

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 3363 OF 2022**

1. Dilip Baliram alias Balwant Patil
2. Rajakka Dilip Patil
3. Rupali Dilip Patil

...Petitioners

**Versus**

1. Pandurang Dnyanu Patil
2. Vilas Dnyanu Patil
3. Indubai Vitthal Patil
4. Ravindra Vitthal Patil (Minor through R3)
5. Dhanashree Vitthal Patil
6. Suman Pandurang Patil
7. Manager, Bhu Vikas Bank, Mumbai
8. Sampat Dnyanu Patil
9. Ananda Dnyanu Patil
10. Jaysingh Dnyanu Patil
11. Kundalik Pandurang Patil
12. Balwant Vishnu Patil
13. Shankar Laxman Patil
14. Namdev Saadu Chaugale
15. Shankar Saadu Chaugale
16. Dilip Shivram Patil
17. Dipali Dilip Patil
18. Dhondiram Shamrao Patil
19. Balasaheb Sakharam Patil
20. Hari Dattatray Patil
21. Kumudini Shrihari Patil
22. Sadashiv Shankar Nawale
23. Tukaram Kalke
24. Annasaheb Shamrao Dewane
25. Bhagwan Bapusaheb Chavan

...Respondents

Mr. Yuvraj Narvankar, for the Petitioners.

Mr. Chetan Patil, a/w Bhushan Jadhav, i/b Mandar Bagkar,  
for the Respondents.

**CORAM: N. J. JAMADAR, J.**

**RESERVED ON: 24<sup>th</sup> APRIL, 2025**

**PRONOUNCED ON: 9<sup>th</sup> JUNE, 2025**

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**JUDGMENT:-**

1. Rule. Rule made returnable forthwith and, with the consent of the learned Counsel for the parties, heard finally.

2. The petitioners – appellants assail the legality, propriety and correctness of an order dated 16<sup>th</sup> December, 2021 passed by the learned District Judge, Kolhapur, on an application to add the co-sharers as party to the suit, i.e. RCS No.398/2003, whereby the said application (Exhibit-43) preferred under Order I Rule 10(2) and Order VI Rule 17 of the Code of Civil Procedure, 1908 (“the Code”), came to be rejected.

3. Shorn of superfluities, the background facts leading to this petition can be stated as under:

3.1 Krushna Rau Patil was the common ancestor. He had two sons, Dnyanu, the elder one, and Baliram @ Balwant, apart from Ganpati, another son, who passed away as a bachelor, and two daughters Parvatibai and Laxmi. Dilip – plaintiff No.1 is the son of Baliram @ Balwant, who passed away on 17<sup>th</sup> December, 1970. Rajakka – plaintiff No.2 is the wife of plaintiff No.1 and Rupali – plaintiff No.3, is the daughter of plaintiff Nos.1 and 2. Defendant Nos.1 and 2 are the sons of Dnyanu, who passed away on 13<sup>th</sup> March, 1980 and late Vitthal, the husband of

defendant No.3 and father of defendant Nos.4 and 5, passed away on 7<sup>th</sup> February, 2002.

**3.2** The petitioners – plaintiffs instituted the suit with the assertions that the properties described in paragraph 3A to 3E are the joint family properties of late Dnyanu and late Baliram @ Balwant. There has not been partition of the suit properties by *metes and bounds*, though the branches of Dnyanu and Baliram @ Balwant were cultivating separate portions of the suit properties for convenience. Late Dnyanu was the *karta* of the joint family. After the demise of Dnyanu, the names of defendant Nos.1 to 6 were mutated to record of rights of the suit properties. Taking undue advantage of the mutation of their names to the record of rights of the suit properties, the defendants started to assert their exclusive title over the suit properties. The plaintiffs demanded partition and separate possession of their shares in the suit properties in the capacity of the successor in interest of Baliram @ Balwant. Defendant Nos.1 to 6 flatly refused to partition the suit properties.

