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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4575 OF 2021

BABURAO BHIMRAO PATIL AND ORS Petitioners.

V/s

**POPAT TUKARAM JADHAV
SINCE DECEASED THROUGH
LEGAL HEIRS**

1a. RAJENDRA POPAT JADHAV AND ORS ... Respondents.

Mr. Mahindra B. Deshmukh for the Petitioners.

**Mr. Shashank Mangle i/b Mr. Balwant V. Salunkhe for the
Respondents.**

CORAM: NITIN W. SAMBRE, J.

DATE: MARCH 08, 2022

P.C.:-

1] Petitioners/Defendants by this Petition are questioning the order passed below Exhibit-548 whereby prayer for impleadment came to be allowed pursuant to the provisions of Order-I Rule 10, sub-rule (2) of the Civil Procedure Code.

2] It is the contention of Counsel for the Petitioners/Defendants that the order impugned suffers from illegality, as similar prayer earlier

moved by the very Respondents/Plaintiffs vide Exhibit-522 pursuant to the provisions of Order VI Rule 17 was rejected on 02/08/2019. He would claim that the said order was never challenged and to by-pass the said rejection, Respondents/Plaintiffs have invoked the provisions of Order I Rule 10 that too in the absence of any challenge to the alleged Sale Deed executed in favour of the ancestors of the proposed Defendants by Defendant No.8. As such, it is claimed that the order impugned is not sustainable. My attention is also invited to the specific issue framed by the Court below in relation to non-joinder of necessary parties.

3] Counsel for the Respondents/Plaintiffs would support the order impugned. According to him, scheme under Order VI Rule 17 and the one under Order I Rule 10, sub-rule (2) is altogether different. He would claim that even if prayer under Order VI Rule 17 for impleadment was rejected, still for proper adjudication of suit claim Court below, having noticed that proposed Defendants are necessary parties, was justified in granting the prayer for impleadment. In addition, his contentions are, the suit in question is for partition and separate possession. That being so, status of parties to the suit

becomes that of interest in common and therefore the Petitioners/Defendants have no locus to question the order impugned. As such, he has sought dismissal of the Petition. So as to substantiate his contentions, he has drawn support from the judgment of the Apex Court in the matter of *Pankajbhai Rameshbhai Zalavadia vs. Jethabhai Kalabhai Zalavadiya (Deceased) Through LRs & Ors. in civil Appeal No.15549 of 2017 arising out of SLP (C) NO.31212 of 2014* particularly paras 4, 5 and 14 so as to canvass that scheme under Order VI Rule 17 and Order I Rule 10 is on different legal status.

4] I have appreciated the said submissions.

5] Admittedly, the suit is for partition and separate possession. In the said suit, Respondents/Plaintiffs have not questioned the Sale Deed executed by Defendant No.8 in favour of ancestors of the proposed Defendants. In the wake of rival pleadings, on 11/12/2013, Trial Court has framed issue No.3 which reads as under:-

“Whether Defendant Nos. 8 to 12 prove that all necessary parties are not joined to the suit?”

6] I am informed that the suit has travelled at an advance stage, as after framing of issues, the witness of the Plaintiffs is under cross-examination. It is to be noted that earlier prayer of Respondents/Plaintiffs for carrying out amendment on the same line was rejected vide order below Exhibit-522 on 02/08/2019. The said rejection is based on the fact that aforesaid issue No.3 was already framed and Respondents/Plaintiffs have failed in the test of due diligence. The said order, of course, has attained finality as not being questioned by the Respondents/Plaintiffs.

7] If we peruse the application that is granted by the Court while passing the order impugned, it appears that pleadings in the application Exhibit-548 so also of Exhibit-522 are on similar lines. The Plaintiffs/Respondents have succeeded in creating illusory picture before the Court below to achieve the object which they could not achieve while their Application Exhibit-522 for amendment was rejected. Furthermore, once the Sale Deed alleged to have been executed by Defendant No.8 in favour of the predecessor of proposed

Defendants is not questioned in the suit, it cannot be said that such Defendants are necessary parties to the suit.

8] In the aforesaid backdrop, Petition stands allowed. The order impugned dated 25/09/2019 is hereby quashed and set aside. Application-Exhibit-548 stands rejected.

(NITIN W. SAMBRE, J.)