

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

**APPEAL FROM ORDER NO.47 OF 2022
WITH CA/11277/2022 IN AO/47/2022**

1. Potanna S/o Ganpati Jangilwad,
Age : 70 Years, Occ. Agriculture
2. Smt. Anusayabai W/o Gangadhar Jangilwad,
Age : 55 Years, Occ. Agriculture and Household,
3. Pochalu S/o Ganpati Jangilwad,
Age : 35 Years, Occ. Agriculture,

All Resident of Chenapur Tq. Ardhapur,
District Nanded.

..APPELLANTS
(Orig. Defendants)

VERSUS

1. Sau. Anusayabai W/o Datta Ghosalwad,
Age : 60 Years, Occ. Household,
R/o. Chikala, Tq. Hadgaon, District Nanded.
2. Sau. Renukabai W/o Mahajan Ghosalwad,
Age : 55 Years, Occ. Household,
R/o. Bolsa, Tq. Mudhol, Dist. Adilabad
(Telangana).
3. Sau. Chandrakalabai W/o Vikram Balpewad,
Age : 46 Years, Occ. Household,
R/o. Shibdara Tq. Himayatnagar,
District Nanded.

. Respondents
(Orig. Plaintiffs)

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Advocate for Appellants : Mr. G. V. Mohekar

Advocate for Respondent Nos. 1 to 3 : Mr. U. B. Deshmukh

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CORAM : S. G. MEHARE, J.
DATE : 30.10.2023

ORDER :

1. Heard the learned counsel for the appellants and the learned counsel for the respondents.
2. The appellants were the original defendants in a suit for partition filed by the respondents/ original plaintiffs. The plaintiffs were sisters and defendants were brothers and defendant No.2 was the widow of one of the deceased brothers. The learned trial Court held that entire ancestral properties shall be included in a suit for partition. However, few properties of their father were not included in *hotchpotch*; Hence, the suit was bad for non inclusion of the entire ancestral properties. The learned trial Court treated the suit as the suit for partial partition and based upon the ratio laid down in the case of ***Govindrao Vs. Dadarao alias Sharwani (dead) by L.Rs. Indrani and others, reported in 2005(1)Civil L.J. 648*** held that the suit was not maintainable.
3. Secondly, the suit was also dismissed as daughters of the deceased brother Gangadhar were not joined as necessary parties.
4. Against the Judgment of the dismissal of the suit, the contesting plaintiffs had preferred First Appeal before the District Court.

5. The learned District Judge, Nanded held that proper issues regarding the non-joinder of the parties and non inclusion of entire joint family properties need to be framed and an opportunity must be given to the parties to lead evidence, and if necessary, to make appropriate amendment in the plaint. On the basis of the above findings the appeal was allowed and the matter was remitted to the trial Court for framing the proper issues as directed and decide the suit after giving opportunity to the parties to lead the evidence in support of the issues so framed.

6. Against the order of remand, the original defendants are before this Court.

7. The learned counsel for the appellants would submit the suit was bad for non joinder of necessary parties the order remanding the case is apparently illegal. Hence, liable to be set aside. He relied upon the following case laws:

(i) Kanakarathanammal V.S.V. S. Loganatha Mudaliar and another
AIR 1965 SC 271 ;

(ii) Taher Ahmed s/o Salim Ahmed Vs. Mrs. Sandhya W/o Girish
Badge [Appeal From Order No. 20 of 2017 with CA No.
3003/2017 in A.O. 20 of 2017 dated 29.01.2018]

- (iii) Vasant Bhaskar Thakur (since deceased through legal heirs) and others Vs. Sitaram Waman Thakur [2023 SCC On Line Bom. 1787].

8. Per contra, the learned counsel for the respondents/plaintiffs would submit that the findings recorded by the learned trial Court were without framing the issues. The plaintiffs were unaware of the burden to be discharged in absence of the issues. Therefore, the First Appellate Court has correctly remitted the matter to the trial Court with a direction to frame the issues as regards non-joinder of necessary parties and non-inclusion of the entire ancestral properties. He also relied on the following decisions :

- (i) Late Gumansing Shivram Patil Vs. Shri. Bhika Harsing Patil 2023 2 ALLMR 678
- (ii) Pandurang Sitaram Pande Vs. Avinash Ramkrishna Pande 2016 6 ALLMR 273,
- (iii) Kalyan Kumar Bera Vs. Milan Kumar Khutia and Others of Calcutta High Court in FAT 451 of 2016 decided on 06.12.2022
- (iv) B. Lalita Pradhanuni Vs. Jasoda Padhunuani and others Vs. Jasoda Padhunuani and Others of the Orissa High Court passed in S.A. No. 54 of 1981 decided on 4th July 2007.

