

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO.1029 OF 2016
WITH
CIVIL APPLICATION NO.1294 OF 2016
IN
APPEAL FROM ORDER NO.1029 OF 2016**

Shri Madhukar Yashwant Ukarde
since deceased, through his legal heris
Smt. Kunda Madhukar Ukarde & Ors. ... Appellants

vs.

Smt. Rakhi Mohanand Hunnare & Ors. ... Respondents

Mr. R.K. Dhakephalkar, Senior Advocate i/b Mr. Niranjana Shimpi for the
Appellants/Applicants.
Mr. Saurabh Oka for the Respondent Nos.1 and 2.
Mr. Siddharth C. Wakankar for the Respondent Nos.3A to 3D.

Coram : **A.A.Sayed, J.**

Date : 10 April 2017

P.C. :

1 The Appeal challenges an order dated 2 December 2015 passed by the learned District Judge, Thane, allowing the Civil Appeal No.362 of 2012 and setting aside the order dated 22 October 1999 passed by the learned Joint Civil Judge Senior Division, dismissing the suit filed by the Plaintiffs on the preliminary issue of non-joinder of necessary party. The operative part of the impugned judgment of the District Court reads as follows:

“19) The cumulative effect of the aforesaid discussion is that, the impugned order passed by the learned trial Court suffers from illegality. Since the suit has been dismissed by the learned trial Court on the technical ground, it is just and necessary to remand back the suit for trial according to law and that would not cause any irreparable prejudice to the parties. I therefore, answer point Nos.1 and 2 in the affirmative and pass the following order:

ORDER

- 1. The appeal is allowed.*
- 2. The order passed by learned trial Court dated 22.10.1999 below Exh.1, Exh.77 and Exh.78 in Spl.C.S. No.84/1991 is hereby set aside.*
- 3. The suit is remand back to the trial Court for the trial according to law.*
- 4. The trial Court to decide the suit expeditiously within six months from the date of the order.*
- 5. The parties to appear before the learned trial Court on 01.01.2016 and shall co-operate the Court in speedy disposal of the matter.*
- 6. Parties to bear their own costs.”*

2 The suit was filed by two sisters against the two brothers and two other sisters for partition of movable and immovable properties. Defendant No.4 in the suit was Smt. Sushila Dattatray Warange, who had settled in USA. The said Smt. Sushila Warange died sometime in the year 1996 in USA. The Plaintiffs had filed an Application on 30 January 1999 for bringing on record the legal representatives of the Defendant No.4 Smt. Sushila Warange on record. The said Application

was rejected on the ground that the death certificate was not annexed to the Application and the name of the proposed legal representatives were not mentioned in the Application. Thereafter, on 19 June 1999 the Plaintiffs have filed another Application for issuance of summons to the legal representatives of the Defendant No.4. In the said Application it was stated that since the Defendant No.4 was settled in USA, it was not possible for the Plaintiffs to bring the death certificate of the Defendant No.4. No order was passed on the said Application. Thereafter, inasmuch as the Plaintiffs could not produce the death certificate of the Defendant No.4, they filed an Application on 4 September 1999 requesting the Court to delete the name of the Defendant No.4 from the array of parties which Application came to be allowed. However, the amendment was not carried out by the Plaintiffs in the suit and the name of the Defendant No.4 continued in the array of the parties.

3 On 18 September 1999 the Defendant No.2 filed two Applications. In one Application (Exhibit 77) the said Defendants have prayed for dismissal of the suit for non-joinder of necessary party (i.e. Defendant No.4) and in another Application (Exhibit 78) request was made for framing preliminary issue under the provisions of Order XIV Rule 2 of Code of Civil Procedure, 1908 with regard to non-joinder of necessary party. Both the Applications were decided by the trial Court

on 22 October 1999 and the suit was dismissed for non-joinder of necessary party, which order was challenged by the Plaintiffs before the District Court in Civil Appeal No.362 of 2012. The Appeal was allowed by the District Court by the impugned order (as indicated in paragraph 1 herein above). Hence, this Appeal.

4 In para 14 of the impugned order the District Court has observed as follows:

“14) It is to be noted that, in the present case the plaintiffs had already examined seven witnesses in support of their case, by the time impugned order came to be passed by the learned trial Court. The law is settled that any objection as to the non-joinder and mis-joinder of party is to be taken at the earliest opportunity. The law prescribes that the first opportunity is at or before the settlement of issues. Moreover, Order 14 Rule 2 of the Code of Civil Procedure would clearly indicates that the consideration of issues and its disposal as a preliminary issue has been made permissible only in limited cases. These issues are to law relates to (1) the jurisdiction of the Court, or (2) bar to the suit created by any law for the time being in force. The preliminary issue would be one which is framed on the pleadings of the parties and require to be looked into and to which the Court should apply its mind at the preliminary/initial stage.

In view of Order 14 Rule 2 of the Code of Civil Procedure if all issues are framed and one of the issue is chosen by the Court as a preliminary issue, the Court can

hear the said issue before other issues are heard, but the Court shall pronounce the Judgment on all issues as mandated by the provisions laid down therein.

In view of this, the learned trial Court was not supposed to decide the issue of non-joinder of necessary party as a preliminary issue at the advance stage of the proceeding, where the plaintiffs have already examined seven witnesses.”

5 The Court is now informed by the learned Counsel for the Respondent Nos.3(a), 3(b) and 3(d) that after the impugned order was passed, the heirs of the Defendant No.4 are already brought on record in the suit.

6 Considering the facts and circumstances of the case, in my view the Defendant Nos.1 and 2 ought not to have been allowed to take advantage of technicalities which resulted in dismissal of the suit particularly at the stage when the suit was part heard and as many as seven witnesses were already examined. In my opinion, the suit is required to be decided on merits and the Trial Court ought not to have dismissed the suit and the District Court has rightly set aside the order of the Trial Court. The only consequence of the impugned order is that the suit will now be decided on merits. The cause of substantial justice must be preferred when pitted against technical considerations. The Defendant Nos.1 and 2 would obviously have an opportunity to

defend the suit. In these circumstances, I am not inclined to interfere with the impugned order, particularly when the heirs of the Defendant No.4 have already been brought on record in the suit.

7 The Appeal from Order is dismissed. No order as to costs.

8 The Civil Application does not survive and the same is disposed of accordingly.

9 Needless to say that since the suit is of the year 1991, the trial Court shall give necessary priority and dispose of the suit expeditiously as directed by the District Court.

(A.A.Sayed, J.)