IN THE HIGH COURT OF JUDICATURE OF BOMBA
BENCH AT AURANGABAD

APPEAL FROM ORDER NO.28 OF 2016
WITH
CIVIL APPLICATION NO.5284/2016

Purushottam s/o Shivdas Chaudhari,
Age: 68 Yrs., occu. Pensioner,
R/o Jalka Bazar, Near Post office,
Nandurbar, Tq. And Dist.Nandurbar. = **APPELLANT (orig. Defendant)**

VERSUS

Narayan s/o Shivdas Chaudhari,
Age; 74 Yrs., occu. Pensioner,
R/o Manoj Bungalow, Shelawadi,
Dhule, Tq. And Dist. Dhule. = **RESPONDENT (orig. Plaintiff)**

Mr.AS Abhyankar, Advocate for Appellant;
Mr.KC Sant,Advocate for Respondent

CORAM : P.R.BORA, J.

RESERVED ON : 30th August, 2016
PRONOUNCED ON: 27th October,2016

JUDGMENT:

1) With the consent of learned Counsel appearing for the parties, the matter is finally heard.

2) The appellant has filed the present appeal challenging two orders both of the date 23rd February, 2016 passed by the Principal District Judge, Nandurbar in Civil Appeal No.17/2011. The aforesaid appeal was filed by the present appellant challenging the judgment and decree passed by Civil Judge, Senior Division, Nandurbar in Special Civil Suit No.13/2007. The aforesaid civil suit was filed by the present respondent, seeking partition and possession. Relief of permanent injunction was also sought. The learned Trial Court decreed the said suit partly and held the plaintiff and defendant therein entitled for half share each in the suit land and the suit house.

3) The civil suit filed by present respondent was resisted by the present appellant on several grounds. It was the contention of the appellant that the partition was already effected in respect of the suit properties in the year 1962. It was the further contention of the

appellant that the suit so brought by the respondent/plaintiff was barred by limitation. The appellant had also raised an objection as regards to non-joinder of necessary parties. The Trial Court, however, has turned down all these objections and has partly decreed the suit thereby holding the respondent/plaintiff for partition and separate possession of half of the share in the suit land and the suit house.

4) Aggrieved by the judgment and decree passed by the trial Court, the present appellant had preferred Regular Civil Appeal No.17/2011 before the District Court at Nandurbar. During pendency of the said appeal, the respondent herein, i.e. original plaintiff, filed an application at Exhibit-23 seeking addition of one Ratilal Hiralal Choudhari as Respondent No.2 in the said appeal and also in the civil suit as defendant No.2 and consequently to amend the suit plaint accordingly. The application so filed by the respondent was resisted by the appellant. It

was the contention of the present appellant that the application so filed by the respondent plaintiff was beyond the period of limitation. It was also contended that despite due opportunities when respondent-plaintiff had not made said Ratilal Hiralal Choudhari as party respondent in the civil suit, he cannot be in the appeal permitted to fill up the aid lacunae.

5) The learned Principal District Judge, after having considered the arguments advanced by the learned counsel appearing for the respective parties, allowed the said application and passed the consequential order below Exhibit-1 thereby setting aside the judgment and order passed in Special Civil Suit No.13/2007 and remanded back the matter to the trial court with a direction to permit the plaintiff to add Ratilal Choudhari as party defendant to the suit and then to decide the suit afresh in accordance with law. Aggrieved by, the present appeal is filed.

6) Shri A.S.Abhyankar, learned Counsel appearing for the appellant criticized the impugned orders on several grounds. The learned Counsel submitted that the objection about non-joinder of necessary party was specifically raised by the appellant before the trial court during pendency of the civil suit. The learned counsel further submitted that the appellant had also submitted an application at Exhibit-112 with a prayer to frame issue about non-joinder of necessary party to the suit, as according to him, Ratilal Choudhari was necessary party to the suit. The learned Counsel further submitted that the said application was objected to by the present respondent. The learned Counsel further submitted that though the trial court did reject the said application, the appellant was allowed to argue the said point at the time of final hearing.

. The learned counsel further submitted that the learned Principal District Judge has failed in properly appreciating all the aforesaid

facts. The learned Counsel further submitted that despite the specific objection raised by the present appellant as regards to the necessity of adding said Ratilal Choudhari as party respondent since the respondent did not add said Ratilal Choudhari as the party to the lis before the trial court, the learned District Judge ought not have allowed the prayer made by the respondent in the appeal.

