

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

WRIT PETITION NO. 3754 OF 2015

1. Sou. Alkabai w/o Baburao Mahajan,
Age : 49 years, Occupation : Household.

2. Surekhabai d/o Keshav Mahajan,
Age : 44 years, Occupation :
Household. Both R/o Waghod,
Taluka, Raver, District : Jalgaon.

**..PETITIONERS
[Orig.plaintiffs]**

VERSUS

1. Subhash s/o Namdeo Patil,
Age : 60 years, Occupation :
Agriculture.

2. Ravindra S/o Namdeo Patil,
Age : 56 years,
Occupation : Agriculture.

3. Namdeo s/o Khushal Mali,
Dead through his
legal representative-

3-A. Ramkrishna s/o Namdeo Mahajan,
Age : Major,
Occupation : Agriculture,

3-B Kashinath s/o Namdeo Mahajan,
Age : Major, Occupation : Agriculture.
All R/o Waghod, Taluka : Raver
District : Jalgaon.

**..RESPONDENTS
[Orig.Defendants]**

.....
Mr. Dhananjay Mane, Advocate holding for Mr. Milind Patil for Petitioner
Mr. A.J.Patil, Advocate for Respondent Nos. 1, 2, 3-A and 3-B
.....

CORAM : MANGESH S. PATIL, J.

JUDGMENT RESERVED ON : 13.10.2021

JUDGMENT PRONOUNCED ON : 20.10.2021

JUDGMENT :-

Heard. Rule. The Rule is made returnable forthwith. The learned advocates for the respondents waive service. With the consent of both the sides the matter is heard finally at the stage of admission.

2] The petitioners are impugning the order passed by the learned Judge of the trial Court in their Suit for partition and separate possession whereby their application (Exh. 88) seeking leave to withdraw the Suit under Order XXIII Rule 1(3) of the Civil Procedure Code with liberty to file a fresh Suit has been rejected.

3] The facts as are relevant for the decision of the writ petition may be summarized as under :

One Namdeo was having two wives Yenabai and Dhanabai. He died in 1971. Both his wives are also no more. Yenabai is survived by two daughters Dwarkabai and Yashodabai whereas Dhanabai is survived by respondent Nos. 1 and 2, one more son Ravindra and three daughters Nababai, Vimalbai and Kamalbai. Since Namdev died intestate without having a male issue, the petitioners filed the Suit for general partition of all the properties left behind by him and separate possession of their shares.

4] The respondent Nos. 1 and 2 contested the Suit by filing their separate written statements. They admitted the genealogy and *inter alia* raised an objection regarding non-joinder of parties namely Ravindra and other sharers. The issues were framed and the matter went for trial. After the evidence was over and the Suit was listed for hearing arguments, the petitioners filed application for amendment of plaint under Order VI Rule 17 of C.P.C. (Exh. 85) as also seeking addition of the parties under Order I Rule 10 of the C.P.C. The respondent Nos. 1 and 2 opposed that application. The learned Judge by the order dated 5.12.2014 rejected the application on the ground that already by virtue of order dated 13.2.2009 on petitioner's application (Exh. 28) they were allowed to carry out amendment and to add parties. The petitioners had failed to carry out the amendment and proceeded

with the hearing of the Suit.

5] However, within a month of rejection of application for amendment and addition of parties, the petitioners submitted the application under Order XXIII Rule 1(3) of the C.P.C. on 13.2.2015, contending that since the daughters are also entitled to claim a share and as Yashodabai and other sisters of respondent Nos. 1 and 2 were not the parties to the Suit there was a formal defect and it would fail and sought the permission of the Court to withdraw the Suit with liberty to file a fresh Suit on the same cause of action. After hearing both the sides, by the order which is impugned in this writ petition, the learned Judge of the trial Court has rejected the application on the ground that the application was filed at a belated stage and if the permission was granted it would result in harassment of the respondents as the matter had reached the stage of final arguments.

