

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

WRIT PETITION NO. 13442 OF 2019

Parigabai w/o. Sakharam Berad Age. 72 years, Occ. Agri., R/o. Sonewadi Mehakari, Tq. & Dist. Ahmednagar.	.. Petitioner [original plaintiff]
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Versus

Dhondiram Bhimaji Borude Deceased through his L.Rs.	.. Respondents [original defendants]
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1-A) Rohidas s/o. Dhondiram Borude
Age. 62 years, Occ. Agri.,
R/o. Sarola Baddi,
Tq. & Dist. Ahmednagar.

1-B) Sevantabai Balu Walke
Age. 60 years, Occ. Agri.,
R/o. Sayyedmir loni, Tq. Ashti,
Dist. Beed.

2) Bhanudas s/o. Bhimaji Borude
Age. 87 years, Occ. Agri.,
R/o. Sarola Baddi,
Tq. & Dist. Ahmednagar.

3) Indirabai w/o. Bajirao Chirke
Deceased through her L.Rs.

3-A) Tarabai w/o. Babasaheb Nimse
Age. 62 years, Occ. Agri.,
R/o. Mandve, Tq. & Dist. Ahmednagar.

- 4) Santosh Baban Sathe
Age. 52 years, Occ. Service,
R/o.Z.P. Primary School,
Madhi, Dalvi Wasti, Tq. Kopargaon,
Dist. Ahmednagar.
- 5) Sangita Arun Borude
Age. 38 years, Occ. Agri.,
R/o. Sarola Baddi,
Tq. & Dist. Ahmednagar.
- 6) Sanjay Pandurang Borude
Age. 47 years, Occ. Labour work,
R/o. Dashmi gavan, Sandwa fatha,
Near North Cannal,
Tq. & Dist. Ahmednagar.
At present Komdiwala Mala,
Ahmednagar, Tq. & Dist. Ahmednagar.
- 7) Bandu Pandurang Borude
Age. 52 years, Occ. Labour work,
R/o. Gajanan Colony, MIDC, Ahmednagar,
Tq. & Dist. Ahmednagar.
- 8) Rakhamabai Pandurang Borude,
Age. 72 years, Occ. Nil,
R/o. Dashmi gavan, Sandwa fatha,
Near North Cannal,
Tq. & Dist. Ahmednagar.

Mr.N.C. Garud, Advocate for the petitioner.

Mr.S.S. Bora h/f. Mr. V.S. Badakh, Advocate for
respondent No.4.

CORAM : N.J.JAMADAR, J.
RESERVED ON : 03.03.2021
PRONOUNCED ON : 08.03.2021

J U D G M E N T :-

01. Rule. Rule made returnable forthwith. With the consent of the Counsel for the parties, heard finally at the stage of admission.

02. The petitioner assails the legality, propriety and correctness of order dated 09.09.2019 passed by learned 7th Jt. Civil Judge, Junior Division, Ahmednagar, on an application [Exh.58], in RCS No.377 of 2016, instituted by the petitioner, to club the said suit with RCS No.102 of 2013 instituted by respondent No.4 against respondent Nos.1 and 2 herein; whereby the learned Judge rejected the prayer of the petitioner.

03. The background facts leading to this petition can be stated in brief as under :-

a] Respondent No.4-Santosh instituted a suit being RCS No.102 of 2013 against respondent Nos.1 and 2 for

appointment of Cadastral Surveyor to measure and determine the boundaries of Gat No.73/2 situated at Mouje Sarola Baddi [Suit-land], as the respondent Nos. 1 and 2 raised dispute about the area of the suit-land and did not give consent to have measurement of the suit land, when respondent No.4 made an application to the Taluka Inspector of Land Records [TILR]. The respondent No.4 averred that the suit-land was acquired by respondent No.4 from late Pandurang Bhimaji Borude, the brother of respondent Nos.1 and 2. There was separate possession and enjoyment of the shares of respondent No.1 and 2, and the vendor of respondent No.4, Pandurang in Gat No.73. On the strength of conveyance dated 17.01.2001 executed by late Pandurang, Gat No.73 came to be sub-divided. The suit-land was numbered as 73/2. Respondent Nos.1 and 2's land was numbered as 73/1. Yet, respondent Nos. 1 and 2 continued to raise dispute about the area of the suit-land. Hence, the suit.

