



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3248 OF 2023

Gopinath S/o. Bapurao Kakade,
Age: 53 Years, Occu. Agriculture,
R/o. Old Kautha, Taluka & Dist. Nanded.

...PETITIONER
(Orig. Defendant No.1)

VERSUS

1. Sau. Girijabai w/o. Bapurao Kakade
(since deceased)

Orig. Plaintiff

2. Bapurao s/o. Naroji Kakade
(since deceased)

3. Sau. Dhrupadabai w/o. Ramji Matre
Age: 66 years, Occu. Household,
R/o. Sukali, Taluka- Kalamnuri,
Dist. Hingoli.

4. Vatchalabai Pundlikrao Holepade
Age: 64 years, Occu. Agriculture,
R/o. Lon, Taluka Basmath,
Dist. Hingoli.

5. Sau. Kamlabai w/o. Keshavrao Yevle
Age: 55 years, Occu. Household,
R/o. Kautha, Taluka & Dist. Nanded.

...RESPONDENTS
(Nos. 2 to 5- Orig. Defendants)

6. Rajesh s/o. Keshavrao Yevle
Age: 37 years, Occu. Agriculture,
R/o. Old Kautha,
Taluka and Dist. Nanded.

7. Balaji s/o. Keshavrao Yevle
Age: 34 years, Occu. Agriculture,
R/o. As above.

...ADDED DEFENDANTS

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Mr.Girish Rane, h/f Mr. Swapnil S. Rathi, Advocate for the Petitioner.
Mr.Akash D. Gade, Advocate for Respondent Nos.3 to 7.

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CORAM : KISHORE C. SANT, J.
RESERVED ON : 31st JANUARY 2025
PRONOUNCED ON: 18th FEBRUARY 2025

ORDER :-

1. This Writ Petition arises out of order dated 11th October 2022 passed by the learned 3rd Joint Civil Judge, Junior Division, Nanded on application below Exh.155 in RCS No.195 of 2009. By way of impugned order, the application of the respondents came to be allowed directing them to be added as defendants in the said suit. The present petition is filed by original plaintiff, who is aggrieved by the said order. The present respondent Nos. 6 and 7 are directed to be added as defendant Nos.6 and 7. Respondent No.1 is the original plaintiff, who died during the pendency of the suit. The respondent Nos. 3 to 5 are now transposed as plaintiff being daughter of Respondent No.1. Respondent No.2 is the original defendant No.2 (now deceased). Respondent No.3 to 5 are the

original defendant Nos.3 to 5.

2. Plaintiff, Girijabai Kakade filed a suit for partition and separate possession of 1/3 portion in the suit land survey No.61 area admeasuring 1H 56R and 77 R. situated at Kautha Taluka & District Nanded. It is the case that, the land is the ancestral property of the plaintiff and defendant No.2. The defendant No.1 is her son. Defendant No.2 mutated the suit land in the name of defendant No.1 without knowledge of the plaintiff and without any allotment in the suit land to the plaintiff. The plaintiff resides separately from defendant No.1 and 2. They are not maintaining the plaintiff and on this ground she claimed 1/3 share in the suit land. The defendants appeared and filed written statement. It is the case of defendant No.1 that the plaintiff has no right to claim any partition. The land is transferred to defendant No.2 to defendant No.3 by way of sale-deed wherein even plaintiff herself is consenting party. The defendant Nos.3 to 5, who happens to be sisters, are also signatories to the said sale-deed. The mutation entry is taken by consent of the sisters as well. It is accepted that the land Gut No.61 is

the ancestral property of plaintiff's and defendant's family. The relation is also accepted. It is mainly the case of the defendants that the defendant No.2 Bapurao Kakade was the owner of land Gut No.68 and 69. During his lifetime, he effected the partition between himself and his three sisters. He sold 1H and 36R land from land Gut No.69 in favour of one Sunil and Sachin. The sisters have received their shares in the property in cash and Bapurao i.e. father sold the property that fallen to his share. Thus the defendant No.1 only received land admeasuring 1H 59R from Gut No.61. It is on the basis of this, the partition mutation entry is taken.

