

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 1938 OF 2023

Ganesh Srinivas Kidambi and anr__ Vs. __ Rakesh Shanabhai Patel and ors
AND

WRIT PETITION NO. 626 OF 2023

Ganesh Srinivas Kidambi and anr__ Vs. __ C. Uma w/o C. Vijay Sarathi and ors

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. R.L.Khapre, Senior Advocate assisted by Mr. P.A.Deshpande, Advocate for petitioners
Mr. Vijay Sarathi, Advocate for respondent No.1 in WP 626/2023
Mr. N.S.Warulkar, Advocate for respondent No.1 in WP 1938/2023
Ms. S.O.Tapadiya, Advocate for respondent Nos. 8 to 10 in Wp626/2023 and for
respondent Nos. 3 to 5 in WP No.1938/2023

CORAM : AVINASH G. GHAROTE, J.

DATE : 18/07/2023

Writ Petition No.626/2023

1] Heard Mr. Khapre, learned senior counsel for the petitioners and Mr. Sarathi, learned counsel for respondent No.1 in WP No. 626/2023. Mr. Warulkar, learned counsel for respondent no.1 in WP No. 1938/2023 supports the petitioners. None appears for respondent nos. 2 to 7, though served. Ms. Tapadia, learned counsel for respondent nos. 8 to 10.

2] The petition questions the order dated 6.12.2022 passed by the learned Trial Court below Exh.166, an application filed by the petitioners for their impleadment as defendant Nos. 11 and 12 in SCS No. 84/07, a suit for partition and separate possession filed

by respondent nos.1 to 3 against the respondent nos.4 to 8.

3] The reason for impleadment is on the basis of two Wills dated 24.8.2005 and 30.9.2005, both executed by Smt. Sarlabai Ramvatar Kidambi, by which she has bequeathed her properties, which is the subject matter of Wills to the defendant No.1, her son, and appointed the respondent No.11 Rakesh Shanabhai Patel as the executor. It is contended that since the Wills bequeath whatever is remainder in case of an alienation by the defendant/respondent no.1 with the consent of the respondent no.11, to the petitioners, they are proper and necessary parties.

4] Mr. Khapare, learned senior counsel by inviting my attention to the Wills dated 28.4.2005 and 30.9.2005, both of which are similarly worded, points out that the intention behind executing the Wills and making any alienation by the respondent no.1 subject to the written consent of the respondent no.11, only for the purpose of family necessity or benefit of the estate, was to preserve the properties for the benefit of the petitioners, who were to receive either the whole of the properties in case the respondent no.1 passed away before 2030 or otherwise to the remainder left. It is therefore contended that since the executor of the Wills i.e. respondent no.11 had become old and infirm, the petitioners had filed the application for their

impleadment in order to support the Wills, on account of which an interest has been created in the petitioners vis-a-vis the subject properties thereof. It is also contended that even on the principles of Order 1 Rule 10 of CPC, the petitioners would be proper parties, as they would be interested in ensuring that the Will is proved so that the bequest therein takes effect. It is also contended that since an alienation was made by the respondent no.1, since it was without the written consent of respondent no.11, as was the condition contained in the Will, the respondent no.11 had already filed suit, namely SCS No. 15/2015, questioning the alienation made by the respondent no.1. It is therefore submitted that considering this overall position, the presence of the petitioners in SCS No. 84/2007 was not only proper but also necessary.

5] Mr. Sarathi, learned counsel appearing for respondent no.1 in W.P.No. 626/2023 submits that the Wills do not create any right in favour of the petitioners as they are not beneficiaries till such time the respondent no.1 is alive and any right which they claimed in the properties which are the subject matter of the Wills, would accrue only upon the demise of the respondent no.1 before 2030. It is also contended that since respondent no.1 has already alienated the properties during the pendency of the suit filed by respondent nos. 1 to 3 which are the subject matter of the aforesaid two Wills, nothing now remains. It is, therefore, contended

that the impugned order which takes into consideration this position is correct and proper.

