



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

**APPEAL FROM ORDER NO. 10 OF 2023
WITH
CIVIL APPLICATION NO. 2036 OF 2023**

Hiralal S/o Chhaburao Jawale,
Age : 62 Years, Occ. Private Service,
R/o. Sukshanti Nagar, Mantha Bypass,
New Jalan, Taluka and District Jalna. Appellant
(Orig. Def. No.2)

VERSUS

1. Nandlal S/o Chhaburao Jawale,
Age : 45 Years, Occ. Farmer and Labour,
R/o. Plot no. 32, in front of Datta Ashram
Prashanti Nagar Road, Jalna
2. Kundalal S/o Chhaburao Jawale,
Age : 60 Years, Occ. Business,
R/o. Kapad Bazar, Sadar Bazar, new
Jalna.
3. Ramlal @Ramrao S/o Chhaburao Jawale,
Age : 55 Years, Occ. Farmer,
R/o. Deomurti Taluka and District Jalna
4. Suraj S/o Chhaburao Jawale,
Age : 50 Years, Occ. Service,
R/o. C/o Hiralal Chhaburao Jawale,
R/o. Mantha Bypass, New Jalan
5. Godavaribai S/o Prabhakar Upare,
Age : 49 Years, Occ. Household,
R/o. New round Masjid, Kadrabad,
New Jalan
6. Ramesh S/o Haribhau Ukande
Through his L.Rs.
 - 6A. Rajani W/o Ramesh Ukande Patil,
Age : 50 Years, Occ. Household
 - 6B. Swati d/o Ramesh Ukande Patil,
Age : 30 Years, Occ. Household

6C. Sanket S/o Ramesh Ukande Patil
Age : 28 Years, Occ. Education

All Resident Shri. Colony, College Road,
New Jalna. ..Respondents
(R-2 to 6 Ori. Defendants)

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Advocate for the Appellant : Mr. Bharat R. Warmaa
Advocate for Respondent No.1 : Mr. Subhodh P. Shah
Advocate for Respondent Nos. 2 to 5 : Mr. Girish S. Rane
Advocate for Respondent No.1-A to 1-C : Ms. Kojagiri M.
Salve holding for Mr. Amol R. Joshi

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CORAM : SANDIPKUMAR C. MORE, J.
RESERVED ON : AUGUST 12, 2024
PRONOUNCED ON : OCTOBER, 24, 2024

JUDGMENT:-

1. The appellant, who is original defendant No.2 in Regular Civil Suit No. 110 of 2012, has preferred this appeal challenging the judgment and decree dated 12.10.2022 passed by the learned District Judge-4, Jalna i.e. the learned First Appellate Court in Regular Civil Appeal No. 129 of 2017, setting aside the judgment and order dated 30.06.2017, passed by the learned trial Court i.e. the learned Civil Judge, Senior Division, Jalna dismissing Regular Civil Suit No. 110 of 2012 filed by the present respondent No.1/plaintiff and remanding back the matter to the learned trial Court with direction to decide issue No.3 afresh. The learned First

Appellate Court has also given an opportunity to the plaintiff i.e. respondent No.1 to include entire joint family properties in the suit.

2. Background facts are as under :-

The appellant is the original defendant No.2 whereas respondent No.1 is the original plaintiff and the other respondents are remaining defendants. The plaintiff had filed Regular Civil Suit No. 110 of 2012 for partition and declaration before the learned trial Court. He had sought partition of the suit properties, namely agricultural land bearing Gut No. 61 admeasuring 1 H 56 R and land Gut No. 62 admeasuring 10 H 25 R comprising lands Survey No. 25 and 26 situated at village Devmurti Taluka and District Jalna. It was also contended that original defendant No.3 Ramlal had sold 4 Acres land out of block No. 62 to defendant No.6 Ramesh by way of registered sale deed dated 13.05.2005 for the consideration of amount Rs. 2,04,000/- and therefore, declaration was also sought by the plaintiff that the aforesaid sale deed is not binding on his share. It is significant to note that respondent No.1/plaintiff in the suit itself had contended that one plot situated at Bhokardan Road, Jalna was also part of joint family property, but since he was unable to pay Court fees he waived right of partition and share in the said plot.

