

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 178 OF 2019
WITH
CIVIL APPLICATION NO. 215 OF 2019
IN
APPEAL FROM ORDER NO. 178 OF 2019**

Abdul Razak Ahemand Khan (Deceased
through legal heirs) ..Appellant

v/s.

Elias Ismail Khan & Ors. ..Respondents

**WITH
APPEAL FROM ORDER NO. 16 OF 2019
WITH
CIVIL APPLICATION NO. 19 OF 2019
IN
APPEAL FROM ORDER NO. 16 OF 2019**

Abdul Razak Ahemand Khan (De ..Appellant

v/s.

Bilkis Iqbal Khulli & Ors. ..Respondents

Mr. Ashok Tajane for the Appellant.

**CORAM : ANUJA PRABHUDESSAI, J.
DATED : 7th JUNE, 2022.**

P.C.

1. The Appellants herein have challenged the judgment and order dated 30.05.2018 passed by learned District Judge, Sindhudurg, in Regular Civil Appeal Nos. 49 of 2009 and 52 of 2009. By the impugned order, the learned Judge has set aside the judgment and decree

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in Regular Civil Suit No. 91 of 2003, and remanded the matter to the trial Court with liberty to the Appellants to implead the Respondent No.1 Elias Ismail Khan as the Defendant and to decide the matter afresh after giving him an opportunity to file the written statement and adduce evidence.

2. The Appellants, who shall be hereinafter referred to as the Plaintiffs had filed a suit for partition and separate possession. The dispute is in respect of the property surveyed under survey nos. 21/7, 20/14, sub-divisions 1, 3, 9 and 13 of survey no.3, survey no.254/4, sub-divisions 29 and 33 of survey no.253, and survey nos.20/7, and 252/1 and the residential houses Nos.458 and 64 situated at Village vetal Bambarde, Taluka Kudal, District Sindhudurg. The said properties more particularly described in Schedule A and B of the plaint shall be hereinafter referred to as “the Suit property” .

3. It is the case of the Plaintiffs that the suit property was owned and possessed by Ahmad Khan Ibrahim Khan, the father of Plaintiff No.1 to 4, deceased Husain Khan and Ismail Khan. The Plaintiffs claim that after the death of Ahmad Khan, Ibrahim Khan, the property was jointly owned and possessed by them and their deceased brothers Hussain Khan and Ismail Khan. The Plaintiff No.5 and Defendant No.8 are the sons of Husain Khan, whereas Defendant Nos.1 to 7 are the children of Ismail

Khan. The Plaintiffs alleged that they and their brother deceased Hussain Khan, were employed in Mumbai and taking advantage of their absence, Ismail Khan got his name recorded in the revenue records. The Plaintiffs claim that they have 1/6th share in the suit property, the Plaintiff Nos.5 and 8 have 1/6th share and the Defendant Nos.1 to 7 have 1/6th share in the suit property. They had requested the Defendant Nos.1 to 7 to partition the property. Rejection of this request led to filing of the suit for partition and separate possession.

4. The Defendant Nos.1 to 3 and 5 to 7 contested the suit. They claimed that the Plaintiffs and Defendant No.8 do not have any right, title or interest in the suit property. These Defendants claimed that the Plaintiffs and Hussain Khan were well educated and were in Government Service in Mumbai, whereas Ismail Khan was uneducated and stayed in the village and was engaged in agriculture. The properties at serial nos.1, 2, 8 to 11 of Schedule A were in his exclusive possession as tenant thereof and he purchased the same under the provisions of the Tenancy Act, whereas the other properties including the house property described in Schedule B are self acquired properties. These Defendants claimed that Defendant No.4, who was deleted from the array of the Defendants, is a necessary party and raised a plea that the suit is bad for non-joinder of necessary party.

5. The trial Court, upon considering the evidence on record held that the suit property is ancestral property, owned by Ahmed Khan and that the Plaintiffs have 1/6th share in the suit property. The trial Court further held that the suit is not for partition inter se between the defendants. The Defendant No.4, though not a party to the suit, was duly represented by the other Defendants. Moreover, DW1 has deposed on behalf of all the Defendants. Hence the Plaintiffs cannot be non suited for non joinder of Defendant No.4. Based on these findings, the suit came to be decreed.

6. Aggrieved by the judgment, the Defendant No.4 filed an appeal No.49 of 2009 and the legal heirs of Defendant No.1, Nos.2 to 5 filed Appeal No.52 of 2009, before the District Court. Learned District Judge set aside the judgment of the trial Court and remanded the matter mainly on the ground that the Defendant No.4, who is a necessary party, was deleted without service of summons. He was not represented by DW1 or by the other defendants and that he is not bound by the decree, which adversely affects his rights.

7. Shri Tajane submits that the Defendant No.4 who was not a party to the suit had no right to appeal without seeking leave of the Appellate Court. Shri Tajane, further submits that summons could not be served on the Defendant No.4 since he was serving abroad, and that it was

incumbent upon the other defendants to furnish his address and to protect his interest by taking a valid defence. He further submits that the trial court has recorded a finding that the Defendant No.4 and the other Defendants have 1/6th share in the property, and has thus protected his rights in the property. He submits that the judgment of the trial court was not adverse to the interest of the Defendant No.4. Hence, the learned Judge was not justified in remanding the matter.

