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**(1964) 03 MP CK 0001**

**In the Madhya Pradesh High Court**

**Case No : Civil First Appeal No. 25 of 1960**

Smt. Chameli Devi

APPELLANT

Vs

Mataprasad Prabhudayal and Others

RESPONDENT

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**Date of Decision : 09-03-1964**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 43 Rule 1, 2(2), 96

**Citation : AIR 1964 MP 234**

**Hon'ble Judges : V.R. Newaskar, J;P.R. Sharma, J**

**Bench : Division Bench**

**Advocate : P.L. Inamdar, for the Appellant; S.T. Mungre and B.D. Gupta, for the Respondent**

**Final Decision : Dismissed**

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## **Judgement**

P.R. Sharma, J.—These appeals arise out of a suit for partition of joint Hindu family property filed originally by Prabhudayal and others against Girwarlal, Payarelal and others, Prabhudayal having died is represented by respondents Nos. 1 to 12. The defendant Pyarelal died on 3-6-1948 during the pendency of the suit and was substituted by his widow Mst. Draupadibai. Later on Draupadi-bai also died and she was substituted by Mst. Chamelibai d/o Girwarlal. Girwarlal also died on 11-6-1952 during the pendency of an appeal before the High Court. Draupadibai and Kaushilyadevi were by the order dated 10-2-1953 of the High Court impleaded as legal representatives of Girwarlal. Girwarlal's widow Mst. Lado having died (sic) 1953 Mst. Chamelibai, the appellant in Civil First Appeal No. 25 of 1960 before us, applied to the High Court for her name to be brought on record in place of Mst. Ladobai. This prayer was allowed by the High Court by its order dated 9-2-1953.

2. By their application dated 9-3-1960 the plaintiffs applied to the trial Court for Kaushalyadevi's name to be deleted from the list of defendants. By another application dated 1-10-1960 they made a similar prayer for removal of the name of Chamelibai from the list of defendants. Both of these applications were

allowed by the trial Court by its order dated 12-10-1960. It appears that the plaintiffs had arrived at a compromise with the remaining defendants and that the same was put up before the Court on 20-10-1959. After the names of Kaushalyadevi and Chamelibai had been removed from the list of defendants in the suit the compromise was recorded by the Court by its order dated 2-11-1960. Kaushalyadevi has filed Civil First Appeal No. 24 of 1960 against these two orders; whereas Chamelibai has filed Civil First Appeal No. 25 of 1960 against the same orders. This judgment shall govern both of these appeals.

3. Two questions arise for consideration in these appeals. Firstly, it has to be decided whether the appeals are maintainable and secondly if they are held to be maintainable whether the plaintiffs had the right in law to withdraw the suit as against the present appellants. Both of these questions, however, involve a common point, namely whether the appellants in the present case were necessary parties to the suit for partition, or they were merely proper parties thereto. I shall, therefore, consider both of these questions together.

On the first point it may be observed at the outset that an order under Order 1, Rule 10 is not appealable under the Code of Civil Procedure. It was, however, argued that in a partition suit every party, whether arrayed on the side of the plaintiff or on the side of the defendant, is in position of a plaintiff in so far as every party whether plaintiff or defendant is entitled to ask the Court to allot a share of the joint property to him. In, such a case it was contended on the authority of *Ramji Pandey Vs. Alafkhan and Others*, that the order striking out of the names of one or more of the defendants would be appealable, inasmuch as its effect is to leave undecided the defendant's claim to a share in the partition.

4. I am, however, of the opinion that in the present case the two appellants were not necessary parties to the suit, inasmuch as they were not entitled to any share on partition of the joint property; but were only entitled to maintenance. Mulla in his book on Hindu Law (12th Edition) in Article 333 mentions in Clause (2) (b) that persons entitled to maintenance from the family, or entitled to a provision for their maintenance, that is widows, daughters, sisters and such like are merely proper parties to a suit for partition. Where a defendant who is not entitled to a share in the joint family property but is entitled merely to maintenance is removed from the list of defendants it cannot, in my opinion, be said that defendant's claim to a share in the partition is left undecided.

