla's Hindu Law as under :

"(2) Parties to suit - (a) The plaintiff in a partition suit should implead as defendants:-

- (i) the heads of all branches*
- (ii) females who are entitled to a share on partition;*
- (iii) the purchaser of a portion of the plaintiff's share, the plaintiff himself being a coparcener;*
- (iv) if the plaintiff himself is a purchaser from a coparcener, his alienor.*

The above are necessary parties and if any of them is not joined, the suit is liable to be dismissed. The entire joint family must be represented either expressly or implicitly"

9. The learned First Appellate Court has correctly held that the suit is bad for non joinder of Kesherbai and her children. It is pertinent to note that, both the Courts have held that Defendant No. 1 married Kesherbai before 1956 i.e. before coming into force of the Hindu Marriage Act. Till the enforcement of the Hindu

Marriage Act, a Hindu was permitted to marry more than one wife. Therefore, the marriage between Kesharbai and defendant No. 1 has been held by both the Courts to be legal. In this view of the matter, heirs of Kesharbai ought to have been impleaded as parties to the suit for partition. The appellant plaintiff failed to do so and therefore, the learned Appellate Court allowed the appeal and dismissed the suit. No fault can be found with the judgment of the First Appellate Court.

10. Reliance has been placed on a case **"Kenchegowda (Since deceased) by Legal Representatives Vs. Siddegowda Alias Motegowda"** (supra). In this authority the plaintiff had filed two suits one for declaration based on title and another for permanent injunction. Both the suits were dismissed. In appeal, both appeals were dismissed. In Second Appeal, an application seeking amendment in plaint was preferred, owing to which the suit based on title was converted

into a suit for partition claiming 1/3rd share in the suit properties. The High Court, decreed the suit and awarded 1/3rd share to the plaintiffs.

The Hon'ble Supreme Court observed as under :-

"The decree for partition could not have been passed on mere application for amendment to hold that the relief of declaration and injunction which is larger relief and smaller relief for partition could be granted is incorrect. Even otherwise, a suit for partial partition in absence of any inclusion of other joint family properties and the impleadment of the other co-sharer was not warranted in law".

11. Thus, the Hon'ble Supreme Court has held that a suit for partition cannot proceed without impleading all the sharers who have right to share on partition. In this view of the matter, appeal is devoid of any substance, hence, appeal is dismissed with no order as to costs.

(M.G. SEWLIKAR)
JUDGE