

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

WRIT PETITION NO. 1455 OF 2020

Pramodkumar Sharadkumar Tiwari and others ... Petitioners

Versus

The State of Maharashtra and others ... Respondents

....

Mr. Shailesh P. Brahme, Advocate for petitioners

Mr. S. N. Morampalle, AGP for respondent Nos. 1 to 3

Mr. S. R. Kedar, Advocate for respondent Nos. 4 to 7

Mr. V. B. Dhage, Advocate for respondent No.8

....

WITH

WRIT PETITION NO. 2093 OF 2020

Sushilsingh Sahebsingh Hazari ... Petitioner

Versus

The State of Maharashtra and others ... Respondents

....

Mr. V. B. Dhage, Advocate for petitioners

Mr. S. N. Morampalle, AGP for respondent Nos. 1 to 3

Mr. Shailesh P. Brahme, Advocate for respondent Nos. 4 to 6

Mr. S. R. Kedar, Advocate for respondent Nos. 7 to 10

CORAM : R. G. AVACHAT, J.

RESERVED ON : 25th JANUARY, 2021

PRONOUNCED ON : 30th JANUARY, 2021

PER COURT :-

. Both these writ petitions are interconnected, and therefore, decided by this common order.

For the sake of convenience, the parties and pleadings of Writ Petition No.1455 of 2020, are referred to.

The Petitioners filed civil suit, being Special Civil Suit No.39 of 2010 before the learned Civil Judge, Senior Division, Majalgaon, for declaration that agricultural lands described in the plaint are the personal properties of petitioner Nos. 1 and 2. Relief of perpetual injunction, restraining respondent Nos. 4 to 7 (defendants) from obstructing the petitioners' possession over the suit lands, is also prayed for. The petitioner in Writ Petition No.2093 of 2020 moved application Exh.167 for intervention/ impleadment as defendant in the suit. The trial Court vide its order dated 27.09.2018 rejected application Exh.167. The said order is under challenge in Writ Petition No.2093 of 2020.

The trial Court decreed the suit on 16.10.2018. The defendants in the said suit (respondents No. 4 to 7) preferred appeal, being Regular Civil Appeal No.79 of 2018 before the District Court at Majalgaon. Respondents No. 4 to 7 - appellants impleaded the petitioner in Writ Petition No.2093 of 2020 as party respondent to the said appeal. The petitioners herein, therefore, moved

application Exh.25 for dismissal of the appeal on the ground of misjoinder of the petitioner in Writ Petition No.2093 of 2020, as respondent to the appeal. The learned District Judge, vide his order dated 19.12.2019, rejected application Exh.25. The said order is challenged in Writ Petition No.1455 of 2020.

2. Shri Shailesh P. Brahme, learned Advocate for the petitioners would submit that the trial Court had rightly rejected application Exh.167. On its rejection, the applicant/petitioner in writ petition No.2093 of 2020 did not challenge the said order until the suit was finally decided i.e. 16.10.2018. The appellants in Regular Civil Appeal No.79 of 2018 did not obtain appellate Court's permission before impleading the applicant as party respondent to the appeal. The order passed by the District Judge is illegal and therefore, unsustainable in law. He would further submit that Order XLI Rule 20 of the Code of Civil Procedure (CPC) has no application in the given facts and circumstances of the case. When application Exh.167 was rejected and immediately not taken exception to by filing judicial proceedings, the same attained finality. Pending the suit, by virtue of Section 105 CPC, any order made by a Court in exercise of its original or appellate jurisdiction from which no appeal

has been preferred or provided, any error, defect or irregularity in such order, may be set forth as a ground of objection in the memorandum of appeal. The same has not been done in the present case. Learned Advocate placed reliance on the judgment of the Supreme Court in the case of *Satyadhyan Ghosal vs. Deorajin Debi* reported in **1960 AIR(SC) 941**. Learned Advocate, ultimately, urged for setting aside the impugned order in Writ Petition No.1455 of 2020 and dismissal of Writ Petition No.2093 of 2020.