6] The learned Advocate for the petitioners submits that though the petitioners were at fault in not seeking amendment of the plaint promptly, so as to implead the necessary parties, they had made such an attempt belatedly. Since their application for amendment and addition of parties (Exh. 85) was rejected, they faced awkward situation and within a month of such rejection

had moved the present application (Exh. 88) under Order XXIII Rule 1(3) of the C.P.C. Since Yashodabai and other sharers were not parties to the Suit albeit the petitioners have been claiming a general partition and separate possession, it was certain that the Suit would fail. It is a formal defect which could have been allowed to be cured, either by allowing the amendment or granting permission to withdraw the Suit with liberty to file a fresh Suit on the same cause of action. No prejudice would have been caused to the respondents. Their harassment could easily have been addressed by paying sufficient costs to them. Instead of doing that the learned Judge has taken a hyper technical view which is not in the interest of justice. Since it is a matter of partition and separate possession of a joint property inherited from the maternal ancestor claiming through the respective mothers of the parties the dispute would not end by mere dismissal of the Suit. He would submit that the petitioner's request ought to have been allowed. The order is illegal and may be quashed and reversed.

7] The learned Advocate Mr. Patil for the respondents would submit that the petitioners' claim suffers from delay and laches. The Suit was filed in the year 2006, the written statements were filed promptly raising objection on the ground of non-joinder of all the sharers and still the petitioners proceeded

to participate in the hearing and allowed the Suit to reach to the fag end. It is at that stage when merely the arguments were to be heard, initially they made request for amendment of the Suit and addition of parties by submitting application (Exh. 85). Though the application was rejected, no attempt was made to challenge that order, instead the present application (Exh. 88) is moved to cure all the defects. The conduct of the petitioners is not reasonable and bona fide. The respondents have already been put to lot of harassment since the litigation is pending for last more than 15 years, even they have been made to face the present writ petition. Therefore, no fault can be found with the order passed by the learned Judge in refusing to concede to the request of the petitioners.

8] The learned Advocate Mr. Patil would then refer to the Division Bench decision of this Court in the case of The Asian Assurance Company Limited V/s Madholal Sindhu and Ors.; AIR 1950 Bombay 378, and the decision of the Gujrat High Court which in turn relies upon the Division Bench decision of this Court, in the case of M/s Pranjivandas Virjibhai and Ors. V/s Pravinkumar Mohanlal Modi; AIR 2011 Gujarat 89. He would submit that non-joinder of necessary parties cannot be a ground to grant permission under Order XXIII Rule 1(3) of the C.P.C.

9] Lastly, the learned Advocate Mr. Patil would submit that the petitioners are mischievous inasmuch as in spite of current state of affairs and the litigation between the parties, even while the present petition is pending in this Court, they have filed a fresh Suit bearing R.C.S. No. 67/2021 for the self same relief of partition and separate possession by arraying all the sharers without there being any leave therefor, they are not entitled to any relief.

10] Before advertng to the matter in controversy, it is necessary to note that the learned Advocate for the petitioners on instruction submits that though a fresh Suit was filed as is being pointed out by the learned Advocate Mr. Patil, the petitioners have done so erroneously and have taken prompt steps and have withdrawn it on 29.6.2021.

11] Now, turning to the matter in controversy, the facts are not in dispute. Even there is no dispute as regards the genealogy. The petitioners are claiming a share in the property left behind by the maternal common ancestors of both the sides viz. Namdeo Omkar Wankhede. Admittedly, he was survived by two daughters Yenabai through whom the petitioners are claiming a share and Dhanabai who is the mother of the respondents Subhash,

Prakash one more son Ravindra and three daughters. Since the source of the property is not in dispute, one need not delve deep. These facts are sufficient to indicate that all these persons who have been left out viz. Yashodabai, Nababai, Vimalbai, Kamalbai and Ravindra are indeed necessary parties to the Suit and ought to have been impleaded. It is also a fate-accomplish that in their absence the Suit is bound to fail.

