

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

**WRIT PETITION NO.9451 OF 2021**

MANGAL BABAN MALI AND OTHERS  
VERSUS  
LAHU DHONDIRAM MALI AND OTHERS

...

Advocate for Petitioners : Mr. Satyajeet S. Dixit  
Advocate for Respondent Nos.1 to 4, 6, 8 to 11, 18 & 21: Mr. R. B.  
Temak

...

**CORAM : NITIN B. SURYAWANSHI, J.**

**DATE : 2<sup>nd</sup> August, 2022**

**ORDER :**

1. The petitioners/defendants have challenged the order passed by the learned Joint Civil Judge, Junior Division, Sangamner below Exhibit-129 in Regular Civil Suit No.149/2004, thereby rejecting the application filed by the petitioners for framing two additional issues.
2. The plaintiff/respondent nos.1 to 4 filed suit for partition and separate possession of ancestral properties. During pendency of the suit, additional written statement was filed by the petitioners/defendants. Thereafter, application (Exhibit-129) is filed by the defendants proposing following issues. The said issues are reproduced in the words of defendants as mentioned in the application:

*"1) Whether plaintiff have prove that their predecessor in title Mr. Bhima was brother of deases Bhika? whether plaintiff have prove that their predecessor in title Mr. Bhima having blood relationship with Bhika?*

*2) Whether the plaintiff has included all the properties in the common hotchpotch situated at village Konchi as alleged?" or whether the suit is hit by non joinder of necessary properties as alleged?"*

3. The respondents/original plaintiffs resisted the said application by filing a say that, the application is not correct, legal and therefore, is liable to be dismissed. The burden is on the plaintiffs to prove the family tree given in the suit and for that, issue no.1 is already framed. The properties of village Konchi are not ancestral properties, but they are owned by Forest Department and are Class-II land. Therefore, the application filed by the petitioners be rejected. The Trial Court after hearing the parties rejected the application. Hence, the present petition.

4. Heard the learned Advocate for the petitioners and the learned Advocate for the respondents.

5. Admittedly, the Trial Court has framed issue no.1 to the effect that "whether the plaintiff have proved that their predecessor in title Mr.Bhima was son of main ancestor Mr.Mukta" This issue covers the issue no.1 proposed by the petitioners. The Trial Court has, therefore, rightly refused to frame the said issue.

6. So far as the second additional issue proposed by the petitioners is concerned, the Trial Court has refused to frame the said issue holding that "But as the suit is filed by the plaintiff in year 2004 and the plaintiff has prayed for partition of suit property then he is at liberty to seek partition for the properties which are in dispute. It is discretion of the plaintiff to seek for partition for the properties which are ancestral as per his prospect. After the decision of present suit, the law itself will bar the parties to file another suit on same cause of action between same parties."

7. The learned Advocate for the respondents/original plaintiffs by relying on the extract of record of right states that the properties at village Konchi are forest land and therefore, they are not liable for partition.

8. It appears from the record of rights that the forest land was distributed to its occupants, on payment of occupancy price and the said lands were transferred in name of ancestor of plaintiffs and defendants. These properties therefore are required to be included in the common hotchpotch, in the partition suit. The Trial Court has ignored this material aspect and has erroneously refused to frame additional issue. Though the Trial Court has observed that after the decision of this suit, the law itself will bar the parties to file another suit, on the same cause of action between the same parties, this

was all the more reason for framing additional issue in respect of properties at village Konchi. If the properties at village Konchi are not put in common hotchpotch while entertaining partition suit, the same will be prejudicial to the interest of both the parties. In this view of the matter, the order passed by the Trial Court to the extent it denies framing of additional issue in respect of properties at village Konchi cannot be sustained.

9. In the result, the following order:

**ORDER**

- i) The writ petition is partly allowed.
- ii) The impugned order to the extent it denies framing of additional issue “whether the plaintiffs have included all the properties in the common hotchpotch situated at village Konchi as alleged?” is hereby quashed and set aside.
- iii) The Trial Court is directed to frame the said issue within a period of two weeks from the date of receipt of this order and proceed with the suit in accordance with law.

**[NITIN B. SURYAWANSHI, J.]**

*Sameer*