

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

Civil Application No. 556/2016 in Second Appeal No. 82/2015

Anil s/o Bhaurao Dhage V/s Smt. Sobha wd/o Suresh Dhage and others

Office notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's Orders.

Shri C.A.Joshi, Advocate for appellant.
Shri U.J.Deshpande, Advocate for Respondent No.1.
Shri R.M.Tiwari, Advocate for Respondent No.3.

CORAM : A.S.CHANDURKAR, J.

DATE : July 26, 2017

The present application has been moved under provisions of Order-1 Rule-10 of the Civil Procedure Code, 1908. It is prayed that the mother of the present appellant be added as respondent No.3 to the proceedings. It is stated that the appellate Court has refused the decree of partition only on the ground that though she was a necessary party, she had not been joined in the suit.

The application is not opposed by the learned counsel representing the proposed party. The application is opposed by Shri U.J. Deshpande, learned counsel for respondent no.1 & 2 on the ground that a necessary party could not be added at this stage as the appellate

Court has allowed the appeal due to non-joinder of a necessary party. He placed reliance on the judgment in *Kanakarathanammal V/s S.Loganatha Mudaliar and another AIR 1965 SC 271* in that regard.

In reply, Shri Joshi learned counsel for the applicant has relied on the judgment in the case of *Pandurang Sitaram Pande & Anr. V/s Avinash Ramkrishna Pande & others 2016 (6) ALL MR 273* to urge that even at the appellate stage, a necessary party could be added in a suit for partition.

Considered the respective submissions. The decision of the Hon'ble Supreme Court relied upon by the learned counsel for respondent no.1 and 2 has been considered in the case *Pandurang Sitaram Pande & anr (Supra)*. It has been held that the said decision was distinguishable. If immediately after the appeal was allowed, steps were taken to join necessary parties, such application could be allowed. The relations between the parties is not in dispute. As the suit is for partition and separate possession, the presence of the proposed party is necessary. Hence the application is allowed, in terms of prayer clause (1).

Civil Application disposed of. Amendment be carried out accordingly.

S.A. No. 82/2015

The appeal is taken up for hearing with the consent of learned counsel for the parties. The appeal was admitted on the following substantial questions of law:-

(i) Whether in a suit for partition and separate possession, mother can be said to be a necessary party or party in the suit ?

(ii) Whether the lower Appellate Court was right in dismissing the suit for the first time on the ground of non-joinder of necessary party without providing an opportunity to the plaintiff to add the parties to the suit?

The appellant is the original plaintiff who had filed suit for partition and separate possession. In that suit partition of the property of Anil Bhaurao Dhage was sought. Bhaurao was married with Taibai @ Champabai. The plaintiff was an issue from said marriage. His elder brother Suresh expired on 04/04/2000 hence his widow was impleaded as the defendant no.1. His sister Kanta was defendant No2. The trial Court recorded a finding that the suit property was ancestral property of Bhaurao

and therefore granted 5/12 share to the plaintiff as well as legal heirs of Suresh and 1/12 share to Kanta as well as Tai. However, as Tai was not party to the suit, her share was not mentioned in the decree.

The defendants challenged this judgment on the ground that there was non-joinder of a necessary party and therefore the claim for partition was not maintainable. This ground was accepted by the Appellate Court while allowing the appeal.

Shri Joshi, learned counsel for appellant submitted that the appellate Court was not justified in dismissing the suit on account of non-joinder of necessary parties. An opportunity to join the necessary party ought to have been given instead of dismissing the suit. He placed reliance on the judgment *Pandurang Sitaram Pande & anr. V/s Avinash Ramkrishna Pande & others 2016 (6) ALL MR 273*. He further submitted that now all necessary parties have been added to the proceedings and therefore decree of the trial Court deserves to be restored.

Shri Deshpande, learned counsel for respondent Nos. 1 and 2 opposed the aforesaid submission by

relying upon judgment of the Hon'ble Supreme Court in *Kanakarathanammal V/s S.Loganatha Mudaliar and another*, [AIR 1965 SC 271]. He submitted that the plaintiff was not diligent in adding the necessary party and therefore the appellate Court was justified in dismissing the suit. Considered the rival submissions. In *Pandurang Sitaram Pande (supra)*, a similar issue was raised. It was held that if after the decision of the appellate Court immediate steps are taken to join the necessary party, the same can be allowed. The decision of the Hon'ble Supreme Court relied upon by the learned counsel for the respondents Nos.1 and 2 has been distinguished on the ground that the proceedings therein was suit for recovery of possession based on title and not for partition.

The trial Court after recording a finding that the suit property was ancestral property has held the parties entitled to share in the same. This decree has been set aside only on the ground that one necessary party was not added. As such permission to add the necessary party has now been granted, the judgment of the first appellate Court is therefore liable to be set

aside.

Accordingly, it is held that the lower appellate Court ought to have granted opportunity to the plaintiff to add necessary parties before proceeding to dismiss the suit. The substantial question of law stands answered accordingly.

In view of the aforesaid the judgment of the first appellate Court in R.C.A. No. 65/2007 is quashed and set aside. The judgment of the trial Court dated 23.3.2007 in R.C.S. No. 258/2002 stands restored.

Second appeal is allowed in aforesaid terms. No costs.

JUDGE