

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

WRIT PETITION NO. 13179 OF 2019

Prakash Raju Rokade (Bari),
Age : 39 Years, Occu. : Nil,
R/o Shirsoli Pragane Bornar,
Taluka & District – Jalgaon. .. Petitioner

Versus

- 1) Raju Suka Rokade (Bari)
Age : Major, Occu. : Agril. & Transportation,
 - 2) Yashodabai Raju Rokade (Bari),
Age : Major, Occu. : Household,
 - 3) Shankar Raju Rokade (Bari)
Age : 36 Years, Occu. : Agril. & Transportation,
 - 4) Sambhaji Sukar Rokade (Bari),
Age : 33 Years, Occu. : Business,
- All R/o Shirsoli Pragane Bornar,
Taluka & District – Jalgaon. .. Respondents

Shri Pushkar S. Shendurnikar, Advocate for the Petitioner.
Shri S. N. Tripathi, Advocate for the Respondent Nos. 1 to 3.
The Respondent No. 4 is served.

CORAM : SHARMILA U. DESHMUKH, J.

CLOSED FOR JUDGMENT/ORDER ON : 12.01.2023
JUDGMENT/ORDER PRONOUNCED ON : 18.01.2023

JUDGMENT :-

. Rule. Rule is made returnable forthwith. With the consent of parties taken up for final hearing.

2. The challenge in the present petition is to the judgment and order dated 03rd April, 2019 passed in Regular Civil Appeal No. 204 of 2011 thereby rejecting petitioner's application filed under Order VI Rule 17 read with Order I Rule 10 of the Code of Civil Procedure, 1908 (for short "Code") for impleading his step sisters at the appellate stage.

3. Facts of the case are as under :

The petitioner had instituted R.C.S. No. 325 of 2005 before the Civil Judge Junior Division, Jalgaon seeking partition and separate possession of the ancestral property and also for a declaration that the sale deed executed by the respondent No. 1 in favour of the respondent No. 2 is not binding on the share of the petitioner. The trial court framed fourteen issues which have been reproduced as under :

01. Does plaintiff prove that plaintiff and defendant Nos. 1 to 4 consists of Hindu joint family ?
02. Whether suit properties are properly described ?
03. Whether suit is bad in law ?
04. Whether plaintiff has paid proper court fees stamps, if not what are its effect ?
05. Whether the suit is bad for non joinder of necessary parties ?
06. Whether the defendants prove that suit is bad for non joinder of all the properties ?
07. Does plaintiff proves that property along with plaint schedule "A" is Hindu joint family property of plaintiff and defendant Nos. 1 to 4 ?
08. Does plaintiff proves that, property along with plaint schedule "B" is purchased by defendant No. 1 from

the income of joint family property, at schedule "A" and therefore, property schedule "B" is also Hindu joint family property of plaintiff and defendant Nos. 1 to 4 ?

09. Whether plaintiff proves that defendant No. 1 transferred half portion of plaintiff schedule "A" property by way of sale deed dt. 17/06/2005 for Rs. 50,000/- to defendant No. 2 without having any legal necessity or debt of Hindu joint family ?
10. Whether plaintiff proves that he is entitled for declaration as to sale-deed dt. 17/06/2005 to the extent of his share is not binding on him ?
11. Whether plaintiff proves that he is having 1/5 share in plaintiff schedule "A" and "B" properties ?
12. Whether plaintiff proves that he is entitled for partition and separate possession of properties described in plaintiff schedule "A" and "B" ?
13. Whether plaintiff is entitled to claim mesne profit ?
14. What order and decree ?

One of the issues framed by the Trial Court was whether the suit was bad for non joinder of necessary parties. The Trial Court answered all the issues in affirmative as regards the Hindu joint family property and as regards the share in the said property. The issue as regards the non joinder of necessary party was answered in the affirmative and the suit came to be dismissed on the finding of non joinder of necessary parties. R.C.A No. 204 of 2011 came to be filed by the petitioner challenging the judgment and decree dated 21st September, 2011. In the said appeal, the petitioner filed an application below Exhibit 25 on 05th December, 2017 for impleading his step sisters as parties, which came to be rejected.

4. Heard Shri Shendurnikar, learned counsel appearing for the petitioner and Shri Tripathi, learned counsel appearing for respondent Nos. 1 to 3.

5. Shri Shendurnikar, learned counsel for the petitioner submits that all the issues in the suit were answered in favour of the petitioner and only on the ground of non joinder of necessary party the suit came to be dismissed, which defect the petitioner sought to cure at the appellate stage. He would further submit that the application for impleadment has been rejected on the ground of delay for which the impugned order holds that there is no explanation. He would further submit that during the arguments before the Trial Court a request was made on behalf of learned counsel for the petitioner to *suo motu* exercise the discretion under Order I Rule 10(2) of the Code and to implead the step sisters in order to avoid multiplicity of the litigation, which was not accepted by the Trial Court. In support of his submissions, learned counsel for the petitioner relies upon the following decisions of this Court and the Madras High Court.

