



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

WRIT PETITION NO. 10535 OF 2024

**SARJERAO PANDU GADHE AND ANOTHER
VERSUS**

**MOHAN PANDU GADHE DIED THROUGH LRS JIJABAI MOHAN GADEKAR
ALIAS GHADDE AND OTHERS**

.....

Advocate for the Petitioner : Mr.Survase B.R. And Rohit B Survase

Advocate for Respondent Nos. 1 to 4 : Mr. Ishwar K. Wagh h/f.

Mr. K.M.More

...

CORAM : SHAILESH P BRAHME, J.

DATE : 25th FEBRUARY 2025

PER COURT :

1. Heard both sides finally at the admission stage with their consent.

2. The petitioners are original defendant Nos. 1 and 3 and are challenging order dated 02.04.2024 below Exhibit-11 passed by District Judge, Newasa in R.C.A No.24 of 2022 allowing application Exhibit-11 filed by the respondent no.1 under Order 1 rule 10 and Order 6 rule 17 of C.P.C. Respondent no.1 is the original-plaintiff who had filed R.C.S No. 780 of 2011 for partition and separate possession. Petitioners were original defendant nos. 1 and 3. The suit was dismissed on 30.06.2022 by the trial court which gave rise to the appeal before the lower appellate court.

3. During pendency of the appeal, the respondent no. 1 submitted application Exhibit-11 under Order 1 rule 10 and Order 6 rule 17 of C.P.C to implead Tarabai Laxman Shelke and Sindhubai Dattu Indapure as the parties to the appeal. They are real sisters of the petitioners and the respondents. Application was contested by the respondents. It was allowed by the impugned order.

4. Learned counsel Mr.Survase for the petitioners submits that lower appellate court exceeded in its jurisdiction. For that purpose my attention is adverted to Section 96, Section 105 and Order 41 rule 31 of C.P.C. He would submit that already similar type of application was filed at Exhibit-66 in the trial court and it was rejected on 01.01.2018. On second occasion, application Exhibit-78 was filed in the trial court by the respondent which was rejected on 30.10.2011. Those orders were not challenged by the respondent. Hence, the application should not have been entertained and it was liable to be rejected. There was no due diligence on the part of respondent. Time barred claim is sought to be introduced at the appellate stages which was lost sight of in the impugned order. It is further submitted that appeal was preferred on vague grounds.

5. Learned counsel for the petitioners further submits that there was registered partition deed dated 04.01.2002 and despite that respondent filed suit for partition. He is not entitled to any share in view of section 6 sub-section (5) of Hindu Succession Act, 1956. It is further contended that there is possibility of remanding the matter, if

the sisters are impleaded at this stage which is not permissible. He would rely on the judgment of Supreme Court in the matter of **Kanakarathanammal vs. Loganatha Mudaliar and another** reported in AIR 1965 SCC 27 and judgment of this Court in the matters of **Ganpat Bhagoji Kshirsagar and others vs. Anjana Krushna Jamdade and another** in Writ petition No.10831 of 2023 and **Usha Sahebrao Surwase vs. Dnyanoba Narayan Lomate and Others** in Second Appeal No. 741 of 2018.

6. *Per contra*, learned counsel Mr.Wagh holding for Mr. More appearing for the respondents supports impugned order. He would submit that those sisters are necessary parties. The appellate court has power to allow applications filed under Order 1 rule 10 or Order 6 rule 17 of C.P.C. Being co-parceners they are entitled to shares in suit properties. Even if the interlocutory orders passed below Exhibit-66 and Exhibit-78 were not challenged, those would not be impediment.

7. I have considered rival submissions of the parties.

8. There is no dispute that Sindhubai and Tarabai are real sisters of petitioners and the respondents. In written statement plea was taken by the petitioners for non-joinder of necessary parties and affirmative finding was recorded. The suit was dismissed on merits vide judgment dated 30.06.2022. In the trial court similar type of applications were moved at Exhibit-66 and Exhibit-78 which were

rejected by distinct orders passed on 01.01.2018 and 30.10.2011 respectively.

9. The submissions of the petitioners that there was partition effected vide registered document and suit for partition is not maintainable would be on merits of the appeal. It is upto the appellate court after conclusion of the hearing of the appeal to decide whether respondent is entitled to decree or not. The purport of section 6 sub-section (5) of Hindu Succession Act, 1956 would be dealt with during the course of hearing by the lower appellate court. Similar is the case with the objection regarding limitation. If the sisters are directed to be impleaded then it would be open to the petitioners to raise grounds of limitation. Apparently, their right to receive shares cannot be said to be barred by time but same shall be subject to decision of the appellate court.

10. Sisters of the parties are co-parceners. If suit is filed for partition then they will have share in the properties. Appeal is continuation of the suit. Non-joinder of necessary parties is in the sense a technical plea *albeit* it goes to the root of the matter. The orders passed below Exhibit-66 and Exhibit-78 can be examined by the lower appellate court under Section 105 of C.P.C.

11. One more aspect of the matter is that sisters are claiming to be heirs of one of the brothers who was defendant no.2 Vitthal Pandu Gadhe. He died issueless. Sisters are Class-II heirs. Therefore,

independently they have interest in the proceedings as well as in subject matter which cannot be denied on any technical ground.

12. I find that the lower appellate court is right in exercising jurisdiction. It has adopted a pragmatic view. There is no perversity or patent illegality in the impugned order.

13. The reliance is placed by the learned counsel for the petitioners on the judgment of **Kanakarathanammal** (supra), **Usha Sahebrao Surwase** (supra) and **Ganpat Bhagoji Kshirsagar and others** (supra). In case of **Kanakarathanammal** (supra) and **Usha Sahebrao Surwase** (supra), there was full-fledged trial in the trial court as well as appellate court. Facts of those case are distinguishable. Those cannot be made applicable when appeal in the present matter is pending. In respect of judgment of this Court in the matter of **Ganpat Bhagoji Kshirsagar and others** (supra), application for amendment was moved by the plaintiff after commencement of trial and it was allowed merely because plaintiff was illiterate lady. In the context of those facts, it was recorded that plaintiff was aware of the transactions and she was held to be not diligent in prosecuting the suit. In the present case the issue of non-joinder of necessary parties to the partition suit is under consideration. The ratio of those judgment is not applicable to the present case.

14. I do not find any merit in the writ petition.

a) The writ petition is dismissed.

b)There shall be no order as to costs.

[SHAILESH P. BRAHME, J.]

vsj..