

ORDER BELOW APPLICATION (EXHIBIT 84) IN
REGULAR CIVIL APPEAL NO. 95/2008
(SHIVAJI & OTHS. VS. PANDURANG & OTHS.)
(PASSED ON : 05/01/2003)

Nature of the Application.

1. This is an application filed by the legal representative of appellant No. 2G-Sakhubai Shivaji Hirave (for short 'Sakhubai') namely Ganesh Shivaji Hirave, Age : 33 years, Occupation : Labour, Resident of Sham Nagar, Madnaik Mala, near Kaka Mill, Jaysingpur, Taluka : Shirol, District : Kolhapur (for short 'LR') to implead him as a respondent (for short 'proposed respondent') in this appeal under Order I Rule 10 (2) of the Code of Civil Procedure (for short 'C.P.C.').

Contents in the Application.

2. The LR has contended that the appellants and the respondent No. 5 have filed Regular Civil Suit (for short 'R.C.S.') No. 122/2002 (for short 'suit') seeking declaration and perpetual injunction, which is dismissed. The appellants have preferred this appeal against the judgment and decree in the suit. During pendency of the appeal Sakhubai died on 12/02/2015 at village Jaysingpur. The LR is the legal heir of Sakhubai. He is resident of Jaysingpur therefore, was unaware of pendency of this appeal and came to know about it in the month of August 2022.

3. The LR is necessary party to this appeal. Therefore, it is necessary to implead him, as respondent in this appeal, in the interest of justice and to avoid technical flaw.

4. On these grounds, the LR has prayed to grant the application.

No Say of the Appellants.

5. The appellants have failed to file their say.

6. Hence, application proceeded without say of the appellants.

Contents in the Say of the Respondent Nos. 1A to 1E and 2.

7. The respondent Nos. 1A to 1E and 2 (for short 'respondents') have filed say and have strongly objected the application.

8. The respondents have contended that the application is not legal and tenable. The LR has no right to file this application.

9. On these grounds the respondents have prayed to reject the application.

The Argument.

10. I have heard Shri. S. D. Jahagirdar, advocate for the LR and Shri. V. B. Chavan, advocate for the respondents, at length.

11. They argued in consonance with their contentions in the application, say and keeping in mind the established principles of law. So it is not necessary to repeat the same.

Points and Findings.

12. Upon hearing, the following points arise for my consideration and I record my findings thereon as under for the reasons stated below :-

	<u>Points</u>	<u>Findings.</u>
1.	Whether the LR proves that his presence is necessary in this appeal in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this appeal, as alleged ?	Yes.
2.	Whether the amendment can be allowed, as prayed for ?	Yes.
3.	Whether the application has the effect of delaying the hearing of the appeal ?	Yes.

4.	What order ?	Application granted. As per final order.
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Legal Position Under Order I Rule 1 and 3 and Order I Rule 10 of the C.P.C.

13. Before proceeding to discuss the merits of the application, for better appreciation, let me reproduce the relevant statutory provision under Order I Rule 1 and 3 and Order I Rule 10 of the C.P.C.

13.1. Order I Rule 1 of C.P.C. reads as under :-

1. Who may be joined as plaintiffs. -

All persons may be joined in one suit as plaintiffs where -

- (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transaction is alleged to exist in such persons, whether jointly, severally or in the alternatively, and
- (b) if such persons brought separate suits any common question of law or fact would arise.

13.2. Order I Rule 3 of C.P.C. reads as under :-

3. Who may be joined as defendants.

All persons may be joined in one suit as defendants where -

- (a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transaction is alleged to exist in such persons, whether jointly, severally or in the alternatively, and
- (b) if separate suits were brought against such persons, any common question of law or fact would arise.

14. The object of Order I Rule 1 and 3 is to avoid multiplicity of suits and needless expenses to the parties if it could be avoided without

embarrassment to the litigants concerned and the Court.

