IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PRANAY VERMA

ON THE 4th OF APRIL, 2022

MISC. APPEAL No. 2576 of 2021

Between:-

SURESHCHANDRA S/O MADANLAL,
AGED ABOUT 64 YEARS,
1. OCCUPATION: PUJA ARCHANA AND AGRICULTURE,
R/O VILLAGE MANNGOD, TEHSIL SARDARPUR,
DISTRICT DHAR. (MADHYA PRADESH)

SHRI RADHAKRISHNA MANDIR
BANKE BIHARI MANDIR MANGOD THROUGH
2. MANAGER PUJARI SURESH CHANDRA
S/O MADANLAL VILLAGE MAANGOD,
TEHSIL SARDARPUR, DIST DHAR (MADHYA PRADESH)

SHRI HANUMAN MANDIR VILLAGE MANGOD
MANAGER PUJARI SURESH CHANDRA
3. S/O MADANLAL VILLAGE MAANGOD,
TEHSIL SARDARPUR,
DIST DHAR (MADHYA PRADESH)

.....APPELLANTS

(BY SHRI VIKAS RATHI, ADVOCATE)

AND

GIRIRAJSINGH S/O MADHAVSINGH RAJPUT,
1. AGED ABOUT 35 YEARS, OCCUPATION: AGRICULTURE,
VILLAGE MAANGOD, TEHSIL SARDARPUR, DIST. DHAR.
(MADHYA PRADESH)

2. **MANOJ S/O UDEYSINGH ,
AGED ABOUT 22 YEARS, OCCUPATION: AGRICULTURE,
VILLAGE MAANGOD, TEHSIL SARDARPUR,
DIST DHAR (MADHYA PRADESH)**

3. **SMT. SARASKUNWAR W/O LATE UDEYSINGH RAJPUT,
AGED ABOUT 50 YEARS, OCCUPATION: AGRICULTURE,
VILLAGE MAANGOD, TEHSIL SARDARPUR,
DIST DHAR (MADHYA PRADESH)**

4. **STATE OF M.P. THROUGH COLLECTOR, DHAR,
DISTRICT DHAR (MADHYA PRADESH)**

5. **GRAM PANCHAYAT MAGOD THROUGH
SARPANCH JILA PANCHAYAT MANGOD
TEH SARDARPUR DIST DHAR (MADHYA PRADESH)**

.....RESPONDENTS

(BY SHRI DATTATREY KALE, ADVOCATE FOR RESPONDENTS NO.1 TO 3)

This appeal coming on for judgment this day, the court passed the following:

J U D G E M E N T

1. This appeal under Order 43 Rule 1(u) of the CPC has been preferred by defendants 1 to 3/appellants against the order dated 15.09.2021 passed in Regular Civil Appeal No.4/2016 and 17/2017 by the First Additional District Judge, Sardarpur, District Dhar whereby setting aside the judgment and decree dated 18.01.2016 passed in Civil

Suit No.68-A/2017 by the Civil Judge, Class-I, Sardarpur, District Dhar, the matter has been remanded back to it for decision afresh as per directions contained therein.

2. The facts necessary for decision of this appeal are that plaintiffs/respondents 1 to 3 instituted an action before the trial Court for declaration that the temples in dispute are situated over their private suit lands hence are their private temples and suit lands are lands of temples and defendant No.1 is only a Pujari therein, for handing over possession of the suit lands and temples to a committee constituted by plaintiffs for their management, for removal of defendant No.1 as a Pujari and directing him to submit accounts of income from the temples before the Court and for permanent injunction restraining defendant No.1 from interfering with worship of plaintiffs and their family members of the temple.

3. The plaintiffs submitted *inter alia* that their private temples Shri Radha Krishna Mandir and Shri Hanuman Mandir are situated at Gram Mangot the same having been constructed over private lands of their

ancestor Hanjabai who had renovated the temples, that Hanjabai had only one daughter Laadkunwarbai, who expired in 1961 whose husband was Jaswant Singh, that Laadkunwarbai and Jaswant Singh were issueless hence Jaswant Singh had married Kunwarbai from whom he had six sons, that Laadkunwar had adopted Madhavsingh and plaintiff No.1 is his only son, that Hanjabai died in 1972 and Madhavsingh died in 2000 and that plaintiffs are legal heirs of Hanjabai.

