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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 7711 OF 2015

Shri Mayuraj Arvind Kshirsagar .. Petitioner

Vs.

Anita Hiralal Pawar and others .. Respondents

Mr.Satyajeet P.Dighe, Advocate for the Petitioner.

CORAM : R. G. KETKAR, J.
DATE : 05th AUGUST, 2015

P.C. :

. Heard Mr. Satyajeet P.Dighe, learned Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original defendant No.1 has challenged the judgment and order dated 08/04/2015 passed by the learned Joint Civil Judge, Junior Division, Sinnar below Exhibit 75 in Regular Civil Suit No. 240 of 2008. By that order, the learned trial Judge allowed the application filed by respondent No.1, hereinafter referred to as plaintiff under Order 1 Rule 10 & Order 6 Rule 17 of Code of Civil Procedure, 1908 (for short 'C.P.C.').

3. In support of this Petition, Mr.Dighe submitted that earlier plaintiff had instituted Suit only against petitioner, hereinafter referred to as defendant No.1 for perpetual injunction restraining

defendant No.1 from creating any third party interest in the property in dispute. The plaintiff thereafter amended the plaint on 23/07/2012 and also added prayer clause (d) by which plaintiff prayed for cancellation of the sale deed dated 27/12/2010 executed in favour of defendant No.1 and for declaration that plaintiff and members of her family are owners of the property in dispute. On 31/07/2013, plaintiff further amended the plaint and added respondent No.2 herein as defendant No.2 in the Suit.

4. Mr.Dighte submitted that thereafter the plaintiff led her evidence and she was also cross examined. In the cross examination, she admitted that her son and daughters have consented for execution of the sale deed. He submitted that in the written statement, defendant No.1 specifically asserted in paragraph 7 that Suit is bad for non joinder of necessary parties. In paragraph 8, defendant No.1 asserted that plaintiff is not the only heir of Hiralal Khandu Pawar. Apart from plaintiff, respondents No. 3 to 6 herein are legal heirs of Hiralal Khandu Pawar. However, plaintiff avoided to make reference of these legal heirs in the Suit. He submitted that the plaintiff thereafter filed present application Exhibit 75 under Order 1 Rule 10 and Order 6 Rule 17 of C.P.C. for adding respondent No.3 to 7 herein as party defendants. He submitted the proposed amendment takes away the admission given by the plaintiff in her cross examination. He has taken me through the cross examination

of plaintiff wherein she deposed that plaintiff has 1/7th share and after the death of her husband, property in dispute is devolved upon her and her children. She further admitted that Suit is instituted by her and her children have consented for execution of the sale deed dated 27/12/2010. In short, he submitted that if the amendment is allowed, it will take away the admission given by the plaintiff during her cross examination and will also cure the defect of non joinder of necessary parties. He, therefore, submitted that the impugned order is liable to be set aside.

5. I have considered the submissions advanced by Mr.Dighe. I have also perused the material on record. As noted earlier, plaintiff had initially instituted Suit for perpetual injunction restraining defendant No.1 from alienating the suit property. On 23/07/2012, plaint was amended and prayer clause (d) was added. By prayer clause (d), plaintiff has prayed for cancellation of the sale deed dated 27/12/2010 and for declaration of ownership of the plaintiff and her family members. Defendant No.1 did not challenge order dated 23/07/2012 by which prayer clause (d) was added. On 31/07/2013, plaintiff impleaded respondent No.2 herein as defendant No.2 as defendant No.2 had executed sale deed in favour defendant No.1 in his capacity as power of attorney holder of plaintiff and respondents No. 3 to 6 herein. In the application for amendment, Exhibit 75, plaintiff asserted that in the written

statement, defendant No.1 contended that Suit is bad for non joinder of the necessary parties and as such, is liable to be dismissed on that count. However, defendant No.1 did not specify the names of the persons who were not impleaded in the Suit and because of non joinder of these persons, Suit is bad for non joinder of necessary parties. It is further contended that only during the course of cross examination, defendant No.1 brought on record that her children are also party to the sale deed and being legal heirs of Hiralal, they have also undivided share in the suit property and therefore, in the Suit, children of the plaintiff are necessary parties. In other words, plaintiff contended that for the first time, defendant No.1 gave particulars as regards parties who according to him are necessary parties. It is in that context, the learned trial Judge has allowed the application for amendment. It is not doubt true that in paragraph 3 of the order, the learned trial Judge observed that plaintiff was not diligent in filing the application. As noted earlier, for the first time, defendant No.1 during the course of cross examination of plaintiff has brought on record the persons who according to him are necessary parties in the Suit. It, therefore, cannot be said that plaintiff was not diligent in filing the application. That apart, in view of prayer clause (d) of the plaint, it is immaterial whether her children are made party in the Suit. I, therefore, do not find merit in the submission of Mr.Dighe that if the amendment is allowed, the

defect of non joinder of necessary party is cured. In the case of ***Abdul Rehman Vs. Mohd.Ruldu* (2012) 11 Supreme Court Cases 341**, in paragraph 13, the Apex Court has observed that it is settled law that if necessary factual basis for amendment is already contained in the plaint, the relief sought on the said basis would not change the nature of the Suit. In the present case, plaintiff has not sought further relief and therefore, the nature of the Suit has not changed. In view thereof, I do not find any merit in the submissions of Mr. Dighe. Hence, Petition fails and the same is dismissed. While deciding the Suit, the learned trial Judge will consider evidence on record as also the submissions of defendant No.1 as regards admissions given by P.W.1 in her cross examination. It is further made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)