15. Order I Rule 1 and 3 is not exhaustive. Before a person can join as plaintiff in the same suit, two conditions must be satisfied : (1) a right to relief in him arises in respect of the same act or transaction or series of acts or transaction; and (2) if separate suits were instituted by such person any common question of law or fact would arise. Both these conditions must exist together. These two conditions are not alternative.

16. To constitute the same act or transaction or series of acts or transactions, a mere finding that there were different causes of action is not sufficient. The question as to joinder depends not on a common cause of action but on common basis of acts or series of acts. The common question of law or fact must be of sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter should be disposed of at the same time. A common question of law or fact does not presuppose an identity of the causes of action or of the interested parties.

17. It is a settled principle of law that plaintiff is the master of the litigation initiated by him. He is dominus litis and he cannot be compelled to join somebody with whom he does not want to fight.

18. All the plaintiffs can only be joined in one suit if the relief arises out of the same act or transaction or series of acts or transactions, and if any common question of law or fact arises. Where the plaintiff's have similar causes of action and are jointly interested to get one decree against one and same defendant, they can rightly and legally unite causes of action. The test is no longer the identity of the cause of action but the identity of the act or transaction, such a joinder of plaintiffs would now be perfectly legitimate.

18.1. Order I Rule 10 of C.P.C. reads as under :-

10. Suit in name of wrong plaintiff.

- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.
- (2) **Court may strike out or add parties.-** The Court at any stage of the proceedings, either upon or without the application of either party, and on such terms as may 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.
- (3) No person shall be added as a plaintiff suing without a new friend or as the next friend or a plaintiff under any disability without his consent.
- (4) **Where defendant added, plaint to be amended. -** Where a defendant is added, the plaint, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of summons and of the plaint shall be served on the new

defendant and if the Court thinks fit, on the original defendant.

- (5) Subject to the provisions of the [Indian Act, 1877(15 of 1877)], Section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

19. Order I, Rule 10 Sub-rule (1) of C.P.C contemplates cases in which a suit is brought by a plaintiff and he subsequently discovers that he cannot get full relief without joining some other person as co-plaintiff or, where it is found that some other person, and not the original plaintiff, is entitled to the relief. In the former case, the application (which must be made by the original plaintiff) will be for adding, and in the latter, for substituting that other person as plaintiff. Liberty to amend may be given upon the terms that the plaintiff should pay to the defendant his costs of the suit up to and including the order of amendment, and that the new plaintiff should only be entitled to such relief as he could have obtained if the suit had been commenced at the date on which he was added as a party.

20. Under Order I, Rule 10 Sub-rule (2) of C.P.C, the power to strike out as well as to add parties may be exercised at any stage of the proceedings, and even without any application by a party. Indeed Order I, Rule 10 Sub-rule (2) of C.P.C can be invoked either by a party to the suit or by the Court suo motu or by a third party who desires to be added as a party. Mere inaction on the part of a plaintiff to implead a party does not affect the Court's power under this sub-rule. The power of the Court under this sub-rule is of discretion to be exercised judicially keeping in mind that one of its objects is to prevent multiplicity of suits and conflict of decisions.

21. The principles under Order I, rule 10 of C.P.C and deducible from the catena of decisions can be summarized thus :-

- a) The test is not whether the joinder of the person proposed to be added as a defendant would be according to or against the wishes of the plaintiff or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the plaintiff, it is whether the relief ed by the plaintiff will directly affect the intervener in the enjoyment of his rights.
- b) It is not enough that the plaintiff's right and rights which the person desiring to be made a defendant wishes to assert should be connected with the same subject-matter. The intervener must be directly and legally interested in the answers to the questions involved in the case. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally-that is by curtailing his legal rights.
- c) The application filed under Order I Rule 10 of C.P.C. need not depend upon the existence of absolute rights. It would be sufficient, if the parties have some interest in the property, which is the subject matter of the suit.
- d) One of the factors to be taken into consideration while deciding the application filed Order I Rule 10 of C.P.C. is that the impleadment is necessary to avoid multiplicity of proceedings.
- e) The power of a Court to add a party to a proceeding

cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party and whether he has interest in the suit property what is required to be seen is whether he would suffer any prejudice, if he is not allowed to participate in the suit. Such right, however, will include necessarily an enforceable legal right.