4. The plaintiffs further submitted that Hanjabai had kept Madanlal, father of defendant No.1 as a Pujari of the temples for taking care of the temples as well as the suit lands, that upon death of Madanlal his son defendant No.1 has been managing the temples and carrying out agricultural work over the suit lands, that neither Madanlal nor defendant No.1 ever had any title to the suit lands or the temples, that defendant No.1 has recently started neglecting the management of the temples and agricultural work of the suit lands in view of which he is liable to be removed as a Pujari and that he has refused to relinquish his

services as a Pujari despite notice to him in that regard.

5. The defendant No.1 contested the plaintiffs' claim by filing his written statement submitting *inter-alia* that plaintiffs are not heirs of late Hanjabai, that the temples and their lands are different, that his father and after him he has been taking care of the temples and its lands as of right, that the suit lands are neither owned by plaintiffs or their families nor have they ever been in possession thereof, that in settlement of 1971-1972 his father was recorded over lands of the temples and plaintiffs were not so recorded, that plaintiffs' claim is barred by time and that the same is bad for non-joinder of necessary parties as remaining sons and daughters of Jaswant Singh have not been impleaded as parties.

6. The defendants 2, 3 & 4 also filed their written statement contesting the plaintiffs' claim. Defendant No.5 also filed his separate written statement.

7. By judgment and decree dated 18.01.2016 the trial Court held that the suit lands over which temples are constructed are private lands

of the temples, that father of defendant No.1 had been appointed as a Pujari by ancestors of plaintiffs for management of the temples, that plaintiffs do not have any right to remove defendant No.1 from management of the temples and its lands and handover the same to a committee constituted by them, that plaintiffs' claim for declaration that temples are their private temples is barred by time whereas the remaining claim is within time and that the remaining heirs of Hanjabai have not been impleaded as parties to the suit though they are necessary parties hence the claim is bad for non-joinder of necessary parties. In consequence plaintiffs' claim was partly decreed holding them to be the owners of the temples and the suit lands and defendant No.1 to be its Pujari and defendant No.1 was restrained from obstructing plaintiffs and their family members from performing religious activities in the temples.

8. Being aggrieved by the judgment and decree aforesaid in so far as their claim had been partly dismissed, the plaintiffs preferred an appeal under Section 96 of the CPC before the lower appellate Court.

The defendants 1 to 3 also preferred an appeal before the lower appellate Court in so far as plaintiffs' claim had been partly decreed. Both the appeals were consolidated, heard and decided together by the lower appellate Court.

9. In the appeal plaintiff No.1 filed an application under Order 1 Rule 10 and Order 6 Rule 17 read with Section 151 of the CPC for impleading the remaining legal heirs of Hanjabai as parties to the appeal. Prayer was also made by him for amendment of the plaint for making necessary averments as regards the necessary parties. The defendant No.1 contested the application by filing his reply to the same.

10. By the impugned order dated 15.09.2021 the lower appellate Court observed that plaintiffs have specifically pleaded the suit property to have been earlier held by Hanjabai hence for passing an effective decree as regards the suit property, the remaining heirs of Hanjabai are necessary parties in absence of impleadment of whom the suit is bad for non-joinder of necessary parties as has been held by the trial Court itself and that for a just and effective adjudication of the disputes

between the parties, impleadment of heirs of Hanjabai appears to be necessary.

11. In consequence application of plaintiff No.1 under Order 1 Rule 10 and Order 6 Rule 17 of the CPC has been allowed and plaintiffs have been permitted to implead the remaining legal heirs of Hanjabai as parties to the suit and have been permitted to make the amendments as proposed by them. The judgment and decree passed by the trial Court has been set aside and the parties have been granted liberty to adduce fresh evidence as regards the amendment made in the plaint and for decision afresh in accordance with law.