**3.3** It was further averred that late Dnyanu had a relationship outside marriage with a lady and had incurred huge liabilities, and the portion of the suit properties were alienated. Therefore, the subsequent purchaser of the portions of the suit properties

were also impleaded as party defendants to the suit. Hence, the suit for partition and separate possession of the plaintiffs  $\frac{1}{2}$  share in the suit properties and mesne profits.

**3.4** Defendant Nos.1 to 4 and 6 contested the suit. It was denied Baliram @ Balwant, predecessor-in-title of the plaintiffs, had any relationship with late Krushna Patil, the original holder, and, thus, interest in the suit properties. A theory of prior partition during the lifetime of late Dnyanu, was also pleaded by the defendants.

**3.5** By a judgment and decree dated 2<sup>nd</sup> November, 2015, the learned Civil Judge returned the findings that defendant Nos.1 to 4 and 6 failed to prove prior partition in the year 1979, the suit was not barred by the provisions contained in Order II Rule 2 of the Code and by law of limitation, and that defendant Nos.1 to 4 and 6 also failed to prove that they acquired ownership over the suit properties by way of adverse possession. The learned Civil Judge, however, held that though the plaintiffs succeeded in establishing that they were entitled to succeed to the estate of late Baliram @ Balwant, yet, since the daughters of Baliram @ Balwant namely, Suman and Kamal, and Sonabai @ Pramila, the daughter of late Dnyanu, were not impleaded as party

defendants to the suit, the suit was bad for non-joinder of necessary parties. Thus, the suit came to be dismissed.

**3.6** Being aggrieved, the petitioners preferred Regular Civil Appeal No.391/2015 before the District Court. In the said appeal, the petitioners filed an application (Exhibit-43) to implead abovenamed daughters of Baliram @ Balwant and late Dnyanu as party defendants to the suit. It was, *inter alia*, asserted that the branches of late Baliram @ Balwant and late Dnyanu were represented by plaintiff No.1 – Dilip and defendant Nos.1 and 2 and the successor in interest of late Vitthal, the sons of late Dnyanu, and, therefore, the sisters of plaintiff No.1 and sister of defendant Nos.1 and 2 were not impleaded as party defendants. Nonetheless, to remove the technical defect in the frame of the suit, Suman and Kamal, the daughters of late Baliram @ Balwant, and Sonabai @ Pramila, the daughter of late Dnyanu, be permitted to be impleaded as a party defendants to the suit. No other amendment except the impleadment of the above-named co-sharers as defendant Nos.26 to 28 was sought.

**3.7** The application was resisted by defendant Nos.1 to 4 and 6.

**3.8** By the impugned order, the learned District Judge was persuaded to reject the application observing *inter alia* that in

the year 2008 the plaintiffs had amended the plaint so as to correct the genealogy and the names of Suman and Kamal and Sonabai @ Pramila were inserted in the said genealogy. The plaintiffs were fully cognizant of the fact that Suman and Kamal are the real sisters of Dilip – plaintiff No.1 and, yet, the plaintiffs chose to proceed with the suit despite specific objection as to the non-joinder of the necessary parties. The instant application, which was preferred in the year 2017, was driven by the objective to fill in the lacuna in the plaintiffs case, held the learned District Judge.

4. Being aggrieved, the petitioners – appellants have invoked the writ jurisdiction.

5. I have heard Mr. Yuvraj Narvankar, the learned Counsel for the petitioners, and Mr. Chetan Patil, the learned Counsel for the respondents, at some length. With the assistance of the learned Counsel for the parties, I have perused the material on record including the judgment of the trial court and the impugned order.

6. Mr. Narvankar, the learned Counsel for the petitioners, submitted that the learned District Judge took a very hyper-technical view of the matter. The non-impleadment of Suman and Kamal, the daughters of late Baliram @ Balwant and

Sonabai @ Pramila, the daughter of late Dnyanu was *bona fide*. Since PW-1 Dilip represented the branch of Baliram @ Balwant and defendant Nos.1 and 2 and defendant Nos.3 to 5 the successor in interest of late Vitthal, represented Dnyanu branch, under a *bona fide* impression that the impleadment of the daughters of Baliram @ Balwant and Dnyanu was not necessary, the plaintiffs prosecuted the suit. However, since the fact that Suman and Kamal were the daughters of late Baliram @ Balwant and Sonabai @ Pramila was the daughter of Dnyanu was explicitly mentioned in the plaint, especially the genealogy, no *mala fide* or intentional non-impleadment can be attributed to the plaintiffs.

