

(1992) 02 MP CK 0018
In the Madhya Pradesh High Court
Case No : S.A. No. 27 of 1978

Gopibai Manaklal and Others

APPELLANT

Vs

Mohammed Hussain and Others

RESPONDENT

Date of Decision : 28-02-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 34 Rule 1

Citation : AIR 1993 MP 21 : (1992) 1 MPJR 233 : (1992) 37 MPLJ 757 : (1992) MPLJ 757

Hon'ble Judges : R.C. Lahoti, J

Bench : Single Bench

Advocate : S.D. Sanghi and N.K. Sanghi, for the Appellant; G.M. Chaphekar and Samvatsar, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Mohd. Hussain (dead) by LRs and Others Vs. Occhavilal and Others, AIR 2008 SC 1462 : (2008) 3 JT 58 : (2008) 3 SCC 233 : (2008) 1 UJ 457 : (2008) AIRSCW 1513 : (2008) 2 Supreme 111

R.C. Lahoti, J.

The defendants have come up in appeal aggrieved by the judgments and decrees of the Courts below directing a suit for redemption of mortgage to be decreed.

The suit was filed by the two daughters and a son of late Haidarali. The relationship of Haidarali with late Hasanali as set out in plaint para 1 was as under:--

Nazarali

	Haidarali	Rajabali	Kalabhai	Hasanali
	Hussainabai Mod Hussain Sugrabai			

On 24-6-1932, late Hussanali made a mortgage with possession of the house with late Nandram and his two sons namely, Manaklal and Motilal. According to the plaint allegations, late Nandram had expired four to five years prior to the institution of the suit. The suit having been instituted on 19-7-67, the time of death of late Nandram would be somewhere in the year 1962 or 1963. The suit was instituted impleading Manakal and Motilal as defendants Nos. 1 and 2 also joining the sons of Manaklal and Motilal as pro forma defendants Nos. 3 to 7. Puran, the defendant No. 8 was joined as pro forma party being a tenant in the mortgaged house.

The suit was contested on very many grounds of which only two deserve to be noticed. It was submitted that the pltfs alone had no right to institute the suit as all the heirs of late Hasanali were not joined as plaintiffs or as pro forma defendants. Secondly, it was submitted that late Nandram was also survived by his two daughters, apart from the two sons, which daughters having not been joined as parties to the suit, the suit was not properly constituted and was liable to be dismissed for want of necessary parties before the Court. The issues Nos. 1 and 2 were specially framed on the objections raised by the defendants.

On 20-2-76, on behalf of the defendants an application was filed inviting attention of the Court to the fact that the suit was bad for non-joinder of necessary parties and that objection deserved to be decided as a preliminary issue which would enable disposal of the suit itself. On 23-2-1976, on behalf of the plaintiffs a written reply was filed to the application pleading that the daughters were not required to be joined as parties to the suit; that the plaintiffs were not seeking any relief against the parties not joined and that it was no business of the defendants to insist on anyone to be joined as party to the suit whom the plaintiffs did not think proper of joining.

Both the Courts below have overruled the defendants' objections and decreed the suit.

Vide order dated 29-3-1978, this Court admitted the appeal for hearing on the following two substantial questions of law :--

(1) In the absence of any evidence to prove that the plaintiffs were the only nearest legal heirs of deceased Hasan Ali, could the plaintiffs succeed in obtaining the decree of redemption with respect to the mortgage created by deceased Hasan Ali?

(2) Whether the daughters of the mortgagee Nandram were necessary parties to the suit and the suit deserves to be dismissed for non-joinder of necessary parties?

QUESTION NO. 1 :--

It is pointed out by the learned counsel for the appellants that the plaintiffs' evidence fell short of proving the enguineness and correctness of the family tree set out in para 1 of the plaint and unless and until the plaintiffs had succeeded in

proving that except the plaintiffs there were no other heirs of late Hasan Ali, the plaintiffs would not be entitled to succeed. It was also submitted, by reading out the evidence adduced on behalf of the plaintiffs, that the family tree pleaded was demonstrated to be prima facie false inasmuch as one of the witnesses had stated that Rajan Ali was survived by a son Gulam Ali while another witness had stated that Rajan Ali had died issueless. The learned counsel further submitted that the averment of the plaintiffs on which the suit is founded that there was no one else except the plaintiffs entitled to redeem the property mortgaged is positive averment of a negative fact; nevertheless they have to discharge the burden of proof which lies heavily on them and in case of failure to do so, they would fail in the suit also; it was not enough for the plaintiffs to have proved that they were somehow related with the deceased mortgagor, but it was further necessary for them to prove that they were real heirs and the only heirs entitled to succeed to the estate of the deceased.

A number of decisions were relied on by the learned counsel in support of his contention which may be noticed.:

In *Dulhin Mahabati Kuer Vs. Raghunandan Prasad Singh and Others*, it has been held (at p. 251).