6] Ms. Tapadia, learned counsel appearing for respondent nos. 8 to 10, who are the purchasers of the properties *lis pendence* supports the contention of Mr.Sarathi, learned counsel for respondent no.1.

7] The principle of Order 1 Rule 10(2) of CPC necessarily requires that it is only a proper and necessary party which is required to be added to a suit, in the teeth of the principle of *dominus litus*, as even if it is held that the plaintiff is a *dominus litus*, in case the Court holds that the presence of the party is proper and necessary, it would be permissible for the Court to direct impleadment.

8] For the purpose of deciding whether the petitioners are proper and necessary parties, a *prima facie* look at the aforesaid Wills is necessary to arrive at some conclusion. This however, has to be considered in light of the background that what has been filed by the respondent nos.1 to 3 is a suit for partition and separate possession of the entire properties, in which the Wills by Sarlabai Kidambi have been set up as a defence. It is a matter of law which cannot be disputed by anyone that in a suit for partition, all persons who are part of the genealogical tree and claim through a common ancestor would be not only proper but a necessary party, as he/they would be entitled to claim a right in the

properties left behind by the common ancestor in his/her/their own right. In that view of the matter, since a suit for partition has been filed by the defendant nos. 1 to 3 claiming right, title and interest in the properties of late Sarlabai Kidambi, all the persons who are her L.Rs would not only be proper but necessary parties in such suit for partition.

9] The question, therefore, cannot be viewed only on the basis of the Wills set forth by the respondent no.1 in his favour, but has to be viewed in light of the nature of the suit and the right claimed therein. In that view of the matter, even *dehors* the Wills, it can be said that the petitioners, since it is not disputed that Sarlabai Kidambi was their common ancestor would be proper and necessary party to the suit.

10] Coming to the Wills in question, since the Wills bequeaths the properties of Sarlabai Kidambi to the respondent No.1, the right conferred under which bequest is made subject to the consent of the respondent no.11, which admittedly is absent, the alienation made by the respondent no.1 clearly falls into question, which will have to be decided on merits, not only in the present suit but also in the suit filed by the respondent no.11, namely SCS No.15/2015 questioning such alienation, on account of absence of his consent, which in terms of the Wills was to be conferred only in case of legal necessity of the family or the benefit of the estate. Since the

alienations by the respondent no.1 are itself questioned on account of absence of consent of respondent no.11, the interest of the present petitioners in ensuring the proving of the Wills would become a thing of necessity, considering that in case the alienation is held to be void, it is the petitioners, who would stand to benefit. That being the position, in my considered opinion, the petitioners cannot be said to be not having any interest in the result of the suit. The position would rather be to the contrary.

11] In that view of the matter, the impugned order in my considered opinion which rejects the application only on the ground that the Wills indicate a right to be created in favour of the petitioners upon demise of the respondent no.1 before 2030, does not consider the terms of the bequest in the proper perspective. In that light of the matter, the impugned order cannot be sustained, the same is hereby quashed and set aside and the application below Exh.166 is hereby allowed.

Writ Petition No. 1938/2023

12] Writ Petition No.1938/2023 questions the similar order for rejection of impleadment of the petitioners in the suit filed by Rakesh Patel, viz SCS No. 15/2015.

13] It is also necessary to note that in SCS No. 15/2015 Rakesh Patel who is the plaintiff himself has given his no objection for impleadment of the petitioners, which is reflected from para 6 of the impugned order dated 31.1.2023 below Exh.84. The same would be an added factor to implead the petitioners on account of the principle of *dominus litus* in addition to what has been stated above, considering which the order below Exh. 84 passed on 31.1.2023 is also hereby quashed and set aside and the application below Exh. 84 is allowed.

14] Both the petitions are allowed in above terms. No costs.

15] The petitioners shall appear in both the suits before the learned Trial Court on 24.7.2023, on which date they shall be impleaded as parties as per the application at Exhs. 84 and 166. In so far as SCS No.84/2007 is concerned, no separate notice shall be necessary to be issued to the petitioners and they shall file their written statement within a period of one month from 24.7.2023.

16] Considering that the suit is of the year 2007, it shall be decided as early as possible.

JUDGE