Another case on which reliance was placed by the learned counsel for the appellants is *Shair Ali Vs. Jagmohan Ram and Another*. That case does not at all help the appellants before me. In that case a distinct relief was claimed against the defendant against whom the suit was subsequently withdrawn. It was observed by Mears C. J. that where the plaintiff had impleaded a person merely upon the ground of convenience, and the plaint discloses no cause of action against him, and the plaintiff has claimed no relief against him and the order of the Court directing the removal of the name of such a defendant does not operate as a decree, for it has not the effect of an adjudication, and the integrity

of the original claim remains unbroken. The case reported in *Lalsa Motisa v. Bhagwant Ramji* AIR 1941 Nag 166 is also distinguishable from the present case, since in that case the name of a defendant had been struck out on the ground that the plaint did not disclose any cause of action against him. Such an order was held by Puranik, J. to operate as a decree and to be appealable as such.

In *Chetanlal v. Dau G. S. Gupta* AIR 1938 Nag 233 the suit was against certain persons for charge against property in their hands for arrears of land revenue paid by the lambardar. The Court found that there was no charge, and on that ground discharged some of the defendants. Such an order was held to amount to a decree because it was a final adjudication on a most important point in issue between the parties. I am afraid the appellants cannot get any assistance from this case. The case reported in *Tukaram Mahadu Tandel Vs. Ramchandra Mahadu Tandel*, also related to a defendant seeking a share in the joint property. There was besides a compromise under which the plaintiff had acquired certain rights. It was in these circumstances that it was held that the plaintiff could not withdraw the suit as against the defendant. It was held in *Gomati Devi Vs. Ram Prasad Prabhudayal and Others*, by Khan, J. that a person who is not entitled to any share in a suit for partition is not a necessary party.

5. It would also appear that it was the case of Mt. Draupadibai at one time that Triloknath had been adopted by Pyarelal, and that the plaintiffs denied the fact of Trilokinath's adoption. However, since Draupadibai herself had at one time taken up the position that her husband had adopted Trilokinath, Mt. Chamelidevi who was substituted in place of Draupadibai after her death, is bound by that admission. Mt. Kaushalya-devi in her application dated 11-3-1949 specifically pleaded that she had adopted Shri Bhagwan as a son to her deceased husband Babulal. It would thus appear that neither Chamelidevi nor Kaushalya-devi claimed any right in themselves to a share in the property involved in the suit. They could at the most claim provision for their maintenance. I would, in the result, hold that parties who are entitled only to a maintenance or a provision for their maintenance, being merely proper parties to a suit for partition the plaintiff can withdraw the suit against them at any stage prior to the passing of a preliminary decree; that the order by which the names of such persons, as are not entitled to any share in the joint property, are removed does not amount to a decree; and is as such not appealable.

6. For the reasons stated above, these appeals have no force and are hereby dismissed with costs.

Newaskar, J.

7. I agree that these appeals, preferred by the two female members of a Joint Hindu Family who had been initially impleaded as having a right of maintenance but who later had been struck off from record to enable the parties having right to a share in the joint family property to arrive at a compromise and to have the suit disposed of on that basis, are not maintainable as the orders, striking out

their names being in pursuance of Court's power under Order I, Rule 10, C. P. C., are not appealable.

8. On behalf of the appellants reliance is sought to be placed upon certain decisions reported in Ramji Pandey Vs. Alafkhan and Others, , Shair Ali Vs. Jagmohan Ram and Another , AIR 1941 Nag 166, AIR 1938 Nag 233 and AIR 1925 Bom. 425, for the contention that an appeal is competent under the circumstances.

9. An order under Order 1, Rule 10, C. P. C. is admittedly not an appealable order as it is not included in the appealable orders mentioned under Order 43, Rule 1, C. P. C. which provides exhaustively for such orders. The appellants can only successfully contend that the orders in question are appealable if they amount to decrees.

10. The term "decree" is defined in Section 2(2) of the CPC as under :

" "Decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 47 or Section 144, but shall not include: (a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default."

11. Now the orders aforesaid striking out the names of the defendant-appellants will only amount to a decree if they amount to formal expression of an adjudication which so far as the trial Court is concerned conclusively determined their rights with regard to all or any of the matters in controversy in the suit or if they amount to rejection of plaint.