. The learned counsel further submitted that while allowing the application at Exh.23 and thereby permitting the respondent to add the said Ratilal Choudahri as respondent in the suit for partition, the learned District Judge has completely ignored the provisions of the Limitation Act. The learned Counsel submitted that along with the issue of non-joinder of necessary party, the appellant had also raised certain other issues having material bearing on the legality and correctness of the judgment and order passed by the trial court. By remanding the matter to the trial court, by allowing the

application submitted by the respondent, the learned District Judge has taken away the valuable right accrued in favour of the appellant to agitate the appeal on the other valid grounds. The learned counsel further submitted that the learned District Judge has also failed in appreciating that the application seeking amendment in the pleadings is also governed by Article 137 of the Limitation Act and as such, any application filed after the period of three years from the date of accrual of the cause of action should not have been entertained as barred by limitation. The leaned Counsel submitted that by accepting the request of respondent to add Ratilal Choudhari as party to the partition suit, the learned District Judge has practically allowed the respondent to fill up the lacunae of want of necessary party by allowing his time-barred application. The learned Counsel further submitted that the learned Principal has misconstrued the provisions under the Code of Civil Procedure and the Limitation Act. The

learned Counsel on all the aforesaid grounds prayed for setting aside the impugned order.

7) Shri K.C.Sant, learned Counsel appearing for the respondent, supported the impugned orders. The learned Counsel submitted that the learned Principal District Judge has rightly involved the powers under Order I Rule 10(2) of Code of Civil Procedure for doing substantial justice. The learned counsel further submitted that it was well within the discretion of the court to direct addition of Ratilal Choudhari as party respondent in the suit for partition. The learned counsel further submitted that after passing of the impugned orders, the matter has already been remanded to the trial court and thereafter the present appellant along with added respondent viz. Ratilal Choudhari has filed the amended written statement to the suit for partition filed by the respondent. The learned counsel submitted that the appellant is thus now estopped from raising any objection to the

impugned orders, when he has already acted upon them. The learned Counsel further submitted that no prejudice is likely to be caused to the appellant because of the remand of the matter vide the impugned orders and all issues are kept open to be agitated by the parties before the trial court. The learned Counsel, therefore, prayed for dismissal of the appeal.

8) During the course of the arguments, the learned counsel appearing for the appellant and learned Counsel for the respondent, have relied upon certain judgments to which I will be referring at proper stage.

9) After having considered the arguments advanced by the learned Counsel appearing for the respective parties and on perusal of the impugned orders and the material on record, it is apparently revealed that the impugned orders cannot be sustained for plural reasons.

10) The present appellant had filed substantive appeal before the District court challenging the judgment and order passed by the trial court on various grounds. Non-joinder of necessary party was one of such ground.

11) As is revealing from the pleadings, the appellant had raised a plea that limitation for entertaining the suit by the trial court seeking partition and possession by the plaintiff therein. The appellant had also raised a plea that the partition in respect of the suit properties had already been taken place in the year 1962 and as such, it was not open for the respondent plaintiff to again seek partition and possession of the said properties. The plea of estoppel, ouster and adverse possession was also raised by the present appellant referring to the factual aspects involved in the suit. The possession aspect was also seriously disputed by the appellant.

12) It is thus evident that non-joinder of necessary party was not the only objection raised by the appellant so that the matter could have been remanded by the first appellate court on the said issue alone. There is substance in the objection raised on behalf of the appellant that by allowing the application filed by the respondent, seeking addition of Ratilal Choudhari as party respondent in the suit and consequently remanding the matter back to the trial court for its decision afresh, the appellate court has practically taken away the valuable right, which was accrued in favour of the appellant to agitate the other issues raised by him in the appeal in challenge to the impugned judgment and order passed by the civil court in Special Civil Suit No.13/2007.

13) The point of limitation was heavily pressed by the appellant before the trial court while resisting the partition suit so filed by respondent plaintiff. The appellant was thus

having right to agitate the point of limitation in the first appeal before the District court when according to the appellant, the finding on the said issue recorded by the trial court was wholly erroneous. The said issue could have been decided in the appeal irrespective of the fact that there was another objection also raised by the appellant about non-joinder of necessary party.

14) As was submitted by Shri Abhyankar, learned Counsel appearing for the appellant, when the first appellate court had heard the entire appeal on merits, it ought to have decided all the points raised by the appellant in exception to the impugned judgment and decree. From the material on record, there appears much substance in the objection raised by the appellant in regard to the limitation for filing the suit by respondent – plaintiff. Contention of Advocate Abhyankar is difficult to be ruled out that if the first appellate court would have recorded

its finding on all the issues and had the appellate court recorded a finding that the suit filed by the respondent – plaintiff was not within the period of limitation and was thus liable to be dismissed on that count alone, perhaps no order of remand would have been passed even though the court would have reached to the conclusion that Ratilal Choudhari was a necessary party to the said suit.