7. Mr. Narvankar would urge that in a situation of the present nature, where the impleadment of the co-sharer was sought at the appellate stage, as the trial court had recorded a categorical finding that though the plaintiffs were entitled to partition and separate possession of their share in the suit properties yet on account of non-joinder of the necessary parties, a decree for partition and separate possession cannot be passed, the courts below could have exercised the jurisdiction vested under Order I Rule 10(2) of the Code to implead the necessary parties, especially when the suit was one

for partition and separate possession of the ancestral properties. To this end, Mr. Narvankar placed reliance on the judgments of this Court in the cases of *Pandurang Sitaram Pande and others vs. Avinash Ramkrishna Pande and others*<sup>1</sup>, *Baby S. Prabhu Dessai (since deceased deleted) and ors. vs. Styabhama P. Prabhu Dessai and ors.*<sup>2</sup> and a Division Bench judgment in the case of *Chitralekha Builders and another vs. G.I.C. Employees Sonal Vihar Co-operative Housing Society Ltd. and others*<sup>3</sup>.

8. Mr. Narvankar would further urge that the impleadment of the proposed defendants at the stage of appeal is also not likely to cause any prejudice to defendant Nos.1 to 4 and 6, the contesting defendants, as they have failed to establish the case of prior partition and acquisition of title over the suit properties by prescription. Therefore, the impugned order deserves to be interfered with.

9. Mr. Patil, the learned Counsel for respondent Nos.1 to 4 and 6, stoutly supported the impugned order. Mr. Patil would urge that the case at hand is not as innocuous as is sought to be projected by the petitioners. The material on record would indicate that the petitioners had the knowledge that Suman and

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**1** 2016 SCC Online Bom 5215.

**2** Bombay High Court WP/10/2010, dt.22/7/2010.

**3** 2005(4) Mh.L.J. 360.

Kamal were the sisters of plaintiff No.1 and the daughters of late Baliram @ Balwant. The petitioners amended the plaint so as to correct the genealogy and include therein Suman and Kamal as the daughters of late Baliram @ Balwant and Sonabai @ Pramila, the daughter of late Dnyanu. The petitioners were also aware that a specific ground of non-joinder of the necessary parties was raised and an issue was also settled. Yet, the plaintiffs chose to prosecute the suit and took a chance. In such circumstances, the plaintiffs, who deliberately chose not to implead the necessary parties despite having full knowledge of their interest in the suit properties, cannot be permitted to rectify the defect at the appellate stage. A very strong reliance was placed by Mr. Patil on a judgment of the Chhattisgarh High Court in the case of *Yovel Kumar and others vs. Anand Kumari through LRs and others*<sup>4</sup>.

10. I have given careful consideration to the rival submissions canvassed across the bar. At the outset, it is necessary to note that the suit came to be dismissed singularly for non-joinder of the necessary parties. The trial court answered all the issues in favour of the plaintiffs except the bar to the tenability of the suit on the ground of non-joinder of the necessary parties. The trial

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**4** 2025 SCC OnLine Chh 2133.

court was of the view that defendant Nos.1 to 4 and 6 failed to establish prior partition and also their claim of acquisition of title over the suit properties by way of adverse possession. However, since Suman and Kamal, the daughters of late Baliram @ Balwant and Sonabai @ Pramila, the daughter of late Dnyanu, were not impleaded as party defendants to the suit, though indisputably they were the co-sharers, in their absence the shares of the parties cannot be determined.

11. Incontrovertibly, the names of Suman and Kamal as the daughters of late Baliram @ Balwant and Sonubai @ Pramila as the daughter of Dnyanu, were included in the genealogy incorporated in the plaint. It is not the case that there was an element of suppression or *mala fide* on the part of the plaintiffs. Being the daughters of late Baliram @ Balwant and Dnyanu, the proposed defendants indubitably had an interest in the suit properties. Nay the fact that Suman and Kamal and Sonubai @ Pramila were the necessary parties to the suit is not in controversy.