12. The orders cannot amount to rejection of the plaint as they are not against the plaintiffs but are against the defendants. Moreover although in a partition suit the defendants who have a right to share and who claim separation of their shares may be said to be in the position of the plaintiffs, persons who have no such right to a share but are merely proper parties as being maintenance-holders cannot claim to be plaintiffs. The reason is that they in their own right cannot sue for partition.

13. The said orders also cannot amount to final determination of the rights of the appellants with reference to the joint family property as while striking out their names as being not necessary parties nothing is determined as to the competency or otherwise of their claim to maintenance. That claim therefore .can independently be pressed notwithstanding such striking out of their names.

14. The decision in Ramji Pandey Vs. Alafkhan and Others, is clearly distinguishable. In that case one Bichan Pandey was added as a party on the

ground that he had an interest in the property of which partition was claimed by the plaintiff against him and others. Some of the parties arrayed as defendant stated that Bichan Pandey had no interest, Bichan Panday sold his interest to one Ritubhanjan and the latter was added on his application. Later however the Court, on plaintiff's application stating-that Bichan Panday had no interest, struck off his name as well as that of the transferee . On appeal by him Das, J., observed at page 122:

"Now a partition suit differs from other suits. In that every party whether arrayed on the side of the plaintiffs or on the side of the defendants is in the position of a plaintiff in so far as every party whether plaintiff or defendant is entitled to ask the Court to allot a share of joint property to him."

15. It is difficult to hold that the persons claiming to be entitled to maintenance can be placed in the same position of plaintiffs, though they be defendants, in much the same way as those entitled to a share. It appears clear from the above decision that the learned Judge held, the order to amount to rejection of the plaint. This is further clear since he relied upon the decision in *Rama Rao v. The Raja of Pittapur* ILR 42 Mad 219 : (AIR 1919 Mad 871, which was a case wherein the name of the defendant was struck off on the ground that the plaint did not disclose a cause of action against him. In this last mentioned case it can properly be said that the plaint of the plaintiff was rejected against a defendant on the ground that it disclosed no cause of action which order, of course, is appealable as a decree in view of the above-quoted definition of the, decree and the provisions under Order 7, Rule 11, C. P. C.

16. The decision in *Shair Ali Vs. Jagmohan Ram and Another* has no application. In that case the plaintiff had claimed a relief against a defendant but the latter's name was struck off. This amounted to rejection of plaint as against him and as such was appealable. The decision relied upon the above-referred two decisions.

17. The decisions in AIR 1938 Nag 233 and AIR 1941 Nag 166 lay down the same principle as in the above referred decisions upon which they specifically rely.

18. The decision in *Shanmuka Nadan and Others 1 to 5 minors by their mother and guardian 6th appt. Vs. Arunachala Chetty (through his agent Shanmugavelayudham Pillai and Others)*, may assist to a certain extent in the view that appeals in the present cases are not competent. That was a suit for partition in which certain minor plaintiffs had sued for partition and the creditors who had obtained decrees against the defendant members of the family alone or against them and the minor plaintiffs were impleaded as defendants. The trial Court struck off their names. The plaintiffs appealed. The High Court held the appeal as incompetent being against an order under Order 1, Rule 10, C. P. C. The learned Judges Oldfield and Ramesam, JJ., however considered that to be a fit case for the exercise of revisional powers of the High Court not because the discretionary power exercised by the learned Judge involved a mistake of law but

because the learned Judge had entirely misunderstood the nature of the judicial discretion which he was called upon the exercise. On examination of the plaint they found that the minor plain-tiffs had assailed the transactions culminating in decrees on the ground that the borrowing by the defendants by charging the family properties was either without legal necessity or benefit to the estate or for illegal and immoral purpose. They consequently were inclined to hold that the attack on the debts was on one basis against each of them and the provisions of Order 1, Rule 3, C. P. C. should have been kept in view.

19. In the present case the order striking of the names of the maintenance-holders does not involve any such consideration. On the other hand it leaves their interest completely intact and the compromise reached in the present case would not any way affect their interest. This, in my opinion, is therefore not a fit case for the exercise of our revisional jurisdiction as in the above mentioned case. In the view taken in that case an appeal is incompetent where the order is one under Order 1, Rule 10, C. P. C.

20. I would, therefore, agree with my learned brother Sharma J., and hold the present appeals as incompetent and would dismiss them with costs.