"Whenever a person claims title to the estate of another by inheritance or succession, it is imperative for him to prove not only that he was related in some way or other with the last male holder of the estate but also that under the law of succession governing the parties he was the only heir entitled to succeed to the estate at the material time. In other words, he must prove not only that he was related in a particular manner but also that no nearer heir was in existence. This will imply no doubt a proof of a negative assertion. There is, however, no invariable rule that all allegations must be proved by the party who affirmatively asserts them.

Unless such evidence is adduced, it cannot be said that the plaintiff has discharged the onus that initially lay upon him to prove prima facie his case."

xxx xxx xxx xxx In *Ram Kali v. Narain Singh* AIR 1934 Oud 298 the Full Bench observed :

"In the present case it is clear that the plaintiff cannot succeed in establishing his claim unless he proves by oral and documentary evidence at what particular time Ram Lal died, when succession opened out to him, and whether at that particular time when succession opened out to him he (the plaintiff) was the nearest reversioner."

A Division Bench of Allahabad High Court held in *Mt. Chunna Kunwar Vs. Lala Mukat Behari Lal and Others*

"Where a person claims to succeed another on ground of relationship with the latter, he should establish not only his own relationship with the last male holder, but also, prima facie, that no nearer heirs are alive, Where the Court cannot

arrive at that conclusion on the evidence of the plaintiff, either because he is not in a position to speak on the subject or because his evidence is manifestly untrue, it should be satisfied by other credible evidence that no nearer heir exists before the defendant is called upon to substantiate his definite case that he is a nearer heir. Where both parties have adduced evidence, the question of onus loses all importance and the Court should record a definite finding as to whether the defendant is the nearer heir. The question may assume some importance where the Court has to reject the evidence adduced on either side as absolutely untrustworthy. In such a case the plaintiffs title can prevail only if the Court is in a position to find not only that he is related to the last male holder, as he alleges, but also that no nearer heir is alive."

xx xx A Division Bench of this Court in *Hazarilal v. Har Govind* AIR 1918 Nag 168 held:

"In a suit by the reversioners of a deceased proprietor for possession of the property left by the deceased, the onus lies on the plaintiffs not only to prove that they are the reversioners entitled to succeed but that they are the only nearest reversioners; at any rate they must satisfy the Court that to the best of their knowledge there are no nearer heirs."

A Division Bench of Calcutta High Court, in *Hemchandra Ganguli Vs. Matilal Ganguli*, held :--

"The general rule of evidence is that, if in order to make out a title, it is necessary to prove a negative, the party who avers it must prove the title. In some cases this allegation, negative in form, is made by the plaintiff, in others by way of defence; the rule applicable to all such cases is that, where a claim or defence rests upon a negative allegation, the one asserting such claim or defence is not relieved of the onus probandi by reason of the form of the allegation or the inconvenience of proving a negative."

xx xx The learned counsel for the appellants read out a passage from Monir's Law of Evidence, Vol. II, page 1117 where at referring to several authorities on the point, the learned author has summed up the law on the point of positive proof of a negative fact making out title, on lines similar with the law laid down by the Calcutta High Court in *Hemchandra Ganguli Vs. Matilal Ganguli*,

There is no quarrel with the principles of law laid down in the above said decisions. The question is one of the applicability to the facts of the present case. The defendants in their written statement have not alleged that there was any other heir of late Hasan Ali, available, but not joined by the plaintiffs as party to the case. In the evidence also, there is no suggestion made on behalf of the defendants that some one else, equal or better in entitlement compared with the plaintiffs, claiming as heirs of late Hasan Ali, was living and available. In so far as Rajab Ali is concerned? the confusion in the evidence appears to have arisen for the reason that Rajab Ali did have a son by name Gulam Ali, but he too had expired at the time of institution of the suit. The civil case has to be decided on

the preponderance of probabilities and by recording findings confined within the four corners of the pleadings. In the present case, it cannot be held that any one other than the plaintiffs was available as heir of late Hasan Ali and hence, the entitlement of the plaintiffs to bring the suit cannot be denied.

QUESTION NO. 2 :--

The fact that late Nandram was survived by two daughters, namely, Anna-puma and Pyaribai, also cannot be denied. There is the defendants' testimony available on the point and not challenged in cross-examination. The evidence adduced on behalf of the plaintiffs also admits the existence of the two daughters of late Nandram. The death of Nandram having taken place after the coming into force of the Hindu Succession Act, 1956, it can also not be disputed that the daughters too were the heirs of first category succeeding in their own rights equally with the two sons and in their own rights. In view of Section 19 of the Hindu Succession Act, it cannot be disputed that the two sons and the two daughters of late Nandram succeeded together to the estate as tenants-in-common and not as joint tenants.

What is the effect of the non-joinder of daughters has now to be seen.

