



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,  
NAGPUR BENCH, NAGPUR.**

**SECOND APPEAL NO.476 OF 2018**

1. Devman s/o Kondya Adbaile (Died).
2. Sandeep s/o Daulat Adbaile,  
Aged about 32 years,  
Occupation-Agriculturist,  
R/o. Bhanegaon, Tahsil-Saoner,  
District-Nagpur.
3. [Sharmila Daulat Adbaile,  
Aged about 38 years,  
Occupation-Agriculturist,  
R/o. Bhanegaon, Tahsil-Saoner,  
District-Nagpur]. (Deleted)
4. Bali Daulat Adbaile,  
Aged about 34 years,  
Occupation-Agriculturist,  
R/o. Bhanegaon, Tahsil-Saoner,  
District-Nagpur.
5. Jankubai wd/o Daulat Adbaile,  
Aged about 72 years,  
Occupation-Agriculturist,  
R/o. Bhanegaon, Tahsil-Saoner,  
District-Nagpur. (Dead)
- 5a) Mandabai w/o Namdeorao Thakre,  
Aged about 47 yeqars,  
Occupation-Household,  
R/o. Village Titur, Tah. Kuhi,  
District-Nagpur.

.. Appellants  
(Original Plaintiffs)

.. Versus ..

1. Haji Bashir Sattar Ashrafi,  
Aged about 61 years,  
Occupation-Agriculturist/Business.
2. Hajiyani Jamila Haji Bashir Ashrafi,  
Aged about 53 years,  
Occupation-Household.
3. Shirin Bano Mohd. Juber,  
Aged about 38 years,  
Occupation-Household.
4. Rajin Bano Mohd. Amzad,  
Aged about 36 years,  
Occupation-Household.

Respondent No.1 to 4 are R/o. 208,  
Chandralok Building, C.A. Road,  
Nagpur.

Respondent No.1 to 4 through their  
Power of Attorney Mohd. Zubair s/o  
Haji Bashir Ashrafi, aged about 43 years,  
Occupation-Business, R/o. 201,  
Chandralok Building, C.A. Road,  
Nagpur.

5. Anuj s/o Krishnan Upal,  
Aged about 52 years,  
Occupation-Agriculturist,  
R/o. 401, Mansarovar, New Colony,  
Nagpur.
6. Saoji s/o Shankar Tagde,  
Aged about 73 years,  
Occupation-Agriculturist,  
R/o. New Bina, Khaparkheda,  
Tah. Saoner, District-Nagpur.

.. Respondents  
(Original Defendants)

Shri N.B. Kalwaghe, Advocate for Appellants,  
Shri N.V. Fulzele, Advocate for Respondent Nos.1 to 4,  
Shri A.B. Patil, Advocate for proposed Respondent No.7.

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**CORAM : SANJAY A. DESHMUKH, J.**

**DATE : 03/09/2024.**

**JUDGMENT :**

1. Heard. **Admit.** Heard the matter finally with the consent of the learned Advocates appearing for the parties.

2. This appeal is preferred against the judgment and decree passed by the learned District Judge, Nagpur in Regular Civil Appeal No.516/2015, dated 18.07.2018, which was preferred against the judgment and decree of the learned Civil Judge, Senior Division, Nagpur passed in Special Civil Suit No.479/2009, dated 08.10.2015. It was suit for declaration and perpetual injunction that sale deed as well as power of attorney is not binding upon plaintiffs. The suit was decreed. The appeal was allowed and the judgment and decree of the trial court was set aside.

3. This court, on 10.09.2018, framed the following substantial question of law :

*“In the light of the decree passed by the trial Court which is joint and inseparable, whether*

*failure to implead the original plaintiff No.6 as a respondent in the appeal is fatal to the case of defendant Nos.1 to 5.?*

4. Learned Advocate for the appellants Shri N.B. Kalwaghe submitted that the basic and mandatory requirement of law is that all the parties in the trial court, who opposed to the suit, must be made parties in the appeal against the said judgment. Admittedly, defendant no.6 was not made party in first appeal. He is relying upon the authority of this court in the case of *Sheikh Yusuf s/o Haji Sheikh Usman and others .vs. Haji Mohammad Jamil Ahemad and others*, reported in **2015 (2) Mh.L.J. 209**, in which, it is held that the decree against the persons, who are not added and judgment had attained the finality and it is inseparable one. The High Court was not right in reversing the order of the executing court as against the said judgment. The said law is also settled in the case of *Rajeswari Amma and another .vs. Joseph and another*, reported in **(1995) 2 SCC 159**.

5. Learned Advocate for the appellants lastly submitted that the judgment of the trial court has attained finality and now the prayer is made in these two applications i.e. Civil Application (CAS) No.998/2019 for condonation of delay and Civil

Application (CAS) No.1000/2019 for permission to implead original plaintiff no.6 as respondent no.7 in the first appeal. He submitted that to allow the appeal and set aside the impugned judgment of the first appellate court.

6. Learned Advocate for the respondents Shri N.V. Fulzele submitted that it is mistake of the Advocate, who filed the First Appeal and considering it an opportunity must be given to the appellants to add plaintiff no.6 in the appeal. He, therefore, prayed for allowing the application for condonation of delay caused for filing application to add plaintiff no.6 in this appeal. It is lastly prayed to remand the appeal to the first appellate court by giving an opportunity to the respondents.

7. It is admitted fact that the appellants did not object that the plaintiff no.6 is not added as party respondents in the first appeal. She had been added as legal representative of appellant no.5 in this appeal. Now she has right to challenge that judgment of first appellate court. The first appellate court also did not consider that plaintiff no.6 is necessary party and unless she is heard, the said appeal cannot be decided. The legal effect of non-joinder of plaintiff no.6 is that the judgment of the first appellate court is *ab initio*, void and illegal. It is therefore not

binding upon her. In the absence of plaintiff no.6 that judgment of first appellate court is not binding on these appellants. Thus the impugned judgment is nullity in the eyes of law and it deserves to be set aside.

8. The argument of the learned Advocate for the respondents is not accepted that the matter be remanded by giving an opportunity to the respondents to add plaintiff no.6 in the appeal and for fresh hearing. The substantial question no.1 is therefore answered in the affirmative that in the absence of plaintiff no.6, the impugned judgment and decree is joint and inseparable and it is illegal. It deserves to be set aside. The appeal deserves to be allowed. The impugned judgment and decree passed by the first appellate court deserves to be set aside. Hence, I pass the following order :

### **ORDER**

- (i) The appeal is allowed.
- (ii) The impugned judgment and decree passed by the first appellate court is set aside and the judgment and decree passed by the trial court is restored.
- (iii) No order as to costs.

(Sanjay A. Deshmukh, J.)