22. It is well settled that necessary parties are parties necessary to the constitution of the suit and without whom no decree at all can be passed. Proper parties are those whose presence enables the Court to adjudicate more effectually and completely the question raised in the suit. A necessary party is one without whom no order can be made effectively and a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. Against a necessary party there must be a right to same relief in respect of the matters involved in the proceedings in question; it must not be possible to pass an effective decree in the absence of such a party. The test for determining the effectiveness of a decree is whether the decree can be executed without the presence of the party in question as regards the property to be decreed in favour of the plaintiff.

Reasons as to Point No. 1.

23. The appellant has filed this appeal against the judgment and decree in the suit.

24. I have applied my mind to the contention of the advocates for the LR and the respondents and their pleadings. I am of the considered view that the LR is necessary party to the constitution of this

appeal. The reasons are :-

- a) That the respondents have not denied the relation between the LR and Sakhubai.
- b) That the LR is the legal heir of Sakhubai.
- c) That Sakhubai was party in this appeal, which makes it clear like crystal that the LR has legal interest in this appeal.
- d) That considering the relief of setting aside judgment and decree in the suit, in this appeal a legal right accrues to the LR to contest this appeal as the respondent.
- e) That the LR has reiterated all the contentions in this application, in the affidavit (Exhibit 84) and also in his arguments, I see no reason to disbelieve the same at this stage which lead me to hold that the LR has right and interest in this appeal.
- f) That the LR is necessary party to the constitution of this appeal and without whom no order at all can be passed.
- g) That if the LR is not allowed to participate in this appeal his legal rights will be prejudiced.
- h) That if the LR is impleaded in this appeal as the appellant it will help to avoid multiplicity of proceeding.

25. I am unable to persuade myself with the arguments advanced on behalf of the respondents that the application is not tenable, for the simple reason that LR has right to implead himself as legal heir of Sakhubai.

26. In short, in view of the principles discussed, supra under Order I Rule 1 and 10 of the C.P.C. and my discussion above I hold that the LR is necessary party to this appeal and his presence is necessary in

this appeal in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in this appeal.

27. Accordingly, I answer Point No. 1 in the affirmative.

Legal Position Under Order VI Rule 17 of the C.P.C.

28. Before proceeding to discuss the merits of the application, for better appreciation, let me reproduce the relevant statutory provision under Order VI Rule 17 of the C.P.C.

29. The purpose and object of Order VI Rule 17 of the C.P.C is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Mere delay cannot be a ground to reject the amendment. The power to allow the amendment is wide and can be exercised at any stage of the proceedings in the interest of justice and the liberal approach should be the general rule particularly in cases where the other side can be compensated with the costs. Amendments are allowed in the pleading to avoid uncalled multiplicity of litigation.

30. I would like to refer usefully *Revajeetu Builders & Developers V/s. Narayanaswamy & Sons*, (2009) 10 Supreme Court Cases 84 (for short 'Revajeetu'), wherein, after referring to the provisions of Order VI, Rule 17 of the C.P.C., the Hon'ble Supreme Court observed as follows :-

'63. On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment :

(1) whether the amendment sought is imperative for proper and effective adjudication of the case;

(2) whether the application for amendment is bonafide or malafide;

(3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;

(4) refusing amendment would in fact lead to injustice or lead to multiple litigation;

(5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

(6) as a general rule, the court should decline amendments if a fresh suit on the amended s would be barred by limitation on the date of application. These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.'

Reasons as to Point No. 2.

31. Admittedly, the appellant has filed this appeal seeking dismissal of the suit by allowing the appeal. It is held while answering point No. 1 that the LR is necessary party to the constitution of this appeal. Therefore, in view of the principles discussed, supra, I am of the opinion that if the amendment as prayed is allowed it will not change the nature of the appeal.