- I. Pandurang Sitaram Pande and another Vs. Avinash Ramkrishna Pande and others reported in 2016(6) All M.R. 273.
- II. Baburao Sitaram Zende and another Vs. Vimal Prakash Zende reported in 2018 SCC Online Bom 16304.
- III. Tulsabai Gyanba Shinde Vs. Shriram Bapurao Kurhe and others reported in 2019(2) All MR 877.
- IV. Sabasthi Nadar Vs. Savurimuthu Nadar and another reported in 1998 SCC Online Mad 523.
- V. Balamani and another Vs. S. Balasundaram reported

in 2009 SCC Online Mad 783.

6. Per contra, Shri Tripathi, learned counsel for respondent Nos. 1 to 3 has supported the impugned order. He would submit that inspite of the specific issue having been framed the petitioner refused to implead the step sisters who were necessary parties to the proceedings. He would further urge that there is no provision whereby an application can be filed U/O VI Rule 17 of the Code post trial for adding of necessary parties. Learned counsel for respondents would further submit that the petitioner had adamantly refused to accept step sisters as necessary parties to the proceedings and the consistent argument was that the step sisters were not necessary parties and as such application for joining step sisters at appellate stage is malafide application. He has invited attention of this Court to the application dated 02nd January 2016 filed before the Appellate Court contending that issue Nos. 5 and 6 regarding non joinder of necessary parties have been wrongly framed. In support of his contention learned counsel relies on following decisions.

- A. Kanakarathanammal Vs. V. S. Loganatha Mudaliar and another reported in AIR 1965 SC 271.
- B. Gangubai Baban Kadam and another Vs. Dr. Vidya Vijay Joshi reported in 2015(2) Mh. L. J. 444.

7. The provision regarding the mis-joinder and non joinder of the parties is contained in Order 1 of the Code of Civil Procedure ("the Code" for short). Rule 9 of Order I of the Code provides that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties, provided that this rule shall not apply to non joinder of necessary parties. The issue in the present case is

whether at the appellate stage, petitioner can be permitted to file an application under Order I Rule 10(2) of the Code. The appeal which has been filed U/O XLI of the Code is continuation of the suit and Order I Rule 10 of the Code provide that the Court may at any stage of the proceeding permit name of any person to be joined who ought to have been joined. Considering that Order 1 Rule 10 permits the impleadment of the parties at any stage of the proceedings, the application filed by the Petitioner cannot be said to be not maintainable, as contended by the learned counsel for the Respondent.

8. In the decision of **Pandurang Sitaram Pande and another Vs. Avinash Ramkrishna Pande and others** (supra) cited by the petitioner, this Court had an occasion to deal with the similar facts and it has been held by this Court that the Appellate Court ought to have granted an opportunity to the plaintiff to add the necessary parties to the proceeding. In the decision of **Pandurang Sitaram Pande** (supra) this Court, after considering provisions of Order I Rule 10(2) of the Code, has held that the second appeal being continuation of the suit, the Court is competent to exercise discretion even at the appellate stage to permit the joinder of necessary parties to the suit and once such permission is granted and the parties are joined as defendants/respondents in the proceedings, the order relates back to the date of filing of the suit and the defect stands cured.

9. In the decision of **Baburao Sitaram Zende and another Vs. Vimal Prakash Zende** (supra), this Court has held that, if the suit is not tenable for non joinder of necessary parties, then the only course open to the first Appellate Court was to remand the suit to give an opportunity to the plaintiff to amend the plaint

and to add those parties, so as to achieve the substantive cause of justice. In the decision of **Tulsabai Gyanba Shinde Vs. Shriram Bapurao Kurhe and others** (supra), this Court has held that even at the appellate stage the Appellate Court could have given an opportunity to the plaintiff to add the sisters to the suit and an opportunity ought to be given to the plaintiffs to add the necessary parties.

10. In so far as decision in the case of **Gangubai Baban Kadam and another Vs. Dr. Vidya Vijay Joshi** (supra) relied upon by the learned Counsel for Respondent is concerned, the facts of the said case pertain to a post trial amendment U/O VI Rule 17 of the Code and in that context the fetter on amendment of plaint was considered. In the facts of that case, the provisions of Order 1 Rule 10 were not required to be discussed, whereas in the present case, the issue revolves around the application filed under Order 1 Rule 10 at the appellate stage. The decision in the case of **Kanakarathanammal Vs. V. S. Loganatha Mudaiar and another** (supra) is clearly distinguishable on facts, in as much as during the pendency of the Petition before the Apex Court, as the Appellant sought to implead the parties, the Apex Court observed that no such application was made before the Trial Court or at the appellate stage or even before the Apex Court until the appeal was allowed to stand over after it was heard. In that fact situation the Apex Court rejected the application for amendment. In my opinion, the decisions relied upon by the learned Counsel for Respondent are inapplicable to the present case.

11. The settled position in law as discerned from the decisions relied upon by the learned Counsel for Petitioner is that there is

no bar to implead the necessary parties in exercise of the powers U/O I Rule 13 of the Code even at the appellate stage. The rejection of the application on the ground of delay, in my opinion, is unsustainable and the Petition deserves to succeed.

12. The impugned order dated 03rd April, 2019 passed by the Adhoc District Judge – 1, Jalgaon in R. C. A. No. 204 of 2011 below Exhibit 25 is hereby quashed and set aside and the application below Exhibit 25 in R.C.A. No. 204 of 2011 for impleading step sisters of the petitioner is allowed. Rule is made absolute in above terms. There shall be no order as to costs.

[SHARMILA U. DESHMUKH, J.]

bsb/Jan. 23