12. Learned counsel for the appellants submits that the impugned order is beyond the jurisdiction vested in the lower appellate Court. The defendants had in their written statement itself raised an objection regarding non-joinder of necessary parties and had contended the suit to be bad for the said reason. However despite their objection no steps were taken by plaintiffs for impleadment of necessary parties to the suit. The trial Court recorded a finding that the suit is bad for non-joinder of

necessary parties. It is thereafter only that necessary parties have been sought to be impleaded by plaintiffs in the appeal which is not permissible at this stage. The lower appellate Court has however permitted the plaintiffs to fill up the lacuna in their case which is illegal. It has not at all adverted to the findings of the trial Court on merits and has only looked into the aspect of non-joinder of necessary parties. The suit had not been decided only on a preliminary issue but had been decided on merits. Re-trial hence could not have been directed under the provisions of order 41 Rule 23 of the CPC. Reliance has been placed by him on the decision of **the Madras High Court in Govindamal and Another V/s. K.L.Murugan and Others 2006 SCC online Madras 720, Dhankunwarbai V/s. Smt.Ramkunwarbai 2019 (3) MPWN 115, Smt. Sudesh Kohli V/s. Chandarani Mishra 2020 (1) MPLJ 377 and Murarilal V/s. Ramkumar Ojha 2015 (1) MPLJ 243**.

13. Per contra, learned counsel for respondents 1 to 3 submits that the lower appellate Court is perfectly justified in allowing the application

filed by plaintiff No.1 and in permitting impleadment of necessary parties and the proposed amendment in the plaint and remanding the matter back to the trial Court for decision afresh on merits. As the trial Court had held that the necessary parties to the suit have not been impleaded, the lower appellate Court is well justified in affording such an opportunity to plaintiffs which should have been afforded by the trial Court itself. By impleadment of necessary parties multiplication of litigation has rightly been avoided. The impleadment of necessary parties was imperative for just and fair adjudication of the disputes hence no error in the impugned order can be found. Reliance has been placed by him on **Siddhu V/s. Kunwar Shakti Singh 1994 (ii) MPWN 164, Urmila Patel and Another V/s. Laxmibai and Others,2001(1) MPLJ 480, Ramit Kumar Pathak V/s. Pawan Kumar Pathak 2014 (4) MPLJ 624, Sultan Khan V/s. Rehman Khan 1999 (1) MPLJ Note 6, Ramratobaba V/s. Smt. Bismilla Usmani and Others 2006 (1) MPLJ 429 and Narayan V/s. Kumaran and Others 2004 (4) SCC 26.**

14. I have heard learned counsel for the parties and have perused the record.

15. By order dated 06.01.2022 the appeal was admitted on the following substantial questions of law :-

> "(a) Whether the lower appellate Court has committed a gross error of law in allowing the application under Order 1 Rule 10(2) and Order 6 Rule 17 of the CPC filed by plaintiff No.1 and in remanding the matter back to the trial Court without deciding the appeal on merits?
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> (b) Whether in the facts and circumstances of the case the application filed by plaintiff No.1 before the lower appellate could have been allowed by it?
>
> (c) Whether the impugned order passed by the lower appellate Court is sustainable the same not being in conformity to the provisions of Order 41 Rule 23 to Rule 29 of the CPC?

16. The lower appellate Court has set aside the judgment and decree passed by the trial Court and has remanded the matter back to it for impleadment of new defendants and affording them opportunity of hearing and deciding the matter afresh in accordance with law. From the impugned order it cannot be gathered as to under what provision the remand has been made by the lower appellate Court. Remand could

have been made by it under the provisions of Order 41 Rule 23 to Rule 29 of the CPC. Rule 23 would not be applicable as the trial Court had not disposed off the suit on a preliminary issue. Rule 23-A would also not be applicable as the lower appellate Court has not gone into the merits of the case and has not reversed the decree upon which a retrial has been deemed necessary. Only application for impleadment of parties has been allowed and matter has been remanded back. Thus the remand as directed by the lower appellate Court is not in conformity with the provisions of Order 41 of the CPC. A remand can be made by the appellate Court only under the circumstances and eventualities as contemplated under Rule 23 to Rule 29 of Order 41 of the CPC and not beyond it. The impugned order does not fall under any of the aforesaid provisions.