Thus, the plaintiff had claimed partition of his 1/6th share in the suit properties.

3. Defendant No.1, despite appearance, failed to file written statement, whereas defendant Nos. 2 and 3 contested the suit under written statements (Exh.31 and 45) respectively by denying all the adverse allegations made against them. According to defendant No.2 i.e. the present appellant, the suit property is his separate property under partition deed dated 05.03.1999. The mutation entry to that effect has also been made in the revenue record. Hence, he prayed for dismissal of the suit. As against this, defendant Nos. 4 and 5 vide their written statement (Exh.37) admitted the claim of the plaintiff by contending that the parties to the suit are having equal share in the suit property, and therefore, the sale deed executed in favour of defendant No.6 is not binding upon them. They also contended that suit property is not self acquired property of defendant Nos. 2 and 3 and no partition had effected in respect of the suit properties among the family members. On the other hand, defendant No.6 also resisted the claim under his written statement (Exh.33) and came with the case that before purchasing the part of the suit property he had made requisite inquiry. As such, he prayed for dismissal of the suit.

4. The learned trial Court, after conducting the trial, though held that the suit properties are ancestral properties and that the sale deed dated 13.05.2005 is illegal, null and void, but dismissed the suit on the sole ground that all the joint family properties were not included in the suit. The plaintiff i.e. present respondent No.1 being aggrieved by the said dismissal preferred an appeal before the learned First Appellate Court as mentioned above and the learned First Appellate Court by allowing the same, remanded the matter back to the trial Court for hearing on issue no.3 by giving an opportunity to the parties to adduce the evidence. Hence, this appeal.

5. The learned counsel for the appellant vehemently submitted that the learned First Appellate Court has definitely erred in remanding matter back to the trial Court as a matter of routine. According to him, the learned First Appellate Court should have decided the matter on merit when the sufficient evidence was already on record. He pointed out that while remanding the matter for decision of particular issue, the learned Appellate Court should have resorted to Order XLI Rule 25 of the Code of Civil Procedure. He pointed out that respondent No.1/plaintiff himself had omitted to sue in respect of one of the ancestral properties i.e. suit plot at Bhokardan

Road, Jalna and had intentionally relinquished his share in the same. As such, he claimed that under Order II Rule 2(2) of the Code of Civil Procedure, the plaintiff is now barred from claiming any share in the said suit plot afresh. The learned counsel for the appellant thus submitted that the learned First Appellate Court has exceeded its power by directing the plaintiff to amend the plaint for adding the plot at Bhokardan Road, Jalna, specially when such direction is beyond the scope of Section 96 read with Order XLI Rule 23 of the Code of Civil Procedure. Thus, he prayed for quashing the order of learned First Appellate Court. In addition to his submissions at bar, he also filed written notes of arguments and relied upon the following judgments :-

- (i) **Balkrishna Dattatraya Butte & Others Vs. Dattatraya Shankar Mohite and others (1998 (2) ALL. M.R.740)**
- (ii) **Govindrao s/o Gangaramji Ajmire Versus Dadarao @ Shrawan s/o Gangaramji Ajmire Dead) Lrs. Indrani Wd/o Shrawan Ajmireand Others 2004 (4) Mh.L.J.653**
- (iii) **Kenchegowda (since deceased) by L.Rs Vs. Sri Siddegowda @ Motegowda (1994 (4) SCC 294)**
- (iv) **Vurimi Pullarao S/o Satyanarayana Vs. Vemari Vyankata Radharani W/o Dhankoteshwarrao & Another (AIR 2020 SC 395)**

(V) **Sirajudheen Vs. Zeenath & Others 2023 Live Law(SC)**

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(VI) **Hon'ble Apex Court in the case of Jegannathan Versus Raju Sigamani And another Civil Appeal Nos. 3347-3348 OF 2012 arising out of Special Leave to Appeal (Civil) No (s).19439-19440/2010 dated 02.04.2012**

(VII) **Hon'ble Apex Court in the case of Aysha & Others Versus A.M. Hussainar Civil Appeal No. 2647/2024 @ SLP © No. 18912/2019 dated 19.02.2024.**

