

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 9568 OF 2016

Shri. Abdulsatar Meerasaheb Tamboli	...Petitioner
<i>Versus</i>	
Smt. Sonutai Karbasayya Hiremath	
And Ors.	...Respondents
....	
Mr.Tejpall S. Ingale, Advocate for the Petitioner.	
....	

CORAM : R. G. KETKAR, J.
DATE : 26th August, 2016

P.C.

1. Heard Mr.Tejpall S. Ingale, learned Counsel for the petitioner, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the judgment and order dated 17.2.2016 passed by the learned Jt. Civil Judge, Junior Division, Sangli below Exhibit-109 in Regular Civil Suit No.625/1991. By that order, the learned trial Judge allowed the application Exhibit-109 made by original plaintiff under Order I Rule 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') for impleading persons, set out in paragraph-2 of that application as plaintiffs.
3. Respondents No.1 and 2/plaintiffs have instituted Regular Civil Suit No.625/1991 against the defendant for

recovery of possession of premises, more particularly described in paragraphs-1A and 1B of the plaint under the provisions of the Bombay Rents, Hotel and Lodging Rates Control Act, 1947 (for short, 'Act'). During pendency of this suit, the suit instituted by plaintiff No.1 for partition, separate possession and mesne profits against defendant No.1 Sou.Sumangala Gurshantgonda Patil, defendant No.2 Lilawati w/o. Gurubasayya Hiremath, defendant No.3 Jyoti Gurubasayya Hiremath, defendant No.4 Priti Gurubasayya Hiremath and defendant No.5 Manik Mrughendra Hiremath was decreed on 8.3.2002. The suit property is at Sr.No.2 of Schdule-A of that suit. On 8.3.2002, the learned trial Judge decreed the suit for partition and declared that the plaintiff, defendants No.1 and 5 therein have $1/5^{\text{th}}$ share each and defendants No.2 to 4 together have $1/4^{\text{th}}$ share in the properties mentioned in Schedules-A and B of the plaint. Aggrieved by this decision, defendants No.2 to 4 preferred Regular Civil Appeal No.123/2002. That Appeal was dismissed on 8.8.2007. In the present suit, defendant filed written statement on 5.3.1994 resisting the suit *inter alia* on the ground that the suit property originally belonged to Murgendra Sangayya Hiremath, since deceased. After his death, the suit property devolved upon his heirs. Reference was made to the suit instituted by plaintiff No.1 for partition and passing of decree therein. It was contended that the

plaintiff did not implead other co-sharers and, therefore, the suit is bad for non-joinder of necessary parties.

4. It appears that the suit filed against the defendant was dismissed in default on 5.9.1999. It is further appears that by registered release deed dated 11.5.2009, plaintiff No.1 Sonutai has transferred her share to her brother Manik who was defendant No.5 in the partition suit. On 21.12.2011, Manik died leaving behind plaintiff No.2, widow Irawati and three daughters. It further appears that on 21.9.2013, present suit was restored to the file of trial Court. On 16.9.2014, plaintiff No.2 Mahesh filed affidavit of evidence. During the course of cross-examination, plaintiff No.2 Mahesh admitted that he was not the owner of the suit property at the time of filing the suit and that plaintiff No.1 had transferred her share in favour of Manik.

5. Plaintiffs thereafter had filed application under Order I Rule 10 of C.P.C. on 30.9.2015 for impleading the persons set out in paragraph-2 of that application as plaintiffs. The defendant resisted the application by filing reply dated 30.10.2015. The defendant opposed that application *inter alia* on the ground that the objection as regards non-joinder of necessary parties was raised in the written statement filed on 5.3.1994. That time, the plaintiffs did not amend the plaint. The suit for partition was decreed in the year 2002. Names of co-sharers were entered in the City Survey record on

20.9.2004. Even at that time, the plaint was not amended. Appeal preferred by defendants No.2 to 4 was dismissed on 8.8.2007. Even after dismissal of appeal, no steps were taken for amending the plaint. The defendant, therefore, contended that the proposed amendment is with a view to withdrawing the admission given by plaintiff No.2 Mahesh during the course of cross-examination. Amendment proposed also suffers from gross delay and laches.

6. By the impugned order, the learned trial Judge has allowed the application. It is against this order, the defendant has instituted the present petition.

7. In support of this petition, Mr. Ingale reiterated the submissions advanced before the trial Court as also contentions raised in the reply filed by the defendant opposing application Exhibit-109. He submitted that there is gross delay and laches in filing application for amendment as also application is filed with a view to withdrawing the admissions given by plaintiff No.2 Mahesh during the course of cross-examination. He further submitted that the application is made by plaintiff No.1 and not by the persons in whose favour the rights were created. For all these reasons, he submitted that the impugned order deserves to be set aside.

8. I have considered the submissions advanced by Mr. Ingale. I have also perused the material on record. As noted

earlier, the respondents No.1 and 2 have instituted the suit in the year 1991 against the defendant. During pendency of that suit, the suit instituted by plaintiff No.1 for partition and separate possession was decreed on 8.3.2002. Defendants No.2 to 4 therein preferred appeal which was dismissed on 8.8.2007. During pendency of suit for partition, present suit came to be dismissed in default on 25.9.1999. The suit was eventually restored on 21.9.2013. In the meantime, the plaintiff No.1 Sonutai executed registered release deed on 11.5.2009 in favour of her brother Manik. Manik died on 21.12.2011 leaving behind plaintiff No.2 Mahesh and widow. After restoration of the suit in the year 2013, plaintiff No.2 filed affidavit of evidence on 16.9.2014. During the course of his cross-examination conducted on 16.9.2014, he admitted that he was not the owner at the time of filing of the suit and that plaintiff No.1 Sonutai has transferred her share in favour of Manik. *Prima facie* nothing turns on the fact whether plaintiff No.2 was owner at the time of filing of the suit or not. As noted earlier, in the partition suit it was declared that the plaintiff and defendants No.1 to 5 have 1/4th share each. Defendant No.5 in partition suit was Manik. Manik died on 21.12.2011 leaving behind plaintiff No.2 Mahesh and widow Irawati. *Prima facie* after the death of Manik, his property will devolve on his heirs which includes plaintiff No.2 Mahesh.

9. On 30.9.2015, the plaintiff filed application below

Exhibit-109 under Order I Rule 10 of C.P.C. for impleading the heirs of Manik as plaintiffs No.3 to 6 and other co-sharers from the branch of Gurbassayya, predecessor in title of defendants No.2 to 4. The application is contested mainly on two grounds, namely, gross delay and laches as also said application is filed for wiping out the admissions given by plaintiff No.2 during the course of cross-examination. In my opinion, the application cannot be rejected only on the ground of delay and laches. I have already dealt with admission given by plaintiff No.2 Mahesh during the course of cross-examination. In my opinion, *prima facie* it will not amount to withdrawal of admission given by plaintiff No.2 to the effect that he was not the owner at the time of filing of the suit. In paragraphs-7 and 8, the learned trial Judge has given reasons for allowing the application. In particular, the learned trial Judge has observed that the persons who are proposed to be impleaded as the plaintiffs have interest in the suit property and for resolving the controversy between the parties effectively, their presence is necessary. Perusal of judgment and decree passed in partition suit clearly supports the finding that the persons who are proposed to be impleaded as plaintiffs have share in the suit property. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and same is dismissed with no order as to costs.

10. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contended by section 105(1) of C.P.C..

(R. G. KETKAR, J.)

Deshmane (PS)