3. In the suit, the application came to be filed by the present respondent Nos.6 and 7 stating that, they are the heirs of defendant No.5 who transposed of plaintiff No.1 after death of Girijabai. It is the case that the plaintiff and defendant No.2 were drove away by defendant No.1 Gopinath and therefore both were staying with defendant Nos.6 and 7. However, after filing of the suit, Girijabai and Bapurao both expired in the house of applicants. It is the case that the

defendant No.1 has prepared falls and bogus consent deed executed of the plaintiff. Now it is the case of defendant Nos. 6 and 7 that Girijabai had executed a registered Will No.7804 of 2011 to the extent of her share in the property in favour of defendant No.6 i.e. Rajesh Yevle. The deceased Bapurao also executed a Will bearing No.8300 of 2012 to the extent of his share of the property in favour of defendant No.7 i.e. Balaji Yevle on 13th September 2012. Thus, both the defendants became successor of their grand parents respectively on the strength of Wills executed by them. In the application, they prayed that they be added as plaintiff in the suit. It is this application that came to be allowed. However, instead of adding them as plaintiffs, the trial Court directed to add them as defendants and directed the plaintiffs to carry out necessary amendment in the plaint.

4. This is how the original defendant No.1 is before this Court challenging the order. It is the case that the defendant Nos.6 and 7 have no *locus standi* to file an application. Their application below Exh. 91 with the same prayers was rejected by the Court. They could not have

made similar application after lapse of time. The application Exh.91 was made in the year 2013 and same was rejected on 8th September 2015 and the said fact is suppressed. The execution of the Will by grandmother and grand-father is specifically denied. The application was not maintainable as there is specific provision under Order XXII Rule 5 of the C.P.C. The application ought to have been filed under Order XXII Rule 5 of C.P.C.. In this view, it is submitted that the application under Order 1 Rule 10 of the C.P.C. was not maintainable. Thus, merely on this ground, the application ought to have been rejected.

5. Mr.Gade, the learned Advocate for the Respondent Nos.3 to 7 strongly opposes the petition. It is the case that when the Will is executed in favour of applicants, the learned trial Court has rightly passed the order under Order 1 Rule 10 of Code of Civil Procedure, 1908 (for short "CPC") as they are the successor and are the persons having interest in the property. The copies of the Will are annexed to the affidavit-in-reply. Even other documents showing the names of the applicants are on record in the form of 7/12 extract and other revenue

records.

6. This Court finds that, the Wills were properly registered. The deceased Girijabai had executed the Will in the office of the Registrar on 27th September 2012. In the said Will it is seen that it is clearly stated that the defendant No.1 i.e. present petitioner is residing separately. She is looked after by defendant No.6, Rajesh Yevle. There is also specific mention of the suit in the Will that she bequeathed the property in favour of Rajesh Yevle.

7. Will of Bapurao Kakade is also on record which is registered on 13th September 2012 wherein he has stated that son Gopinath Kakade is residing separately. He is looked after by defendant No.7 Balaji Yevle. He has bequeathed the property in his name. There are certificates on record showing that both these persons were in fit condition to give statements. He also relied upon the order passed by the learned trial Judge dated 17th February 2015 allowing to transpose original defendant Nos.3 to 5 as plaintiff No.1-A to 1-C. That order is not challenged. On this, the Court has to consider this petition.

8. The learned Advocate for the petitioner relied upon the judgments in the case of *Jagadi Suguna (dead) through L.Rs. Vs. Satya Sai Central Trust and Ors.*¹ and *Mahanth Satyanand Alias Ramjee Singh Vs. Shyam Lal Chauhan and Ors.*².

9. In the case of *Jagadi Suguna* (supra), the Hon'ble Apex Court held that, the Legal Representatives of the deceased are to be brought on record under Order XXII Rule 5 or Order XXII Rule 11 of Code of Civil Procedure. It is held that the provision of Rule 4 and 5 of Order XXII are mandatory. When the respondent in an appeal dies, the Court cannot simply say that it will hear all rival claimants to the estate of the deceased-respondent and proceed to dispose of the appeal. It is also held that it is only when the question of legal representative is determined by the Court and such legal representatives are brought on record, in such cases, it can be said that the estate of the deceased is represented and therefore, the inquiry under Order XXII Rule 5 for the limited purpose is necessary.

1 AIR 2008 SC 2866

2 (2018) 18 SCC 485

10. In the case of ***Mahanth Satyanand*** (supra), the Hon'ble Apex Court held that, there is burden cast upon the Court to first decide as to who is the legal representatives of the deceased. Without doing this exercise, the Court cannot proceed with the disposal of the case on hand. At the same time, the Court cannot make all the contenders as parties. The said question cannot be postponed till final disposal of the appeal on merits. The Court, in this case, has also considered the judgment in the case of ***Jagadi Saguna*** (supra).

