

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

WRIT PETITION NO.7900 OF 2015

Shivanand Ashok Hiremath & Ors.

...Petitioners

vs.

Deepak Ashok Hiremath & Anr.

...Respondents

Mr. Sandesh D. Patil for the Petitioners.

Mr.Vijay Killedar for Respondent Nos.1 and 2.

CORAM : SMT. SADHANA S. JADHAV, J.

DATE : 29th November, 2017

P.C.:

. Heard. Rule. Rule is made returnable forthwith with the consent of the parties.

2. The Petitioners herein happen to be the original Plaintiffs in Regular Civil Suit No.33/2010 filed before the Court of Joint Civil Judge, Junior Division, Jath, District Sangli. The status of the parties is as follows:

The Petitioner No.3 happens to be the second wife of deceased Ashok Shivlingayya Hiremath. Petitioner Nos.1 and 2 are the sons born out of the second marriage. The suit was filed for partition and possession. It is pertinent to note that while drafting the plaint the head of the Family and others were not added as defendants. The Plaintiff had only contended in the plaint that she has knowledge about the co-parceners as well as the fact that the family owns certain property outside the State of Maharashtra. However, for want of better particulars the properties could not be included as the

suit properties. The suit was filed on 15/9/2010. The Defendant Nos.1 and 2 had appeared in the said suit and written statement was filed on 13/3/2013. It was specifically contended by the Defendants that the suit is bad for non joinder of necessary parties as well as the suit properties and, therefore, it was prayed that the suit be dismissed for nonjoinder of necessary parties and necessary properties.

3. Upon receipt of the written statement the Plaintiffs had filed an application on 3/12/2014 under Order 6 Rule 17 of Code of Civil Procedure seeking amendment of the pleadings and adding of necessary parties to the suit. The Defendants had objected the said application on the ground that the suit had proceeded substantially and, therefore the said application was not maintainable. The learned trial Court had rejected the application vide order dated 8/4/2015. Hence, this writ petition.

4. Due to the pendency of this writ petition the suit has not proceeded further. The Plaintiffs have closed their evidence by filing pursis at Exh.39 even before filing of an application under Order 6 Rule 17. The learned court has rejected the said application in view of proviso 2 of Order 6 Rule 17 which reads as follows:

“Amendment of Pleadings.- the Court may at any stage at the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the

party could not have raised the matter before the commencement of trial.”

5. Mr.Patil, learned counsel for the Petitioners has vehemently submitted that the Petitioner Nos.1 and 2 were minor at the time of institution of the suit and the Petitioner No.3 is not aware of the provisions of law and had blind faith in the advocate engaged by her. She had no knowledge as to whether all the properties are to be included or that all co-parceners should be added as party Defendants.

6. The suit is filed against the children of the first wife of her deceased husband and, therefore, according to me the pleadings can be amended at any stage in the interest of justice. Learned counsel for the Petitioners has placed implicit reliance upon Order 1 Rule 10(2) of CPC which reads as under”

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.”

7. The very object of Rule 10, Sub-clause 2 is that no 'lis' should be dismissed on technical grounds but should be decided on merits. Suit for partition cannot be tenable unless all the co-owners are joined as parties. Hence, they would be necessary parties to the suit and the suit should not be dismissed for non-joinder of necessary

parties. Hence, suo motu power is given to the Court 'also' to do substantive justice.

8. It is therefore submitted that although the error was apparent on the face of the record, the Court could have even without application filed by the Plaintiff, taken recourse to Order 1 Rule 10(2) and directed the Plaintiff to add necessary parties in the interest of justice.

9. Mr.Killedar, learned counsel for the Respondents submits that in the eventuality the said prayer is allowed at this stage, defence of Respondents that the suit deserves to be dismissed on account of non joinder of necessary parties would become redundant and hence it is prayed that no such liberty can be granted. However, since this Court is of the opinion that the error of advocate can be corrected by the Court by taking recourse to necessary provisions of law cannot be overlooked and the litigant cannot be allowed to suffer any injustice on account of negligence of the advocate engaged by such litigants. This Court also cannot be oblivious of the fact that the Plaintiffs have no knowledge either of law or the manner in which she should claim her right for partition and possession upon demise of her husband. Learned counsel for the Petitioners has further submitted that it is not the fault of the minors i.e. Petitioner No.1 and 2 that the advocate has not impleaded the parties properly. In view of this fact, this Court is inclined to allow the application partly. As far as the prayer made in the application below Exh.43 for adding properties situated in Karnataka as suit properties, learned counsel for the Petitioners submits that at this stage the Plaintiff would for the time being

relinquish the right to claim over the suit property with liberty to file an application for the same. Order 2 Rule 2 of CPC reads as follows:

“(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs—A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits except with the leave of the court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

10. Therefore in the eventuality said application is filed, the same will have to be decided on the merits of the matter. Leave to file an application would not mean that the said application can be allowed. In view of this, the order dated 8/4/2015 is partly allowed. The Plaintiff shall add necessary parties to the suit mentioned in her application below Exh.43 and make necessary amendment restricting to the parties so added in the plaint. In view of addition of the parties, summons be served upon the parties so impleaded. Hence, the petition is partly allowed. The Petitioners shall add parties to the suit, but not the properties as was being stated in the application below Exh.43.

(SADHANA S. JADHAV, J.)