In *Girdhar Parashram Kirad v. Firm Motilal Champalal, Owners, Hiralal Champalal* AIR 1941 Nag 5, a Division Bench of this Court held that in case of tenants-in-common, there is no unity of title. The titles are distinct when persons hold as tenants-in-common. In this background touching the omission of certain defendants and following the view taken in *Girwar Narain Mahton v. Mt. Makbulunnissa* AIR 1916 Pat 310, the Division Bench held:

"A mortgage is indivisible and if upon the record there be not found all parties entitled to a share of the money due under the mortgage the suit must be dismissed in its entirety."

Following observations made by a Division Bench of this Court in *Ghanaram v. Balbhadra Sai* AIR 1938 Nag 42 are useful and have applicability to the facts of the present case though the observations were made in the context of the appellant's failure to bring on record the L.Rs. of a deceased respondent in an appeal against preliminary decree of foreclosure:

"..... a suit on a mortgage cannot lie unless all the parties, or their representatives are joined. The same thing also appears from Section 45, Contract Act; one of several mortgagees cannot, without the consent of the others, release his rights under the mortgage or give a valid discharge to the extent of his share. There may possibly be exception when the mortgage deed itself makes their rights advisable, or when there has been an express severance with consent in the manner contemplated by Section 67, T.P. Act, but we can envisage no other possibility. Even a splitting up of the mortgage security u/s 60 would not have that effect, for all the parties to the mortgage would still have to be there. If then a suit cannot proceed in the absence of a party to the

transaction, it is difficult to see how an appeal can. The principles must be the same in both cases."

xx xx xx Sunitibala Debi v. Dhara Sundari Debi AIR 1919 PC 24 was the case of mortgagee's holding the mortgaged property as tenants-in-common and not as joint tenants. Their Lordships held :--

"..... No redemption could be effected of part of the property by paying to one of the mortgagees her separate debt."

"Where a mortgage is made by one mortgagor to two tenants in common, the right of either mortgagee who desires to realise the mortgaged property and obtain payment of the debt, if the consent of the co-mortgagee cannot be obtained, is to add the co-mortgagee as a defendant to the suit and to ask for the proper mortgage decree, which would provide for all the necessary accounts and payments, excepting that there could be no judgment for a sum of money entered as between the mortgagee-defendant and the mortgagor."

xx xx xx A Division Bench of Oudh High Court held in Rudra Singh v. Jangi Singh AIR 1915 Oudh 29.

"A release of the mortgage-debt by some of the heirs of a deceased mortgagee, on payment to them of the entire mortgage-money does not bind the other heirs of the mortgagee living separately from those whom payment has been made. Such payment does not discharge the mortgagor from his liability to those heirs to whom payment has not been made."

xx xx xx Saeed-Ud-Din Khan and Others Vs. Hira Lal and Others, is a case of non-joinder of a daughter in a suit for redemption of mortgage. It was held by the High Court of Allahabad :

"In a suit for redemption of a mortgage all the mortgagees or their representatives are necessary parties. If one of the mortgagees is not made party, the suit should be dismissed for non-joinder."

The observations of their Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, vide para 15 drop the curtain on the controversy. Their Lordships said:

"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 u/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 Order 1, Rule 9 of the CPC 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 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."

xx xx xx In the facts and circumstances of the case, the theory of substantial representation would not salvage the plaintiffs' case. The heirs of the deceased-mortgagee include married daughters belonging to another family. Order 1, Rule 13 of the CPC is also not meant to apply to a case where a necessary party to the suit is not before the Court, and hence, no effective decree can be made in the absence of such party. (See: *Ra Man Singh v. Ramvishal*, 1979 MPLJ 587, *Venkiteswara Pai Rama Pai Vs. Luis*, ; *Narayan Prasad Ruia Vs. Mutuni Kohain and Another*, ; *P. Govinda Reddy and Others Vs. Golla Obulamma, and Chandra Mohan Saha and Another Vs. Union of India (UOI) and Another*,

To sum up, the two daughters of late Nandram were tenants in common with the two defendants in so far as the rights of late Nandram in the mortgaged property and the mortgage debt are concerned. The defendants on record could not and did not represent the interest of the two daughters. In their absence, the present defendants could not have given a valid discharge to the mortgage debt and thereby redeem the property from mortgage. The objection as to non-joinder was taken at the earliest opportunity and was pressed throughout. Strangely enough the plaintiffs did not take steps for bringing on record the necessary parties left out from being joined. They dogmatically persisted in proceeding ahead with the hearing of the suit which was not properly constituted and they knew it. The defect is fatal. It cannot be remedied now. Even if the plaintiffs are afforded an opportunity of rectifying the defect as to non-joinder of necessary parties at this belated stage, the suit would fail on the ground of limitation. This Court is left with no other go but to uphold the objection and dismissing the suit as bad for non-joinder of necessary parties.

For the foregoing reasons, the appeal is allowed. The judgment and decrees of the Courts below are set aside. The suit filed by the plaintiff-respondents is directed to be dismissed. In the facts and circumstances of the case, the parties are left to bear the costs as incurred throughout.