6. On the contrary, the learned counsel for respondent No.1/plaintiff strongly opposed the submissions made on behalf of the appellant and supported the judgment of learned First Appellate Court. According to him, for the order of remand, only the appellant is objecting whereas other defendants or the members of joint family are not opposing. He heavily relied on the following judgments :-

- (I) Hon'ble Supreme Court in the case of
R. Mahalakshmi Vs. A.Kanchana And Another
(2017) 11 Supreme Court Cases 548
- (ii) Hon'ble Supreme Court in the case of
Vurimi Pullarao S/o Satyanarayana Vs. Vemari

Vyankata Radharani W/o Dhankoteshwarrao &

Another 2019 Legal Eagle (SC) 1416

7. On the other hand, the learned counsel for respondent Nos. 3,4 and 5 also supported the judgment of the learned First Appellate Court and relied on the following judgments :-

- (I) **Hon'ble Supreme Court in the case of Life Insurance Corporation of India Versus Sanjeev Builders Private Limited And another AIR 2022 Supreme Court 4256**
- (ii) **Govindrao s/o Gangaramji Ajmire Vs. Dadarao @ Shrawan s/o Gangaramji Ajmire (dead) LRs. Indrani wd/o Shrawan Ajmire and another 2004(4) Mh.L.,J.**

8. Heard rival submissions and also perused documents on record along with the impugned judgments.

9. Admittedly, the learned trial Court has held that the suit properties mentioned in the plaint are joint family properties of original plaintiff and defendant Nos.1 to 5. Further, it is also held that the sale deed executed in favour of defendant No.6 is not binding upon the share of plaintiff. However, the learned trial Court has dismissed the suit only on the sole ground that all the joint family properties were not included in the plaint. Admittedly, the plaintiff, in clear terms has mentioned in the plaint itself that one plot situated at Bhokardan Road, Jalna

was also part of joint family property, but as he was unable to pay the Court fees, he waived the right of partition in the same. Thus, it can be seen that all the joint family properties are not included in the suit and for that purpose the dismissal of the suit at the hands of the learned trial Court on that sole ground is quite justified. However, the main question in the present dispute is, whether the act of learned First Appellate Court remanding matter back to the trial Court for inclusion of the aforesaid plot in the plaint can be justified ?

10. For this purpose, the learned counsel for the appellant has relied on various judgments as mentioned above. In the case of ***Balkrishna Dattatraya Butte and Others Vs. Dattatraya Shankar Mohite and others*** (supra) it is held that an order of remand under Order XLI Rule 23(A) of the C.P.C. cannot be made without considering the merits of the findings recorded by the trial Court. Further in the case of ***Govindrao s/o Gangaramji Ajmire Vs. Dadarao @ Shrawan s/o Gangaramji Ajmire Ded Lrs. Indrani Wd/O Shrawan Ajmireand Others*** (supra) it is observed that it is a rule that a partition suit should embrace of the joint family properties, is recognized and firmly applied in order to bring the equitable partition by metes and bounds. Further, in the case of ***Kenhegowda (since deceased) by L.Rs. Versus Sri.***

Siddegowda @ Motegowda (supra) it has been laid down that suit for partial partition is not maintainable. Similarly, in the case of **Vurimi Pullarao S/o Satyanarayana Vs. Vemari Vyankata Radharani W/o Dhankoteswarrao and Another** (supra) it is observed that having omitted the claim for relief without the leave of the Court, bar under Order II Rule 2(3) of the C.P.C. would stand attracted. Further in the case of **Sirajudheen Versus Zeenath and Others** (supra) it is observed that the scope of remanding terms of Order XLI Rule 23 of the Code of Civil procedure is extremely limited. In the case of **Aysha & Others Versus A. M. Hussainar** it is observed by the Hon'ble Apex Court that an order of remand under Order XLI Rule 23 of the Code of Civil Procedure cannot be made on mere asking. By placing reliance on the aforesaid observations, the learned counsel for the appellant has argued that the learned First Appellate Court in violation of the aforesaid observations, had remanded the matter back to the learned trial Court by enlarging the scope of dispute and by allowing the plaintiff to add the plot at Bhokardan Road, Jalna being an ancestral property in which he had already relinquished his share.