8. I have considered the submissions advanced by the learned Counsel for the Plaintiffs. It is pertinent to note that in ***Smt. Jatan Kanvar Golcha vs. M/s. Golcha Properties Pvt Ltd. (1970) 3 SCC 573***, the Appeal filed by the Petitioner before the Apex Court was rejected by the High Court since he had not appeared before the Company Judge. He was not served with notice by the Official Liquidator or by the Company Judge, hence it was held that the only remedy was by way of a suit after obtaining leave of the Company Judge under Section 446 of the Company Act. The Hon'ble Supreme Court while considering the question whether the Appellant, whose rights were directly affected by the order proposed to be made was debarred from filing the appeal because the Official Liquidator had failed to discharge his duties properly by having a notice issued to the Appellant, held that :

“If there was default on their part in not following the correct procedure, it is wholly incomprehensible how the

appellant could be deprived of her right to get her grievance redressed by filing an appeal against the order which had been made in her absence and without her knowledge. It would be a travesty of injustice if a party is driven to file a suit which would involve long and cumbersome procedure when an order has been made directly affecting that party and redress can be had by filing an appeal which is permitted by law. It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the Appellate Court and such leave should be granted if he would be prejudicially affected by the judgment.”

9. In the instant case, a perusal of the impugned judgment reveals that the Defendant No.4 had in fact filed an application for leave to appeal. However, the appeal came to be registered without any order on the application. The learned District Judge, while deciding the issue of maintainability of the appeal without such leave, has held that though the Defendant No.4 was a necessary party, his name was deleted. His rights have been determined without hearing him in the matter and that the decree prejudicially affects his rights. The learned Judge therefore held that refusal of leave would cause substantial loss to the Defendant No.4.

10. It is not in dispute that the rights of the Defendant No.4 have been determined without hearing him. He is directly affected by the decree. Under such circumstances, dismissal of the appeal for want of order on the application for leave to appeal will be travesty of justice. Hence, the findings on the issue of maintainability of the appeal does not warrant interference.

11. The next question is whether the suit for partition and separate possession is bad for non joinder of necessary party viz. Defendant No.4.

12. The Plaintiffs have filed a suit for partition and separate possession on the premise that the suit property is an ancestral property of Ahmad Khan. The plaint proceeds on the basis that Defendant No.4 and Defendant Nos.1 to 3 and 5 to 7, who are the children of Ismail Khan have 1/6th share in the suit property. Thus, as per their own assertion Defendant No.4 is one of the co-owners/ co-sharers of the suit property. Acknowledging that in a suit for partition, all the co-owners are necessary parties, the Plaintiffs had impleaded the Defendant No.4 as a party to the suit.

13. The records reveal that the summons issued to Defendant No.4 had returned unserved. Shri Tajane, contends that the Defendant No.4

could not be served since he was out of India and his address was not known. It is to be noted that Rule 25 of Order V of CPC provides that where the Defendant resides out of India and has no agent in India empowered to accept service, the summons shall be addressed to the Defendant at the place where he resides. In the instant case, there is nothing on record to indicate that the Plaintiffs had made any efforts to serve the summons on the adult male member of the family or to serve the summons by affixation at the last resided address, or that they had taken steps to procure the registered address of the Defendant No.4 to effect service under Rule 25 of Order V of CPC. Instead of taking effective steps to serve the Defendant No.4, the Plaintiffs sought to delete him and proceeded with the suit in his absence. Furthermore, the plaintiffs also did not seek to implead the Defendant No.4, though as per their own admission the Defendant No.4 was in Mumbai since the year 2005.

14. As noted above, the other defendants had denied that the suit property is ancestral property of Ahmed Khan and had claimed that the property was exclusively owned and possessed by their father Ismail Khan. The learned Judge has rejected the defence and recorded a finding in favour of the Plaintiffs and determined the share of the Defendant No.4 in his absence by holding that his interest is protected by his brothers and sisters. The findings recorded by the trial court that

the Defendant No.4 was represented by Defendant No.1 as Power of Attorney is not borne from the evidence on record. There is absolutely no evidence to indicate that Defendant No.4, who was otherwise not a party to the suit, had authorized DW1 to depose on his behalf. These defendants had not represented Defendant No.4, on the contrary, they had raised a specific plea that the suit was bad for non-joinder of Defendant No.4 being a necessary party. The trial court did not consider this plea in its right perspective and decreed the suit in his absence on an assumption that his interest is protected by his brothers and sisters. Even if the defence of the defendants is not considered, as per the assertion of the Plaintiffs in the plaint, the Defendant No.4 is one of the co-sharers of the suit property. Since the co-sharer is a necessary party in a suit for partition and separate possession, no effective decree could have been passed without impleading Defendant No.4 as a party to the suit and without giving him an opportunity of setting up his defence. In this view of the matter, the learned District Judge has set aside the decree passed in the absence of the Defendant No.4, and remanded the matter to the trial court with an opportunity to the Plaintiffs to implead the Defendant No.4 in the suit. There is no apparent error in the findings recorded by the learned District Judge. The appeals do not raise any substantial question of law. Hence the appeals are dismissed.

15. Civil Applications stand disposed of, in view of dismissal of the

appeals.

16. Prayer to continue ad-interim relief is rejected.

(ANUJA PRABHUDESSAI, J.)