32. The proposed amendment sought by the LR will not cause any harm or injustice to the respondents, but will help to decide the appeal on merit by giving full opportunity to both parties and will also help to avoid multiplicity of proceeding. In view of this discussion, I am inclined to grant this application seeking amendment by adding the LR as the appellant in this appeal.

33. In my considered opinion, the amendment sought by the LR to add himself as the appellant in this appeal is permissible on the touchstone of all the tests laid down by the Hon'ble Supreme Court in the case of Revajeetu, supra.

34. To sum up, relying on the principles discussed, supra under Order I Rule 10 and Order VI Rule 17 of the C.P.C. and my discussion above I hold that the amendment sought by the LR to add himself as the

appellant in this appeal deserves to be granted.

35. Accordingly, I answer Point No. 2 in the affirmative.

Reasons as to Point Nos. 3 and 4.

36. However, by no stretch of imagination it can be concluded that the LR was not aware of the suit and the appeal and importance of impleadment of himself in this proceeding. The appellant is dead on 12/02/2015. This application is filed on 03/09/2022. No acceptable explanation is coming on record by the LR why this was not done earlier. Due to negligence on the part of the LR, the respondents have unnecessarily suffered and definitely the matter will linger. **Thus, this application, certainly has the effect of delaying the hearing of the appeal and for no fault of the respondents, it is they who shall suffer real prejudice.** The LR cannot escape from his liability by merely filing such application at this stage.

37. This non-action in that regard is unexplained and without any legal and valid reason **and I am of the considered view that only to delay the hearing of the appeal this application is filed, belatedly.** Therefore, this is a fit case in which the respondents need to be compensated by awarding suitable costs. The state i.e. the Taluka Legal Services Authority, Pandharpur is also the entitled to share the cost amount as directed from time to time by the Hon'ble Supreme Court and the Hon'ble High Court. The cost is quantified at Rs. 7,500/- considering the nature of application, delay caused and the overall conduct of the LR and the stage of this application.

38. Further, the LR will also be required to supply copy of the amended appeal.

39. Accordingly, I answer Point No. 3 in the affirmative and Point No. 4 as application granted, partly as per final order.

40. In the result, I pass the following order.

ORDER.

1. The application (Exhibit 84) is granted as here in below :-		
(i)	The LR-Ganesh Shivaji Hirave is directed to pay costs of Rs. 7,500/- (Rs. Seven Thousand Five Hundred only) to be deposited in the Court on or before <u>09/02/2023</u> , failing which the application shall stand rejected, automatically.	
(ii)	The LR-Ganesh Shivaji Hirave is directed to amend the title clause of the appeal by adding herself as appellant No. 2(G)(B) on or before <u>09/02/2023</u> , after depositing costs, as ordered.	
(iii)	The LR-Ganesh Shivaji Hirave is directed to supply copy of amended appeal to all the respondents on or before <u>09/02/2023</u> , failing which the application shall stand rejected, automatically.	
(iv)	The respondents are directed to verify the amended appeal memo if filed by the LR-Ramesh Shivaji Hirave and certify the same if found correct on or before 09/02/2023. If the respondents fail to verify and certify the amended appeal memo as ordered then it shall be deemed that it is correct.	
2. The cost awarded shall be apportioned as herein below :-		
a)	The respondent Nos. 1A to 1E and 2.	Rs. 7,000/- (Rs. Seven Thousand only).
b)	The Taluka Legal Services Authority, Pandharpur.	Rs. 500/- (Rs. Five Hundred only).

(Pronounced in the Open Court).

Date : 05/01/2023.

(M. B. Lambe),
District Judge-1,
Pandharpur.

District Judge-1, Pandharpur.

C E R T I F I C A T E

I affirm that the contents of this PDF file Order is same word to word as per the original Order.

- (a) Name of the Stenographer : Sou. M. M. Kulkarni
- (b) Court : M. B. Lambe, District Judge – 1 & Addl. Sessions Judge, Pandharpur.
- (c) Order signed by P.O. on : 05/01/2023
- (d) Order uploaded on : 10/02/2023