12] The question here is as to if such failure to add the necessary parties can be said to be a formal defect. The whole emphasis of the learned Advocate Mr. Patil for the respondents is on the Division Bench decision in the case of *Asian Assurance Company Limited* (Supra). I have carefully gone through this decision. The learned single Judge had granted permission under Order XXIII Rule 1(2) of the predecessor of the present C.P.C. and which provision was similar to the provision contained in Order XXIII Rule 1(3) of the C.P.C. The plaintiff therein had pointed out as a formal defect that the two persons who ought to have been made parties to the Suit were not so made and the Suit suffered from the defect of non-joinder. It was observed by the Division Bench that that Suit could not have failed by reason of non-joinder. It was further observed that the easiest and the simplest thing for the plaintiff to have done was to have those persons made parties to the Suit. In view of

such observations in my considered view it cannot be said that the Division Bench has laid down a ratio to the effect that non-joinder of necessary parties cannot be a formal defect contemplated under Order XXIII Rule 1(3) of the C.P.C. Besides, the Division Bench has also observed that the defect of non-joinder can also be cured by adding the parties who have been left out. Therefore, the respondents are not entitled to derive any benefit from this decision.

13] On the contrary, as is suggested by the Division Bench (Supra) the petitioners did make an attempt to add the parties by moving application (Exh. 83). Unfortunately, the learned Judge rejected that application on 5.12.2014 (Exh. 85) on the ground of delay and laches. Instead of challenging that order the petitioners preferred the present application (Exh. 88) under Order XXIII Rule 1(3) of the C.P.C. Unfortunately, once again the learned Judge has rejected the application on the ground of delay and laches and on the ground that the Suit has reached the stage of final arguments.

14] It is to be borne in mind that it is a Suit for partition and separate possession of joint properties. Even if it fails, for non-joinder of necessary parties, the status of the property would not alter. The remaining sharers who

have been left out and even the respondents herein would still be entitled to file a separate Suit for partition and separate possession. Meaning thereby, the dispute between the parties would not abate unless their shares are severed by metes and bounds. If that does not happen in the present Suit, there is every possibility that it would happen in future at the instance of some other sharers. Merely by dismissal of the present Suit the petitioners' right to claim a share would not cease. If this is the state of affairs, though technically the petitioners are to be blamed for the delay and latches, a pragmatic view needs to be taken.

15] There is one more aspect. Since the genealogy was admitted by the parties even the trial Court could have called upon the petitioners to add the parties no sooner the objection raised by the respondents was noticed, before proceeding with the trial. The trial Court is not supposed to act as an umpire but is expected to take active part in conducting and concluding a lis. Therefore, even if the plaintiffs are to be blamed for the latches, even the trial Court is equally remiss in conducting the trial.

16] Further if really the respondents wanted the sharers who were not added as parties to be so added, they also could have taken a pragmatic

stand when the petitioners had filed the application (Exh. 85) seeking addition of the parties.

17] All in all the Suit is bound to fail in the absence of necessary parties. Since it is a Suit for partition and separate possession of joint property, the dispute would not end by mere dismissal of the Suit. Though the petitioners are indeed lax in prosecuting the Suit, the respondents having faced a lot of harassment, it would have been just and proper for the learned Judge to have imposed heavy costs for granting leave to withdraw the Suit with permission to file a fresh Suit as prayed for, instead of rejecting the application out-rightly.

18] In view of above, interest of justice would be met if the writ petition is allowed by imposing heavy costs as a condition precedent.

19] The writ petition is allowed subject to the condition that the petitioners shall deposit in the trial Court costs of Rs. 25,000/- of the respondent Nos. 1 and 2 each within four weeks. The respondent Nos. 1 and 2 would be entitled to receive the costs. On such costs being deposited the trial Court shall allow the application (Exh. 88).

20] The Rule is made absolute in above terms.

[MANGESH S. PATIL, J.]

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