

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

Second Appeal No.523 of 2015
(Smt. Nirmala w/o Vasant Rao Thakare v. Narayan Bablaji Pate and others)

Office Notes, Memoranda of Coram,
appearances, Court's orders or directions Court's or Judge's orders
and Registrar's order

Shri B.N. Mohta, Advocate for Appellant.

Coram : R.K. Deshpande, J.
Date : 19th January, 2017

The Trial Court dismissed the suit for partition and separate possession. The lower Appellate Court has partly allowed it, and the plaintiff, who is the daughter of defendant No.1-Narayan, is held entitled to the share in the house property. The claim of the plaintiff for share in the agricultural lands has been rejected by the Courts below, holding that the properties were the self-acquired properties of Narayan, the father, who purchased it along with his brother by the registered sale-deed dated 7-4-1958. The sale-deed is in the names of Narayan and his brother. In view of this, it was necessary for the plaintiff to have come forward with a case that this property was purchased out of the nucleus of the joint family property. This was not the pleading in the plaint.

During the pendency of the appeal, the plaintiff moved an application for amendment of plaint along with another

application under Order XLI, Rule 27 of the Code of Civil Procedure for permission to adduce the additional evidence. Shri Mohta, the learned counsel appearing for the appellant-plaintiff, has invited my attention to the order dated 1-2-2014 passed by the Trial Court rejecting the application for amendment at Exhibit 15, and also to the order dated 17-12-2013 passed by the Trial Court rejecting the application at Exhibit 16 under Order XLI, Rule 27 of the Code of Civil Procedure. He submits that the application for amendment was rejected on the ground that the suit itself is not maintainable, and, therefore, the amendment does not hold any substance. He further submits that the application under Order XLI, Rule 27 of the Code of Civil Procedure should have been decided at the time of final hearing of the appeal itself.

Unless the application for amendment at Exhibit 15 along with the application at Exhibit 16 under Order XLI, Rule 27 of the Code of Civil Procedure are allowed, the plaintiff cannot succeed in the second appeal. The reasoning given by the lower Appellate Court for rejecting the application for amendment that the suit itself is not maintainable, may not be correct. The plaintiff is the daughter; the defendant No.1 is the father, who is alive, and hence by way of subsequent amendment introduced in the year 2005 to Section 6 of the Hindu Succession Act, 1956, the suit would be maintainable. However, that by itself is not

enough to allow the application for amendment. The appellant-plaintiff was required to establish two things – one is due diligence in view of the proviso to Order VI, Rule 17 of the Code of Civil Procedure; and another is that the amendment was necessary for deciding the real controversy involved in the matter.

I have gone through the copy of the application for amendment at Exhibit 15, which was moved at the appellate stage when the plaintiff had already suffered a dismissal of suit by the Trial Court. The reason putforth is that the plaintiff is illiterate lady and is ignorant about law, legal procedure and provisions of court rules and her counsel did not ask about the real source of suit property to the defendant No.1. Except this, there is no other reason putforth in the application for amendment. The reason cannot be accepted, because the plaintiff, who was vigilant about her right in the ancestral property on the basis of the amended provision of Section 6 of the Hindu Succession Act cannot be termed as “a lady ignorant of the provisions of law”. Any negligence on the part of a lawyer cannot constitute a cause for due diligence. Hence, the order rejecting the application for amendment cannot be interfered with.

So far as the application under Order XLI, Rule 27 of the

Code of Civil Procedure is concerned, obviously the decision of the Apex Court in the case of *Union of India v. Ibrahim Uddin and another*, reported in (2012) 8 SCC 148, deals with the provision of Order XLI, Rule 27(1)(b) of the Code of Civil Procedure, which relates to the evidence required by the Court. Obviously, this was not the case in the present matter. Hence, the rejection of application also cannot be faulted with.

No substantial question of law arises for consideration. The second appeal is dismissed.

Judge.

Lanjewar