

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8928 OF 2021
ALONG WITH
INTERIM APPLICATION NO.4044 OF 2021
ALONG WITH
WRIT PETITION NO.8929 OF 2021**

Laxmibai Murlidhar Khalkar & Ors. .. Petitioners

Vs.

Baban Pandu Khalkar & Ors. .. Respondents

...

Mr. Girish R. Agrawal for the petitioners.

Ms. Smita R. Gaidhani with Mr. Kedar Purav for respondent
Nos.1 to 6.

...

CORAM : SMT. BHARATI DANGRE, J.

DATED : 15TH DECEMBER, 2021.

P.C:-

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1. The petitioners, being the unsuccessful plaintiffs in Regular Civil Suit No.177 of 2004, have instituted Regular Civil

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Appeal No.2 of 2012. The said appeal is pending before the appellate court since 2012 and it is informed by learned counsel for the respondents that it is at its fag end and is scheduled for argument on 20/12/2021.

In the appeal, an application is taken out by the appellants (the petitioners herein) under Order 1 Rule 10 of the CPC seeking the legal heirs of defendant No.1 to be brought on record and also seeking incorporation of the house property as a suit hotchpotch. This application being rejected on 22/03/2021 by the District Court, Nashik, the petitioners are before this court.

2. Peeping into the background of the appeal, it can be discerned that the plaintiffs instituted a suit for partition, separate possession, declaration and perpetual injunction against the defendants, all of them being the descendants of one Khandu Khalkar. This Khandu Khalkar had four children viz. Pandu, Gangubai, Mahadu and Anusayabai. The plaintiffs are the lineal descendants of Mahadu, defendant Nos.1 to 9 are the descendants of Pandu and defendant No.11 to 11-I are the descendants of Gangubai. They sought partition of the suit property as set out in the plaint.

3. Learned Judge formulated the following issues for consideration:

“1. Whether plaintiffs prove that they are in

possession of suit property as per Tenancy Act?

2. *Whether plaintiffs prove that name of Pandu Khandu is mutated on behalf of Hindu Joint family?*
3. *Whether plaintiffs prove that suit property purchased from income of joint family property?*
4. *Whether plaintiffs prove that suit properties are ancestral/joint family properties?*
- 4A. *Whether suit is hit by principle of non joinder of necessary parties?*
- 4B. *Whether suit is properly valued?*
- 4C. *Whether suit is bad for non-inclusion of all the properties in hotchpot?*
5. *Whether plaintiff is entitled for partition and possession? If yes, to what extent?*
6. *Whether plaintiff is entitled for perpetual injunction as prayed?"*

4. Answering issue Nos.1 to 4, 5 and 6 in the negative and by answering issue Nos.4(a), 4(b) and 4(c) in the affirmative, the suit is dismissed on 29/11/2011. I have perused the deliberation and the reasoning of the learned Judge regarding Issue Nos.4(a) and 4(c), since it has a bearing on the application for amendment.

5. After nearly a decade of the dismissal of the suit, the plaintiff sought to cure the defects noticed in the suit filed by them and when the relief claimed by them were refused on the ground of non rejoinder of necessary parties when the suit was held to be bad for non-inclusion of the properties in the hotchpotch. In order to cure this lacune, the appellants took out an application under Order 1 Rule 10 of the CPC and now he sought to bring on record, the legal heirs of one Vimalbai, since while dealing with Issue No.4A, learned Judge has recorded that deceased defendant No.11H Vimalbai Pakhale is having two daughters and two sons and her husband is also alive, and even they would be entitled to claim their share in the property and to decide their share, their impleadment in the suit was necessary. In absentia, it was recorded that the suit was hit by the principles of non-joinder of necessary party, in the wake of the law governing the partition of properties between the coparceners.

Apart from this, another flaw of non-inclusion of all the properties in the hotchpotch, is also sought to be overturned by bringing the property, which is a house property as a suit property.

This amendment is sought in the wake of the findings rendered by learned Judge on issue No.4C, where a finding is returned that in view of the admission coming from PW-1 Vijay, it can be inferred that there are house properties situated on the suit property, which are not included in the present suit and, the ordinary rule applicable to the coparcenery property is that when

a suit is filed for partition of the suit properties, it would embrace all the joint family properties of the joint family, so that there can be a complete and final partition. Recording that the plaintiffs have failed to bring the house properties situated on the suit properties in the hotchpotch, the suit is held to be not maintainable. For inclusion of the house properties at this stage, when the appeal is in its culmination, and after a decade when the suit was dismissed, the amendment is sought to the aforesaid effect.

The appellate court has rejected the application on both the counts by recording that it is nothing but an attempt to protract the hearing and the application being moved belatedly after passing of nine years of the impugned decree, it deserves to be rejected.

6. The aforesaid may be one prime consideration, which would persuade me to uphold the impugned order apart from the consideration of the application on its merits. Pertinent to note that as far as the issue of non-impleadment of the heirs of defendant Nos.11H is concerned, learned Judge has rightly recorded that the mother of defendant Nos.10 and 11 Vimal Pakhale has already relinquished her rights, four years before institution of the suit and, therefore, the heirs of defendant No.11 need not be brought on record. As far as the suit property is concerned, though Mr. Agrawal vehemently argued that a finding is rendered by the trial court to the effect that it is a joint

family property, I am unable to accept the said submission since paragraph Nos.72 and 73 of the impugned judgment merely record a finding to the effect that there is house located on the suit property, which are not included in the suit hotchpotch. While answering the issue as to whether the plaintiffs plead that the suit property is purchased from the income of the joint family properties or whether the suit properties are joint family properties, both these issues are answered in the negative. Therefore, the assumption of Mr. Agrawal that the house property, which is not included in the hotchpotch stand on a different footing, cannot be accepted. The merits of the application also does not warrant any consideration and the learned Judge has rightly rejected the application. In the wake of the above, the impugned order is upheld with a mandate being issued to the District Judge-1, Nashik to conclude the proceedings in the appeal expeditiously and, in any case, within a period of eight weeks from today.

7. The writ petition is dismissed in the aforestated terms. In view of dismissal of the writ petition, the interim application does not survive and is disposed of as such.

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8. Heard the learned counsel appearing for the respective parties.

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9. The petitioners, the original plaintiffs are aggrieved by the order passed at Ex-66 and Ex-68 by which the appellants sought setting aside of the abatement of defendant No.10A-5 by condoning the delay and bringing his legal heirs on record.

Perusal of the order impugned passed by the District Judge, Nashik reveals that the said application is filed after nine years of refusing a decree in favour of the plaintiffs and on the demise of the defendant No.10A-5 on 31/01/2019, the learned Judge has recorded that the parties to the proceedings are in brotherhood and it is hard to believe that they became aware of the demise of respondent No.10A-5 in the month of July, 2021. The attempt to file the application being perceived as attempt of delaying the proceedings, the learned Judge has rejected the aforesaid application.

10. Pertinent to note that the suit itself has proceeded ex-parte against defendant No.7 to 11-I, which included defendant No.10A-5. In the wake of the aforesaid facts, when the defendants never put an appearance during the proceedings in the suit nor in the appeal, which was pending before the court for more than a decade, the attempt on the part of the appellants to bring the legal heirs on record by taking out an application, has been rightly construed by learned appellate court to be a delaying tactic.

11. The impugned order does not warrant any interference and is upheld. Resultantly, the writ petition is dismissed.

[SMT. BHARATI DANGRE, J.]