11. However, from the observation of learned First Appellate

Court, it is evident that the learned trial Court had dismissed the suit only on the sole ground that all the joint family properties were not included in the plaint and therefore, to avoid the multiplicity and considering the inability of the plaintiff for paying the necessary Court fees, the learned First Appellate Court has remanded the matter back to the learned trial Court for addition of the aforesaid plot and for deciding the issue No.3 afresh. It is further evident that the learned appellate Court had opined that only because the plaintiff was unable to pay the Court fees, it cannot be the ground of exception to the general rule that all the joint family properties are to be included in a suit for partition. It is also observed by the learned First Appellate Court that waiver of right by one of the coparcener in respect of any particular property being the joint family property is not sufficient, since the Court has to decide shares of all the coparceners in all the joint family properties. This observations can be justified since not only the plaintiff but the defendant Nos. 4 and 5 have also claimed partition in the suit properties and if the plot at Bhokardan Road, Jalna is kept outside from the rest of the joint family properties only on the say of the plaintiff, then it will definitely jeopardize the right of other coparceners.

12. The learned counsel for the appellant vehemently argued

that there was no prayer or ground in the appeal for remand of matter and the direction of the learned First Appellate Court for inclusion of the plot at Bhokardan Road Jalna is definitely out of scope. However, the Hon'ble Apex Court in the case of ***R. Mahalakshmi Versus A. Kanchana And Others*** (supra) has settled this issue. The aforesaid judgment is relied upon by the learned counsel for the respondent No.1/plaintiff wherein the Hon'ble Apex Court has made following observations :-

10. The only point to be decided in this case is whether the High Court was right in interfering with the judgment of the lower appellate Court by which the suit was remanded to the trial Court. As stated earlier, this Court in its judgment dated 03.08.2009 in *R. Mahalakshi Vs. A.V. Anantharaman* has categorically held that all the properties that were inherited by Shri. A.V. Venkataraman by virtue of a registered deed of partition dated 27.04.1954 have not been included in the suit schedule. This Court clearly held in the said judgment that another ground for remand was that the appellant has taken a consistent stand from the beginning that the suit for partial partition was bad in law.

11. In our view, the first appellate Court was right in remitting the matter to the trial Court to take into account the other properties which were

inherited by the appellant's father, Shri. A.V. Venkataraman, by virtue of the registered deed of partition dated 27.04.1954. The High Court committed an error in holding that there was no direction given by this Court for including the other properties in the suit schedule. The High Court held that the only direction given by this Court while remitting back to the trial Court was to give an opportunity to the parties to amend their respective pleadings, file additional documents and to lead further evidence in support of the amended pleadings. The High Court was wrong in ignoring para 33 of the judgment in which it was clearly held by this Court that the remand was warranted in view of the grounds mentioned therein. One of the grounds was that all the properties that were inherited by the appellant's father, Shri. A.V. Venkataraman, were not included in the suit schedule."

13. On going through the aforesaid observations, it is clarified that the learned First Appellate Court can direct trial Court to include all the properties which are part of ancestral properties of the litigating parties. Such order is held to be within purview of the suit for partition. Thus, in the light of aforesaid observations of the Hon'ble Apex Court, the main question or issue in the present appeal has been satisfactorily answered and therefore, the judgments relied by the learned

counsel for the appellant/defendant No.2 as discussed above have lost its applicability in the instant case. Therefore, considering all these aspects, no interference is required in the judgment of the learned First Appellate Court and therefore, the present Appeal from Order stands dismissed along with pending Civil Application No. 2036 of 2023. The interim relief granted in favour of appellant also stands vacated.

(SANDIPKUMAR C. MORE, J.)

LATER ON

14. After pronouncement of order, learned counsel holding for learned counsel Mr. B.R. Warmaa, for the appellant requested for continuation of interim relief.

15. Learned counsel for the respondents strongly opposed the same.

16. However, considering that the said interim relief was in force during the pendency of this appeal and the appellant wants to challenge this order before the superior authority, the said interim relief is continued only for further period of four weeks from today.

(SANDIPKUMAR C. MORE, J.)