12. The controversy revolves around the question as to whether the Appellate Court could have permitted the appellants – plaintiffs to amend the plaint so as to add the above-named proposed defendants as party defendants to suit

at the stage of appeal, despite the dismissal of the suit on the ground of non-joinder of the above-named proposed defendants as party defendants to the suit.

**13.** The provisions contained in Order I Rule 10(2) empower of the Court to add any person as a party to the suit or delete a party, at any stage of the suit. The first appeal before the District Court is, in essence, continuation of the suit which came to be dismissed by the trial court for non-joinder of the necessary parties.

**14.** It is well recognized that the impleadment of a party to the suit is not a matter of initial jurisdiction but that of judicial discretion to be exercised by the Court having regard to all the relevant circumstances. The question whether a person, sought to be impleaded as a party to the suit, deserves to be so impleaded hinges upon the character of such party. If the presence of such person is necessary for a complete and effectual adjudication of the dispute between the parties, the prayer for impleadment can hardly be contested. As noted above, the fact that the proposed defendants were the necessary parties to the suit is rater incontrovertible.

**15.** The circumstance which predominantly weighed with the learned District Judge, was the non-impleadment of Suman and

Kamal, the daughters of Baliram @ Balwant, and Sonubai @ Pramila, the daughter of late Dnyanu, despite their names having been included in the genealogy, which was amended in the year 2008 and the specific ground of non-joinder of necessary parties having been raised by the defendants. In my considered view, the aforesaid factum of disclosure of the co-sharers in the plaint itself, can be appreciated in two ways. One, as held by the learned District Judge, it would indicate that the plaintiffs obstinately prosecuted the suit despite being fully cognizant of non-impleadment of the co-sharers and, therefore, were not entitled to seek the impleadment of the co-sharers at the appellate stage, after the suit came to be dismissed on that count. Two, it could be equally urged that the trial court could have directed the plaintiffs to implead the proposed defendants as party defendants to the suit as the trial court was also empowered to exercise the discretion to add the necessary parties *suo motu*. That course would have equipped the trial court to pass an effective order.

16. The facts in the case of ***Pandurang Pande*** (supra), on which reliance was placed by Mr. Narvankar, resemble the facts of the case at hand. In a suit for partition, two of the sisters of the plaintiffs had passed away before the institution of the suit

and yet their legal representatives were not joined as party defendants to the suit. The trial court decreed the suit observing that the said two sisters had executed relinquishment deed in favour of the plaintiffs. Reversing the said finding, the learned District Judge held that the suit was liable to be dismissed for non-joinder of the legal heirs of those two sisters. In the second appeal, this Court ruled that the lower appellate court ought to have granted an opportunity to the plaintiffs to add necessary parties to the proceedings and it is only upon failure of the plaintiffs to comply with such directions as contemplated by Order I Rule 13 of the Code, the court could have dismissed the suit on the ground of non-joinder of necessary parties. The observations in paragraphs 12 to 15 are material and hence extracted below:

"12. No doubt, that the issue regarding non joinder of necessary parties was raised in the trial Court and it was also framed. The trial Court records the finding that since two sisters have relinquished their share, the suit cannot be dismissed for non joinder of necessary parties. The lower appellate Court for the first time dismisses the suit on the ground of non joinder of necessary parties. As pointed out earlier, the appellant/plaintiff, realizing the mistake, filed Civil Application No. 5737 of 2008 in this second appeal for grant of permission to join the legal representatives of two sisters, was not opposed and allowed by this Court on 10.01.2013. Accordingly, their names are brought on record and also in the present second appeal.