17. Before the trial Court a specific objection had been raised by defendants 1 to 3 as regards the suit being bad for non-joinder of necessary parties. On such a plea issue had specifically been framed by the trial Court in that regard. The defect as regards the suit being bad

for non-joinder of necessary parties had been brought to the notice of the plaintiffs by defendants 1 to 3 at the very outset and plaintiffs had ample opportunities of remedying the said defect. They however failed to implead the necessary parties and persisted in not joining them despite pleadings of defendants 1 to 3. The plaintiffs thus took the risk of going ahead with their suit despite the objections having been taken as regards non-joinder of necessary parties hence it was too late for them to have attempted to rectify the said mistake at the appellate stage. The same was impermissible but has illegally been permitted by the appellate court.

18. The fact that such a course was not permissible to plaintiffs also finds support from the decision of the Hon'ble Apex Court in **Kanakarathanammal V/s. V.S. Loganatha Mudaliar and Another** reported in **AIR 1965 SC 271** in which it was held in paragraph No.15 as under :-

> **"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 Section 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 Order 1 Rule 9 of the Code of Civil Procedure no suit shall be defeated by reason of the mis-joinder or non-joinder of the 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 Order 1 Rule 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 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 proceedings 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* v. *Radheshyam Mahish* [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 Order 1 rule 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.”

19. The aforesaid view is also fortified by the decision in **Girdhar Parashram Kirad V/s. Firm Murtilal Champalal and Others** reported in **AIR 1941 Nagpur 5** in which it was held in paragraph No.8 as under :-

> "**8.** A nice point in some cases arises as to whether O. 1, R. 9, is subservient to O. 34, R. 1. In the above case 1 PAT LJ 468 [('16) 3 AIR 1916 Pat 310 : 36 IC 542 : 1 Pat LJ 468, *Girwar Narain* v. *Mt. Makbunessa*.] it was held that it was. Here the point does not arise because even though it be held that the Court has power to join (*see*, 52 ALL 134 [('29) 16 AIR 1929 All 941 : 121 IC 106 : 52 All 134, *Baldeo Prasad* v. *Bhola Nath*.] and 60 CAL 87, [('33) 20 AIR 1933 Cal 325 : 143 IC 315 : 60 Cal 87 : 58 CLJ 422 : 36 CWN 1138, *Umeshchandra Mandal* v. *Hemangachandra Maiti*.]) a view to which we incline, a Court cannot join a party when the litigant in whose interest the joinder is to be made refuses to have the necessary parties joined, as here. Before us the respondents offered to join but we consider this comes too late. The point of non-joinder was properly taken in the pleadings. The danger was pointed out, and the pleader refused to join these people. If the proper parties have not been joined the plaintiffs cannot succeed to the extent of their share or at all. This being so the suit fails against the appellant for non-joinder and the further question of limitation does not arise. It follows that the appeal succeeds with costs here and below."

20. Order 1 Rule 9 of the CPC stipulates that no suit shall be defeated by reason of mis-joinder or non-joinder of parties but the proviso states that the said Rule shall not apply to non-joinder of a necessary party. Order 1 Rule 13 states that all objections as regards non-joinder of

parties shall be taken at the earliest possible opportunity. In the present case the defendants 1 to 3 had taken such an objection in their written statement itself. The plaintiffs thus were aware of the risk of the suit being defeated for non-joinder of necessary parties yet went ahead with the trial and at the appellate stage have attempted to rectify the said defect. Their application for impleadment of necessary parties has been allowed only on the ground that they appear to be such necessary and proper parties. However, the fact whether such impleadment can be considered at the appellate stage has not at all been taken into consideration.

21. The lower appellate Court has not even entered into the merits of the case and has remanded the matter only upon allowing the application under Order 1 Rule 10 (2) and Order 6 Rule 17 of the CPC filed by plaintiff No.1. The said course in my opinion was wholly impermissible and illegal. As the matter had been decided on all issues on merits by the trial Court, the lower appellate Court was bound to consider the entire matter on merits and to have adjudicated the same

upon merits including the application filed by plaintiff No.1.

22. The impugned order hence cannot be sustained and is hereby set aside and the matter is remitted back to the lower appellate court for decision of the appeal before it in accordance with law and by taking into consideration the observations as made here-in-above.

23. There shall be no order as to costs.

(PRANAY VERMA)
JUDGE

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