15) In fact, the appropriate course for the first appellate court would have been to decide all the issues at a time instead of entertaining the application filed by the respondent – plaintiff under Order I Rule 10(2) of C.P.C. and consequently to pass the final order thereby remanding the matter to the trial court for deciding it afresh. It was an unusual course adopted by the learned District Judge of deciding the appeal on an application submitted by the respondent thereby setting aside the impugned judgment and order, which was in favour of the

said respondent and which was never sought to be set aside by the said respondent.

16) Moreover, while allowing the application at Exh.23 filed by the respondent under Order I Rule 10(2) of CPC, the learned District Judge has failed in not considering the provisions of the Law of Limitation and certain factual aspects relating to the request so made by the respondent – plaintiff in the said application. The first appellate court has recorded a positive finding in the impugned order passed below Exh.23 that Ratilal Choudhari was necessary party to the suit. However, the further finding recorded by the learned District Judge that it would not be in the interest of justice to defeat the claim of the plaintiff on a technical ground of non-joinder of necessary party cannot be upheld. It's a debatable issue and the learned District Judge should have given some more thought before recording any such finding.

17) In the case of S.D.Ayyakannu (Died) and

Ors Vs. Somasundram and Ors. - 2002 AIHC 1138 Madras, the trial Court had dismissed the suit for partition on the ground of non-joinder of necessary parties. In the appeal, the Madras High Court upheld the order passed by the trial court, observing that there was no patent error of law or perversity in approach in so far as the lower court having arrived at its own decision on each and every issue and ultimately deciding to dismiss the suit for having not brought on record the necessary parties in the suit for partition and separate possession.

18) The Andhra Pradesh High Court in the case of *Nalla Venkateshwarlyu Vs. Porise Pullamma and Anr. - AIR 1994 Andhra Pradesh 87*, has held that if in a partition suit, a necessary party is not impleaded, the suit has to be dismissed on that ground. It was sought to be canvassed in the said matter that as provided in Order I Rule, 9, no suit shall be defeated by reason of mis-joinder or non-joinder of parties and the Court

may in every suit deal with the matter in controversy as regards to the rights and interest of the parties actually before it. The argument was, however, turned down by the high court with the following observation, -

> "10. Though the provisions of Order I, Rule 9 say that no suit shall be defeated by reason of mis-joinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, the proviso makes it clear that this rule does not apply to non-joinder of necessary parties. Therefore, if necessary party is not impleaded in a suit or an appeal, it will have to be dismissed on that ground.
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> 11. Admittedly, the third defendant is having 1/3rd share in the property and she was impleaded as second respondent. But, against her name, it was noted that she is not necessary party. The copy of the grounds filed contain many alterations and in fair copy of the

> grounds, the third respondent was not impleaded. Therefore, the second appeal cannot be maintained in the absence of 3rd respondent, who is a necessary party. On this ground, the second appeal is dismissed but in the circumstances of the case, without costs."

19) It was contended by Shri Sant, learned Counsel appearing for the respondent that the appellant did not raise the objection as regards to the non-joinder of necessary party in its written statement and as such, was estopped from raising the said objection at the subsequent stage in view of Order I, Rule 13 of CPC. Reading out the said Rule 13, the learned Counsel submitted that the appellant shall be deemed to have waived the objection as regards to the non-joinder of Ratilal Choudhari as party to the suit in the trial court since no such objection was raised by the appellant in the written statement filed by him in the civil suit. However, the objection so raised also cannot be sustained in

view of the judgment of Madras High Court in the case of *Shanmugham and Ors Vs. Saraswathi and Ors. - AIR 1997 Madras 226*.In the said matter, similar issue was involved and the contention so raised was rejected by the Madras High Court, observing that the question of non-joinder of necessary parties in a suit for partition can be raised at any time as it goes to the root of the matter. The High court has further observed that the suit for partition is not maintainable in absence of some of the co-sharers.

. The aforesaid judgments are referred by me only to point out that the objection of non-joinder of necessary party in a partition suit cananot be said to be technical ground as noted by the learned District Judge.

20) Certain further observations made by the learned Principal District Judge on the point of limitation also cannot be subscribed. The learned District Judge has made the following observations, - “The submission of the learned

Advocate for the appellant that the present application is not within limitation cannot be accepted as the court, at any stage of the proceedings, can order, without the application of the party the name of any person whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit be added."