9. As far as the ratio laid down in the case of Kanakarathanammal Vs. V. S. Loganatha Mudaliar and Others. the co-ordinate Bench of this Court distinguished the ratio laid down in the said case on the factum that the said suit was not for partition and separate possession. This Court has no reason to differ with a constant view of the co-ordinate Bench;. Hence, I record a finding that the ratio laid down in the case of Kankarathanammal would not apply to the facts of the present case.

10. The facts in brief were that the sister had filed a suit for partition joining the brother and the wife of the deceased brother. The defendants in their written statement had specifically raised the issue that the suit is bad for non joinder of the daughters of the deceased brother. The daughters of the deceased brother were necessary parties and; hence, the suit is bad for non joinder of necessary party. However, there were no pleadings before the Court either from the plaintiffs or from the defendants that the entire properties were not included in the suit for partition. However, the learned trial Court ignored this disputed fact and recorded a finding that the suit is bad for non including the entire properties of Ganpati. Though the issue of non-joinder of necessary parties was raised, the issue as to non joinder of the necessary parties was not framed, only the findings were recorded.

11. In the circumstances whether non framing of issue was bad is a question to be determined.

12. The parties have led the evidence. From the evidence, it appears that they led the evidence on joinder and non joinder of the necessary parties, so it can be safely said that they were aware that they had to lead the evidence and contest the issue of non joinder of the necessary parties. If the parties lead the evidence consciously and proceed further with any issue without issue being framed specifically, this court in the case of *Sk. Ibrahim s/o Sk. Mohamood and Others Vs. Sk. Mahmood s/o Sk. Vazir AIR 2003 Bombay, 357* had held that, when the parties fully aware of their respective cases, lead all the necessary evidence not only in support of their case, but in refutation of the claim of the other side; non framing of issues where no objections were raised in the trial Court, is not fatal to the interest of the parties. Therefore, this Court is of the view that non framing the issue of non-joinder of necessary parties did not affect the rights of the plaintiffs.

13. Order XLI Rule 24 of the CPC provides that where sufficient material is available on record, the appellate Court shall decide and determine all the issues. That provision prohibits the Court from exercising power under Order XLI Rule 23-A of the Code of Civil

Procedure. Sufficient material was available before the First Appellate Court to deal with the issue of non-joinder of necessary parties.

Hence, the First Appellate Court has committed error in remitting the matter on that point.

14. As far as the remittance of the suit to the trial Court on the ground that all properties were not included, the First Appellate Court appears to have erred in holding the same as none of the parties had raised issue about it. However, the learned trial Court has recorded the finding without framing the issue. When the parties were not contesting a particular issue, in such a situation, the Court should not discuss and record a findings against any of the parties to the suit. So, whether the findings in the absence of pleadings of non inclusion of the entire properties recorded by the learned trial Court was legal or proper was to be determined by the First Appellate Court. The First Appellate Court ought to have considered the legality and correctness of the findings recorded by the trial Court. For that purpose remand of the matter was not essential.

15. Hence, for the above reasons, the court is of the view that the impugned order of the First Appellate Court remitting the matter to the trial Court directing to frame the issues and give an opportunity to

both the parties to lead the evidence is illegal and incorrect; and liable to be set aside.

ORDER

- (i) The appeal is allowed.
- (ii) The impugned Judgment and order of learned Ad-hoc District Judge-3 Nanded passed in RCA No. 109 of 2016 dated 27/02/2020, is quashed and set aside.
- (iii) The learned Ad-hoc District Judge-3, Nanded is directed to decide the appeal afresh on merits .
- (iv) Both parties shall appear before the learned Ad-hoc District Judge-3, Nanded on 20th December, 2023.
- (v) Civil Application stands disposed of.

(S. G. MEHARE)
JUDGE