11. The learned Advocate for the respondent relied upon the following judgment:-

(i) ***Suresh Kumar Bansal Vs. Krishna Bansal and Anr.***³

(ii) ***Moreshar Yadaorao Mahajan Vs. Vyankatesh Sitaram Bhedi (D) Thr. Lrs. And Ors.***⁴

(iii) ***A Krishna Shenoy Vs. Ganga Devi G. and Ors.***⁵

12. In the case of ***Suresh Kumar Bansal*** (supra), the parties were sought to be impleaded as party on the strength of Will. The trial Court

3 AIR 2010 SC 344

4 AIR 2022 SC 4710

5 2023 DGLS (SC) 1244

did not allow the application holding that the Will was suspicious. Ultimately, the Hon'ble Supreme Court allowed the application for impleadment as party. It has held that the enquiry is limited for the purpose of deciding such application. At this stage, Court need not go in to the question of genuineness of Will etc. The said case was arising out of under Order XXII Rule 5 of the C.P.C.

13. In the case of ***Moresnar Yadaorao Mahajan*** (supra), it was the case under specific relief Act. An application was filed under Order 1 Rule 10 of the C.P.C. The question was of necessary parties. In that case, the plaintiff had admitted that the suit property was jointly owned by defendant, his wife and three sons. The objection was also taken by the defendant in the written statement regarding non-joinder of necessary party. It was thus held that the suit was bad in law for non-joinder of necessary parties. The only thing needs to be considered that is the suit is held to be bad in law for non-joinder of necessary parties.

14. In the case of ***A. Krishna Shenoy*** (supra), the Hon'ble Apex Court held that, in the suit for partition, every party is deemed to be a plaintiff.

Considering all above, the defendant Nos. 6 and 7 are not only claiming to be legal heirs of the plaintiff but also they claim to have derived a right in view of Will executed in their favour. It is thus no doubt that they are necessary parties to the suit. The question only in what manner, they are to be brought on record. Whether they were required to file an application under Order 1 Rule 10 of C.P.C. to join them as party being necessary parties or an application invoking the provision of Order XXII Rule 4 and 5 of C.P.C. If the nature of application is seen, the applicants is filed under Order 1 Rule 10 of C.P.C. The earlier Application Below Exh.91 was rejected long back. There is no challenge to the said order. The respondent had accepted that order. The Defendant Nos. 3 to 5 thereafter came to be transposed as plaintiff No. 1-A to 1-C. Though the present petitioners were shown as defendants. The learned Advocate rightly pointed out from the judgment in the case of ***A. Krishna Shenoy*** (supra) that in the suit for partition, every party is plaintiff. Thus, the defendant No.1 is also plaintiff and can oppose adding the defendant Nos.6 and 7 as party. In the judgments relied upon by the learned Advocate for the petitioners, there is nothing to suggest that though it is

held that it is necessary to invoke the provision of Order XXII Rule 5 for bringing on record legal heirs on record. There is nothing to indicate that no such application can be filed under Order 1 Rule 10 of C.P.C. Thus, the main objection of the petitioners that the application ought to have been filed under Order XXII Rule 5 of C.P.C., is not acceptable.

15. So far as the judgment in the case of **Suresh Kumar Bansal** (supra), in that case, it was an application under Order XXII Rule 5 of C.P.C. The only dispute is about the Will which was alleged to be suspicious and the Court held that there is no ground to deny the person to be added as party to the suit. In the case of **Moreshwar Mahajan** (supra), this Court finds that it is only on the point of adding as necessary party. In the present case, there is no dispute about this proposition.

16. Considering all the submissions and the order passed by the trial Court, this Court comes to the conclusion that the respondents are the necessary parties. They are not claiming as legal representatives of the deceased but claiming their rights on the strength of Will executed by the Girijabai and Bapurao, respectively. This Court is of the view that it

was not necessary for them to file an application under Order XXII Rule 5 of the C.P.C. They had rightly filed an application under Order 1 Rule 10 of C.P.C. This Court does not find any illegality in the impugned order passed by the trial Court. This Court finds that no case is made out calling for interference at the hands of this Court. Hence, the following order:-

ORDER

- (i) Writ Petition stands dismissed.
- (ii) No order as to costs.

[KISHORE C. SANT, J.]