

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CIVIL APPLICATION NO.9482 OF 2018
IN SA/50/2018

PRAVEEN OMPRAKASH POKHARNA AND OTHERS

VERSUS

THE STATE OF MAHARASHTRA AND OTHERS

...

Mr. G.R. Syed, Advocate for appellants

Mr. B.V. Virdhe, AGP for respondent Nos.1 and 2

Mr. N.B. Kamble, Advocate for the respondent No.3

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CORAM : SMT. VIBHA KANKANWADI, J.

DATE : 08th SEPTEMBER, 2021.

ORDER :

1 Present application has been filed by the applicants to get them impleaded as party and also for transposition.

2 The appeal has been filed by original plaintiff Nos.3 and 5 to challenge the concurrent Judgment and Decree passed by the Courts below. They along with other plaintiffs had filed Regular Civil Suit No.686/2006 before Civil Judge Senior Division, Nanded for declaration of ownership and possession in respect of suit land. The said suit came to be dismissed on

29.09.2011. The appeal was preferred by original defendant Nos.1 and 2 i.e. the Government, which was only to the extent of findings given by the Civil Judge Senior Division, Nanded that the defendant No.3 is the owner of land Sy.No.5, by virtue of Will, executed in his favour, by his biological mother. In other words, it can be said that the original plaintiffs had not filed any appeal. The learned District Judge-6, Nanded allowed the appeal and set aside the said findings given by the learned Trial Judge by Judgment and Decree dated 29.09.2017. Challenging the same the appellants before this Court in the Second Appeal are the original plaintiff Nos.3 and 5.

3 Heard learned Advocate Mr. G.R. Syed for appellants, learned AGP Mr. B.V. Virdhe for respondent Nos.1 and 2 and learned Advocate Mr. N.B. Kamble for the respondent No.3. In order to cut short it can be said that they have argued in support of their respective contentions.

4 It is to be noted that the applicants are coming with a case that the applicant No.1 is the original plaintiff No.2. Applicant Nos.2 to 10 are the purchasers of the suit property from original plaintiff No.1. In fact, original plaintiff No.1 had sold his share to one Shriram Bhimrao Rathod and from said Shriram the applicant Nos.2 to 9 had purchased the pieces of properties vide registered sale deeds in the year 2016-2017. They have

contended that since their predecessor in title i.e. the original plaintiff No.1, though now arrayed as respondent No.4 in the Second Appeal, had not preferred any appeal. The applicants are seeking permission to prosecute the Second Appeal, which is now filed by the original plaintiff Nos.3 and 5. It is pertinent to note that they say that they may be permitted to prosecute on behalf of the original plaintiff No.1 Madhavrao. Thereafter, the applicant Nos.10 and 11 say that they are the owner and possessors of some portion of suit land, on the basis of gift deed, executed by the original plaintiff No.6. Original applicant Nos.12 and 13 are also seeking permission to prosecute the Second Appeal.

5 The learned Advocate appearing for the applicants has relied on the decision in **Mukesh Kumar and others vs. Colonal Harbans Waraiah and others, AIR 2000 SC 172**, wherein it has been held that -

“Section 21(2) applies only to those cases where the claim of the person transposed as plaintiff can be sustained on the plaint as originally filed or where person remaining as a plaintiff after the said transposition can sustain his claim against the transposed defendant on the basis of the plaint as originally filed. For sub-sec. (2) to apply all that is necessary is that suit as filed originally should remain the same after the transposition of the plaintiff and there should be no addition to its subject matter. Where a suit as originally filed is properly framed with the proper parties on record, the mere change

of a party from array of defendants to that of plaintiffs under O. 1, R. 10 of CPC will not make him a new plaintiff and will not bring the case within this Section and in such a case sub-sec. (1) will not apply. For instance, where one of the plaintiffs refusing to join as plaintiff was first made a defendant and thereafter transposed as a plaintiff, he is not a new plaintiff. Therefore, the plea that the suit is barred by limitation in so far as 'A' one of the defendants is concerned inasmuch as he is transposed as a plaintiff after the period of limitation, does not stand to reason."

6 At the outset, it can be seen that the present application can be said to be under Order 1 Rule 10 of the Code of Civil Procedure. The applicants have not come with a case that they had no knowledge about the pendency of the appeal before the First Appellate Court. They had purchased the portion of the suit property as alleged by them during the pendency of the First Appeal in 2016-2017 and thereafter the decision has been given by the learned District Judge-6, Nanded on 29.09.2017. There was no attempt by them to get themselves impleaded as respondents in the First Appeal. Another point to be noted is that none of the plaintiffs had ever challenged the Judgment and Decree passed by the Trial Court. Under such circumstances, the present applicants cannot be said to be the necessary parties to the Second Appeal. A limited dispute was before the First Appellate Court regarding a particular finding that was given by the Trial

Court and then it went against the original defendant No.3. It can be reiterated that the First Appellate Court proceeded only to the extent of the crucial issue about the correctness of the findings recorded by the learned Civil Judge Senior Division, Nanded that the defendant No.3 is the owner of the land Sy.No.5, by virtue of Will, executed in his favour, by his biological mother. There was no question of deciding the dispute in respect of title of the plaintiff No.1 by the First Appellate Court, as the same was already decided by the Trial Court in the negative. Issue No.1 was – Do plaintiffs prove that they are owners of the suit property ? And the finding was given - in the negative. It is also to be noted from the Judgment of the learned Trial Judge that the defendant No.3 was joined as a party to the suit later on and in his written statement he denied the title of the plaintiffs as they had claimed as the owners of the suit property. Under such circumstance, there is no question that the applicant Nos.2 to 15 to be added as party to the Second Appeal. Applicant Nos.16 and 17 are already the original appellants. The ratio laid down in **Mukesh Kumar**'s case (supra) will not be applicable to the facts of the case, for the simple reason that the situation therein about transposition and the limitation was considered from the point of view of the fact that the suit was properly instituted between appropriate parties. Here, directly transposition and/or addition of party cannot be entertained for those persons who have purchased the property subsequently and the

findings in respect of whose predecessor the finality has achieved.
Application, therefore, stands rejected.

(Smt. Vibha Kankanwadi, J.)

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