21) In the commentary on the Code of Civil Procedure by Mulla (15th Edition), it is said that "the mere fact that the court of its own motion orders that the name of any person be added as a party, does not render the provisions of Section 21 of the Limitation Act inapplicable to the case. There is nothing in sub-rule(2) which frees the court where acting on its own motion from the restrictions of the Limitation Act. In other words, a court acting under sub-rule (2) is bound by the provisions of Section 21 of the Limitation Act, and the rights which the parties

may have acquired under the Limitation Act are, therefore, safeguarded."

22) In the instant case, the appellant had raised a specific plea that the application filed by the respondent/plaintiff was barred by limitation. The learned Principal District Judge has, however, failed in appreciating the said objection. Though the appellant had also relied upon the judgment of this court (Coram: D.G.Karnik,J.) in the case of *Harinarayan G.Bajaj and Anr. Vs. Vijay Agarwal and ors. - 2012 (2) Mh.L.J.106*, the learned District Judge does not seem to have considered the said judgment.

. One more objection was raised by the appellant to resist the application filed by the respondent plaintiff at Exh. 23 stating that when despite the objection raised that Ratilal Choudhari was the necessary party, the respondent plaintiff proceeded in the suit without joining said Ratilal Choudhari as party, it was not permissible to allow the respondent plaintiff to

remedy the said defect in appeal. Shri Abhyankar, learned counsel for the appellant, has relied upon the Full Bench judgment of Travancore High court in the case of *Chenthiperumal Pillai Chanthanamuthu Pillai Vs. D.M.Devasahayam – 1956 TRA.CO.181* wherein it is held that, -"It is a well-recognised rule of law that if in spite of objection raised at the proper time, the plaintiff persists in the suit without joining the necessary parties, the suit has to be dismissed and that he cannot be allowed to remedy the defect in appeal." It is not in dispute that in the instant matter, the specific objection was raised by the appellant that Ratilal Choudhari was a necessary party to the suit. It is further not in dispute that the respondent plaintiff had at a time taken a stand that Ratilal Choudahri was not necessary party to the suit. The question arises whether the respondent could have been permitted by the learned Principal District Judge to take a contrary stand and whether would it not amount to

allow the respondent plaintiff to remedy the defect in appeal. I prefer not to make any comment, whether the aforesaid Full bench judgment would be applicable to the facts of the present case and leave it to be considered by the first appellate court.

24) Shri Sant, leaned Counsel appearing for the respondent, had relied upon two judgments of this Court, one in the case of *Sushil Kaur w/o Sukhbirsingh Chhatwal and Ors. Vs. Aurangabad Ginning and Pressing Factory and Anr. - 2012 (2) Mh.L.J. 295* and another in the case of *Sumitra Anna Aware and Ors. V. Anusaya Rajaram Aware and Ors. - 2012 (3) Mh.L.J. 649*. I have gone through the text of the said judgment. There cannot be a dispute about the findings recorded and the law laid down in both the aforesaid judgments. However, in the facts of the present case, the observations made and the conclusions recorded in both the aforesaid judgments would not apply and may not take further the cause canvassed by the

respondent-plaintiff. Anothoer contention raised by Adv. Sant that the present appeal has become infructuous since the appellant has acted upon the order of remand and had also filed the amended written statement jointly along with the added defendant, also do not deserve any consideration, is liable to be rejected.

25) For the reasons stated above, both the impugned orders are liable to be set aside. However, before concluding the Judgment, I would like to make it clear that whatever observations are made by me in this judgment are all prima facie in nature and I have not expressed any opinion on the merits of any of the issues arising for decision in the suit or in the appeal and whatever I have stated herein is only for the purpose of demonstrating that the appellate court should not have remanded the matter to the trial court to decide it afresh without considering all the objections raised by the appellant in exception to the judgment and order passed by the

trial court. In the result, the following order, -

ORDER

I) The orders dated 23.2.2016 passed by Principal District Judge, Nandurbar below Exhibit-23 and Exhibit-1 in Regular Civil Appeal No.17/2011 are quashed and set aside. The appeal shall stand restored to the file of the Principal District Judge;

ii) The Principal District Judge is directed to decide the Regular Civil Appeal No.17/2011 on its own merits, taking into account all the grounds of objections raised by the appellant and keeping in view the the observations made by this Court in this judgment;

iii) The Appeal is allowed in the aforesaid terms. Pending Civil Application stands disposed of.

sd/-
(P.R.BORA)
JUDGE

bdv/
Fldr 25.10.16