b] The petitioner-Parigabai instituted the instant

suit for partition and separate possession of her share in the joint family properties including the agricultural land bearing Gat No.73/2, which was allegedly sold to respondent No.4-Santosh. It was averred that there was no partition by metes and bounds in the joint family properties including Gat No.73/2. The vendor of respondent No.4 was thus not entitled to execute the sale-deed of the land Gat No.73/2. The area which was sought to be sold under the sale dated 17.01.2001 was, in any event, in excess of the land which could fall to the share of the vendor of respondent No.4. It was alleged that the sale-deed and the consequent mutation of the name of respondent No.4 to the land bearing Gat No.73/2 were illegal. The petitioner also sought declaration that the said sale-deed was void and not binding on her. The consequential reliefs of injunction were also sought against respondent No.4.

c] In the backdrop of these suits, the petitioner preferred an application [Exh.58] to club both the suits,

on the premise that if the suits are tried separately, there is a possibility of conflicting decisions. On the contrary, it would be just and proper to evaluate evidence and decide both the suits together.

d] The defendant No.4 resisted the prayer. It was contended that the nature of the suits was distinct. The prayers were different. Thus, it was not warranted to consolidate the suit.

e] The learned Civil Judge was persuaded to reject the application holding, inter-alia, that the parties in both the suits were different. The plaintiff was not party to RCS No.102 of 2013 instituted by defendant/respondent No.4. The nature of each of the suits was also quite distinct. Though one of the suit properties in the suit instituted by the petitioner herein was also the subject matter of RCS No.102 of 2013, it was not necessary to club the suits as the finding in one suit would not bear upon the outcome of another suit.

It was further noted that RCS No.102 of 2013 was posted for final arguments and the later suit instituted by the petitioner was at the stage of settlement of issues. Thus, the application came to be rejected.

04. Heard learned Counsel for the petitioner and learned Counsel for the respondent No.4.

05. It was urged on behalf of the petitioner that the substantive suit instituted by the petitioner for partition and separate possession of the joint family properties including the suit property in RCS No.102 of 2013, is required to be decided together with RCS No.102 of 2013 as the finding in the said suit would bear upon the claim of the respondent No.4-plaintiff in RCS No.102 of 2013. It was further submitted that the learned Civil Judge committed an error in rejecting the prayer for clubbing of the suits on the basis of the stage of the proceedings. The hearing in the suit instituted by the petitioner can be expedited and both the suits can be

disposed of in a time bound manner. The possibility of conflicting decisions, if both the suits are allowed to be heard and decided separately is imminent, urged the learned Counsel for the petitioner.

06. Per contra Mr. Bora, learned Counsel for respondent No.4 stoutly submitted that the application for clubbing of the suits was totally misconceived. The prayer in the suit instituted by the plaintiff was only for appointment of the Court Commissioner to measure the suit land as the defendant Nos.1 and 2 therein stalled the efforts of the plaintiff-respondent No.4 to get the suit land measured. On the one hand, they did not give consent for measurement of suit. On the other hand, they continued to commit acts actuated by the design of grabbing respondent No.4's land. Thus, there is no justification for the prayer for consolidation of the suits, urged Mr. Bora.