Learned Advocate representing respondent Nos.4 to 7 (Writ Petition No.1455 of 2020) and learned Advocate for the petitioner (Writ Petition No.2093 of 2020), would submit that the petitioner Nos. 1 and 2 have played mischief. The petitioner (Writ Petition No.2093 of 2020) is a necessary party to the suit. Appeal is continuation of a suit. The appellate Court, therefore, rightly rejected application Exh.25 moved by the petitioners. The trial Court ought to have granted application Exh.167. Learned Advocates ultimately urged for dismissal of Writ Petition No.1455 of 2020 and allowing of Writ Petition No. 2093 of 2020.

3. Order I Rule 10(2) of the CPC, reads thus:

“10. Suit in name of wrong plaintiff .-(1)

(2) Court may strike out or add parties. - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

4. Rule 9 of Order I CPC reads that no suit shall be defeated by reason of the 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 interests of the parties actually before it – provided that nothing in this rule shall apply for nonjoinder of a necessary party.

In view of terminology of Rule 9 above, the appellate Court has rightly rejected the application Exh.25, although it has not referred to provisions of Order I Rule 9 CPC.

5. Learned Advocate for the petitioners was right in submitting that Order XLI Rule 20 has no application to the present case. It empowers the appellate Court to add any person as a party

respondent, who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal.

6. Appeal is continuation of a suit. Provisions of Order I Rule 10 CPC, are therefore applicable to a suit pending in appeal.

7. I have perused the pleadings in the suit and documentary evidence adduced therein. The evidence on record of the suit does indicate that the petitioner No.3- Balaji Mandir Public Trust, is a trust registered in the office of the Charity Commissioner. The suit lands are shown to be the properties of Balaji Mandir Public Trust. Petitioner Nos. 1 and 2 were its erstwhile trustees. They have been removed from trusteeship, way back in 2009. The petitioner in Writ Petition No.2093 of 2020 is one of the trustees of Balaji Mandir Public Trust. The prayers in the suit would indicate that the petitioner Nos. 1 and 2 have claimed exclusive title to the suit lands. Thus, the prayer in the suit is prejudicial to the interest of petitioner No.3 – Balaji Mandir Public Trust. Under these facts, petitioner Nos. 1 and 2 should not have made the trust, a plaintiff in the suit. It is surprising as to how the trial Court was oblivious of this fact. Respondent Nos. 4 to 7 (contesting defendants in the suit) are not

the trustees. In spite of there being voluminous evidence to suggest the properties in the suit being the trust properties, the suit came to be decreed (this is a *prima-facie* observation). When petitioner Nos. 1 and 2 claimed exclusive title and possession over the suit lands in spite of those lands having been shown to be the trust properties in the official record, the trustees of the said trust are entitled to contest the claim made in the suit. The petitioner (Writ Petition No.2093 of 2020), had therefore, rightly moved application Exh.167 for his impleadment in the suit. The trial Court found him to be not necessary party. The findings of the trial Court in this regard, are perverse one. It has been specifically pleaded in Writ Petition No.2093 of 2020 that a copy of the order rejecting application Exh.167 had not been supplied until the suit was finally decided. Since the applicant/petitioner (Writ Petition No.2093 of 2020) was not a party to the suit, he could not take recourse to Section 105 CPC and challenge the said order in appeal. He has no other remedy than to prefer writ petition against the order rejecting his application. It is true that the appellants in RCA No.79 of 2018 before impleading him as party respondent to the appeal, ought to have obtained prior permission of the appellate Court. The said act needs to be deprecated. The fact, however, remains that the

applicant (Exh.167) / petitioner (Writ Petition No.2093/2020), is necessary party to the suit. He has already been on record as a party respondent in the appeal. The appellate Court, was therefore, justified in dismissing application Exh.25. Since the order passed below Exh.167 is unsustainable in law, the same needs to be set aside, allowing Writ Petition No.2093 of 2020.

8. Both the writ petitions are therefore disposed of in terms of the following order :

ORDER

- (i) Writ Petition No.1455 of 2020 is dismissed.
- (ii) Writ Petition No.2093 of 2020 is allowed in terms of prayer clause "C".
- (iii) Application Exh.167 in Special Civil Suit No.39 of 2010.

[R. G. AVACHAT, J.]

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