13. Order I, Rule 10(2) of the Civil Procedure Code being relevant, is reproduced below;

"O. I R 10(2) - The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may be appear to

the Court to be just order that the name of any party improperly joined, whether as plaintiff or defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. The aforesaid provision confers a discretion upon the Court to permit the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectively and completely to adjudicate upon and settle all the questions involved in the suit, be added at any stage of proceedings. The second appeal being continuation of the suit, this Court is competent to exercise discretion even at the second appellate stage to permit the joinder of necessary parties to the suit. Once such permission is granted and the parties are joined as defendants/ respondents in the proceedings, the order relates back to the date of filing of the suit and the defect stands cured.

15. All the parties added, who are the legal representatives of the two sisters of the plaintiff namely Smt. Jankibai and Smt. Tarabai, have filed their reply on oath to the application of the plaintiff for grant of permission to join them as party defendants/respondents in the proceedings. In categorical terms they have stated in their reply that they do not want to claim any share or interest in the suit properties and their predecessor in title had relinquished their shares in favour of the brothers. There is no contest involved which is required to be adjudicated by this Court upon granting permission to join certain persons as defendants/respondents in the proceedings. The plaintiff would, therefore, be entitled to 1/5th share in the suit property and the suit cannot, therefore, be dismissed in the facts and circumstances of this case for non joinder of necessary parties. The lower appellate Court ought to have granted an opportunity to the plaintiff to add the necessary parties to the proceedings and it is only upon the failure of the plaintiff to comply with such direction as contemplated by Order 1, Rule 13 of C.P.C., the suit could not have been dismissed on the ground of non-joinder of necessary parties. The substantial question of law is, therefore, answered accordingly."

17. In the case of *Baby S. Prabhu Dessai* (supra) this Court enunciated that the parties can be joined at appellate stage. Since the appeal being the continuation of the suit, a person

may be added as party to it, even at the stage of appeal, provided his addition is necessary in order to enable the Court to effectively and completely adjudicate upon and settle all the questions involved in the suit. If the non-joinder was shown to be *bona fide*, an order of impleadment of a party does not call for interference in exercise of the extraordinary jurisdiction.

18. A profitable reference, in this context, can be made to a Constitution Bench judgment of the Supreme Court in the case of *Kanakarathanammal V. vs. Loganatha Mudaliar and another*<sup>5</sup>. In the said case, the Supreme Court declined to permit the plaintiff to add the necessary party to the suit when the proceeding reached the Supreme Court. The observations in paragraph 15 are instructive and hence extracted below:

“15. It is unfortunate that the appellant's claim has to be rejected on the ground that she failed to implead her two, brothers to her suit, though on the merits we have found that the property claimed by her in her present suit belonged to her mother and she is one of the three heirs on whom the said property devolves by succession under S. 12 of the Act. That, in fact, is the conclusion which the trial Court had reached and yet no action was taken by the appellant to bring the necessary parties on the record. It is true that under O. 1 R. 9 of the Code of Civil Procedure no suit shall be defeated by reason of the misjoinder or non-joinder of parties; but there can be no doubt that if the parties who are not joined are not only proper but also necessary parties to it, the infirmity in the suit is bound to be fatal. Even in such cases, the Court can under O. 1 R. 10, sub-rule (2) direct the necessary parties to be joined, but all this can and should be done at the stage of trial and that too without prejudice to the said parties' plea of limitation. Once it is held that the appellant's two brothers are co-heirs with her in respect of the properties left intestate by

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5 AIR 1965 Supreme Court 271.

their mother, the present suit filed by the appellant partakes of the character of a suit for partition, and in such a suit clearly the appellant alone would not be entitled to claim any relief against the respondents. The estate can be represented only when all the three heirs are before the Court. If the appellant persisted in proceeding with the suit on the basis that she was exclusively entitled to the suit property, she took the risk and it is now too late to allow her to rectify the mistake. In *Naba Kumar Hazra & Anr. v. Radheshyam Mahish & Ors.*(AIR 1931 PC 229) the Privy Council had to deal with a similar situation, In the suit from which that appeal arose, the plaintiff had failed to implead co-mortgagors and persisted in not joining them despite the pleas taken by the defendants that the co-mortgagors were necessary parties and in the end. it was urged on his behalf that the said co-mortgagors should be allowed to be impleaded before the Privy Council. In support of this plea, reliance was placed on the provisions of O. 1 R. 9 of the Code. In rejecting the said prayer, Sir George Lowndes, who spoke for the Board observed that "they are unable to hold that the said Rule has any application to an appeal before the Board in a case where the defect has been brought to the notice of the party concerned from the very outset of the proceedings and he has had ample opportunity of remedying it in India."