07. The nature of the suits and the prayers therein

have been noted above in some detail, on purpose. Evidently, Gat No.73 which was ancestral property of defendant Nos.1 and 2 and the predecessor in title of the plaintiff, namely, Pandurang, has been divided into Gat No.73/1 and 73/2. It is the claim of the plaintiff – respondent No.4 that he had purchased the said Gat No.73/2 from Pandurang by virtue of the sale-deed dated 16.01.2001. The fact that respondent No.4-plaintiff is in possession of at least a portion of Gat No.73/2 is borne out by the averments in the plaint in RCS No.377 of 2011, instituted by the petitioner. There is a prayer for a mandatory injunction directing defendant No.4 to dismantle the structures erected thereon and hand over possession thereof to the plaintiff-petitioner.

08. In the light of the aforesaid facts, the prayer for consolidation of the suits is required to be appreciated. The suit instituted by the petitioner is for general partition and separate possession of all the alleged joint family properties including the suit land

in RCS No.102 of 2013. The remit of the suit in RCS No.102 of 2013, on the other hand, is for an order for measurement of the suit-land by the TILR. The question whether respondent No.4-plaintiff is entitled to such reliefs in the backdrop of sub-division of Survey No.73, in the circumstances of the case, may not impinge upon the claim for partition. In the suit for partition, the legality and validity of alienation by one of the co-sharers can be legitimately enquired into and adjudicated upon and even the equities can be worked out. A direction for measurement of the suit land in RCS No.102 of 2013, would not foreclose the determination of aforesaid issues in the suit for partition.

09. A useful reference can be made to a judgment of the Supreme Court in the case of **Chitivalasa Jute Mills Vs. Jaypee Rewa Cement, (2004)3 SCC 85**, wherein the aspect of consolidation of the suit was elucidated. The observations of the Supreme Court in para No.12 are instructive. They read as under :-

"12. xxxxxxxx The Code of Civil Procedure does not specifically speak of consolidation of suits but the same can be done under the inherent powers of the court flowing from Section 151 CPC. Unless specifically prohibited, the Civil Court has inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties for multiplicity of proceedings, delay and expenses. Complete or even substantial and sufficient similarity of the issues arising for decision in two suits enables the two suits being consolidated for trial and decision. The parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. The evidence having been recorded, common arguments need to be addressed followed by one common judgment. However, as the suits are two, the court may, based on the common judgment, draw two different decrees or one common decree to be placed on the record of the two suits. Xxxxxxxx "

[emphasis supplied]

10. The aforesaid pronouncement enunciates that the test for consolidation of the suit is complete or even substantial and sufficient similarity of the issues arising for decision in two suits. The Supreme Court observed that, in such cases, the consolidation of the suits relieves the parties of the need of adducing the same or similar documentary evidence twice over in the two suits in two different trials.

11. In the case at hand, in my considered opinion, the aforesaid test is not satisfied. The issues which arise for determination in the suits can be termed neither completely similar nor even substantially similar.

12. The matter can be looked at from a slightly different perspective. The thrust of the submission on behalf of the petitioner is that consolidation of the suits was necessary to obviate conflicting decisions. Section 10 of the Code seeks to achieve the said object. It seeks to avoid two parallel trials on the same issue by two Courts and to avoid recording of conflicting findings on the issues which are directly and substantially in issue in previously instituted suit.

13. The test for applicability of Section 10 was expounded by the Supreme Court in the case of National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, AIR 2005 SC 242, in the following words :-

"8. xxxxxxxx The object of section 10 is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue". Therefore, section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical."

14. I am mindful of the fact that the aforesaid test may not apply with equal force to the prayer for consolidation of the suits. However, the fact that one of the issues is incidentally or collaterally in issue in another suit cannot be a sustainable ground for consolidation of the suits.

15. The conspectus of aforesaid consideration and discussion is that the prayer for consolidation and/or clubbing of the suit is not sustainable. The learned Civil Judge did not commit any illegality in rejecting

the prayer for clubbing of the suits. Thus, no interference is warranted in the exercise of extraordinary jurisdiction. Resultantly, the petition deserves to be dismissed.

Hence, following order :-

O R D E R

The petition stands dismissed.

Rule discharged.

[N . J . JAMADAR , J .]