

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

WRIT PETITION NO.3372 OF 2017

Shri Ajinath Yashvant Wanve & Ors. ... Petitioners

Vs.

Smt.Avadabai Dattu Toande & Ors. ... Respondents

Mr.B.S. Shinde for Petitioners

**CORAM: Mrs.MRIDULA BHATKAR, J.
DATED: APRIL 5, 2017**

P.C. :

1. This petition is directed against the judgement and order dated 12.8.2016 passed by the learned Civil Judge, Junior Division, Indapur, allowing the application made by respondent No.2 under Order 1 Rule 10 of the Civil Procedure Code. It is the case of the petitioners that Respondent No.1/plaintiff has filed suit i.e., R.C.S. No.6 of 2000 for injunction and possession of the agricultural land against the petitioners. Respondent No.2 was made a formal defendant No.2 in the said suit. However, no summons was served on the respondent No.2 for a long time. Hence, the Court dismissed the suit against respondent No.2 i.e., the original defendant No.2. Thereafter, respondent No.2 filed an

application under Order 1 Rule 10 of the CPC that he be added as a party to the proceedings. The said application was allowed and the plaintiff was directed to add respondent No.2 i.e., the applicant as defendant No.6 in the said suit.

2. The learned Counsel for the petitioner submits that the said order passed by the learned C.J.J.D., Indapur, is illegal and perverse and is to be set aside. He submitted that the suit is filed in the year 2000 and the respondent No.2 filed application for adding him as a party to the suit in the year 2015. Thus, there is an inordinate delay of 15 years in filing this application and it is time barred. The learned Counsel has further submitted that in the plaint itself, the plaintiff / respondent No.2 has averred that defendant No.2 i.e., respondent No.2 is a formal party and the entire relief is sought against the defendants i.e., the petitioners, and not against defendant No.2. Under such circumstances, the order passed by the learned trial Judge is not tenable.

3. Perused the order passed by the learned trial Judge and other papers placed before the Court. The plaintiff is claiming property from her father as the mother of the respondent No.2 is a real sister of the plaintiff. Thus, both are the successors of their

father Eknath. The plaintiff, therefore, at the time of filing of the suit, has made the respondent No.2, son of Narmada, as a party defendant No.2. However, it appears from the record that notice was not served on him and as the plaintiff failed to take steps to serve defendant No.2, the suit was dismissed on 20.8.2002 for want of taking steps. It appears from the order of the learned trial Judge that the respondent No.2 thus, had no knowledge about the filing and pendency of the Suit No.6 of 2000 in the Court. The view taken by the learned Judge that the suit was dismissed due to the fault of the plaintiff and, therefore, the Court has used the powers under Order 9 Rule 5 of the CPC. When the defendant acquired knowledge about filing of the suit, he came forward and filed application that he be impleaded as a party to the suit under Order 1 Rule 10 of CPC. Though the order of dismissal is passed under Order 9 Rule 5, that cannot preclude the defendant to move application under Order 1 Rule 10 of the CPC, as soon as he or she has knowledge of filing of such suit.

4. The second submission of the learned Counsel for the petitioners is that respondent No.2 is a formal party and it is mentioned accordingly in the plaint itself. This submission of the

learned Counsel cannot be appreciated in view of the family tree shown in the plaint. Respondent No.2 is a grandson of Eknath, who is also a predecessor of the plaintiff. Had it been a suit simpliciter for injunction, then, the respondent No.2 would not have been called as a necessary party but as it is a suit for possession, he is a necessary party and the view taken by the learned trial Judge cannot be faulted with.

5. Writ Petition is, therefore, dismissed.

(MRIDULA BHATKAR, J.)