(emphasis supplied)

19. Mr. Patil banked upon the decision in the case of *Yovel Kumar* (supra), which follows the aforesaid pronouncement, to support the submission that under no circumstances, a party can be permitted to be added at the appellate stage, where the suit has been dismissed for non-joinder of the necessary parties.

20. Ordinarily, when an objection as to the non-joinder of necessary parties is raised; which has to be raised at the earliest opportunity, the plaintiff ought to amend the plaint and seek impleadment as a necessary party. However, a failure to do so cannot preclude the Court from exercising the discretion

vested in the Court under the provisions of Order I Rule 10(2) of the Code. The object of the said provisions, which empowers the Court to implead a party is to equip the Court to decide the lis effectively and completely. The Court is empowered to exercise the said distinction at any stage of the suit. It may not be permissible to lay down an absolute proposition of law that once the suit is dismissed for non-joinder of a necessary party, the plaintiffs cannot be permitted to make amendment subsequently.

**21.** The nature of the suit, the character of the parties, who were stated to be the parties necessary to the suit, and the reason ascribed for their non-impleadment, before the trial court, are few of the factors which bear upon the determination. In the case at hand, it was the stand of the plaintiffs that since plaintiff No.1 Dilip represented Baliram @ Balwant branch and defendant Nos.1 and 2 represented Dnyanu branch, the daughters were not impleaded as party to the suit. The said stand of the plaintiffs may not be sustainable. However, the Court cannot lose sight of the fact that the names of the proposed defendants were duly disclosed as the co-sharers. It was not the case that the non-impleadment of the proposed defendant was either *mala fide* or actuated by a design to usurp

their interest. Partition of the suit properties was primarily sought qua the undivided interest of late Dnyanu and late Baliram @ Balwant.

**22.** The matter can be looked at from a slightly different perspective. The trial court adjudicated upon the contentious issues including the existence of ancestral and partible property, the entitlement of the plaintiffs to a share therein, the failure of the defendants to establish the factum of prior partition and perfection of title by way of adverse possession. The suit was, however, dismissed on the ground of non-joinder of necessary parties though their identity and relationship with the prepositus were not in contest. In such circumstances, the dictate of public justice commands that the issue of partition and carving out the shares of all the co-sharers is decided by the Court on merits rather than on technicalities.

**23.** At any rate, the plaintiffs are seeking the impleadment of the proposed defendants as party defendants to the suit simplicitor, without seeking any amendment in the body of the plaint. The Appellate Court would thus be not required to reopen the trial, and can legitimately decide the claim for partition and separate possession, on the basis of indisputable relationship between the parties.

24. The upshot of the aforesaid consideration is that the learned District Judge committed an error in dismissing the application for addition of the proposed defendants as party defendants to the suit. The impugned order, therefore, cannot be sustained.

25. Hence, the following order:

**: O R D E R :**

- (i) The petition stands allowed.
- (ii) The impugned order stands quashed and set aside.
- (iii) The application for impleadment of proposed defendant Nos.1 to 4 and 6 as party defendants to the suit stands allowed.
- (iv) The petitioners – plaintiffs shall carry out the necessary amendment in the plaint within a period of three weeks from the date of uploading of this order.
- (v) By way of abundant caution, it is clarified that the observations hereinabove are confined to determine the legality, propriety and correctness of the impugned order rejecting the application for impleadment of the parties and they may not be construed as an expression of opinion on the merits of the claim and the learned District

Judge shall decide the appeal on its own merits and in accordance with law, without being influenced by any of the observations made hereinabove.

- (vi) Rule made absolute to the aforesaid extent.
- (vii) No costs.

[N. J. JAMADAR, J.]