

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER (STAMP) NO.8556 OF 2016
ALONG WITH
CIVIL APPLICATION NO.1034 OF 2016

Baburao Sitaram Zende and Anr.	 Appellants-Applicants
V/s.	
Vimal Prakash Zende	 Respondent

Mr. Sachin V. Khandagale for the Appellants-Applicants.

Mr. Rahul S. Kadam for the Respondent.

CORAM : DR. SHALINI PHANSALKAR-JOSHI, J.

DATE : 10TH SEPTEMBER, 2018.

P.C. :

1. Heard Mr. Khandagale, learned counsel for the Appellants-Applicants, and Mr. Kadam, learned counsel for the Respondent.

2. This Appeal is directed against the 'Judgment and Order' dated 18th January 2016 passed by the Ad-Hoc District Judge-3, Pune, in Civil Appeal No.283 of 2010, thereby setting aside the 'Judgment and Decree' passed by the Court of Civil Judge, Junior Division, Saswad, in Regular Civil Suit No.34 of 2008, dated 26th February 2010, and remanding the Suit back to the Trial Court for giving opportunity to the Respondent-Plaintiff to amend the Suit for adding necessary parties.

3. The facts of the Appeal are to the effect that, Respondent herein is a widow, who has filed the Suit for partition and separate possession of her share in the agricultural lands and house properties, which, according to her, are the ancestral joint family properties. It was also her case that, the joint family properties have already been partitioned between her father-in-law and his brothers and some of the properties are purchased by her husband.

4. Both the Trial Court and the first Appellate Court held that, the Respondent has failed to prove that the ancestral joint family properties have already been partitioned between her father-in-law and his brothers. It was also held that, the Respondent has failed to prove that her husband has paid amount for purchase of some of the suit properties. Both the Trial Court and the first Appellate Court, however, dismissed her Suit for partition, mainly on the count of non-joinder of necessary parties.

5. It was observed that, the Respondent has admitted in her cross-examination the whole family tree of “Khandu Zende”, thereby proving that Khandu has two sons, namely, Sitaram and Bapu. Sitaram has two sons, namely, Appa and Baburao. Bapu has two sons, namely, Balasaheb and Shrirang, and two daughters, namely, Bayadabai and Sonabai. Appa has two sons, namely, Dattatraya and Somnath, and two daughters by name Shantabai and Kantabai. Prakash is the son of Baburao. It was

found that, the Plaintiff is the widow of Prakash and Defendant No.1- Baburao is the father of Prakash.

6. In view thereof, it was found that, all the legal heirs of Appa, Bapu and Baburao are not joined in the Suit and as it was held that, no previous partition is proved between Sitaram and Bapu and between Appa and Baburao, the joinder of the legal heirs of Appa and legal heirs of Baburao was essential. The Trial Court has, therefore, held that, the Suit cannot be tenable for non-joinder of necessary parties and hence, dismissed it on that count only. The first Appellate Court has, however, held that, the Plaintiff, being the widow, in order to give her opportunity to make the other co-sharers as parties to the Suit and to decide the Suit on merits, it would be proper to remand the Suit back to the Trial Court. Accordingly, the first Appellate Court has remanded the Suit to the Trial Court.

7. The grievance of learned counsel for the Appellants is that, remand of the Suit is as good as having the *denovo* trial and, that too, when major issues are answered against the Respondent-Plaintiff and in favour of the Appellants. It is submitted that, some of those issues have absolutely no connection with the addition of the parties.

8. It is urged that, some properties are purchased by the Appellants themselves from their own income and a finding to that issue is recorded

accordingly by both the Trial Court and the first Appellate Court, in affirmative and if that finding is set aside, along with the findings to some other issues, it will cause prejudice to the rights of the Appellants and, therefore, it was not proper on the part of the first Appellate Court to remand the Suit after recording findings to the issues.

9. However, in my considered opinion, if for non-joinder of the necessary parties, the Suit was not tenable, then the only course open to the first Appellate Court was to remand the Suit to give an opportunity to the Respondent-Plaintiff to amend the plaint and to add those parties, so as to achieve the substantive cause of justice. Otherwise also, if for non-joinder of necessary parties, Suit is dismissed, then Respondent-Plaintiff is not precluded from filing any fresh Suit for the partition. Therefore, instead of having a fresh litigation and in order to avoid multiplicity of proceedings, the first Appellate Court had thought it fit to remand the Suit for joinder of necessary parties and to that extent, giving an opportunity to the Respondent-Plaintiff to correct the error crept in the Suit. Therefore, no fault can be found in the impugned order passed by the first Appellate Court of remanding the Suit, instead of dismissing the same on any technical ground of non-joinder of necessary parties.

10. As regards the grievance of learned counsel for the Appellants that, the findings to some of the issues are recorded by both the Trial

Court and the first Appellate Court in their favour, needless to state that, the evidence, on the basis of which these findings are recorded by the Trial Court and the first Appellate Court, is not going to be washed away, merely because the Suit is remanded to the Trial Court for fresh decision, after adding the necessary parties and after considering their contentions. Remand will give the opportunity to the Respondent-Plaintiff to lead the additional evidence. Similarly, the Appellants are also having the opportunity to lead the additional evidence and in the light of the contentions raised by both the parties, including the parties to be added, the Suit will be decided on its own merits, but also taking into consideration the evidence, which is already on record. Therefore, that grievance can no more remain.

11. In view thereof, the Appeal stands dismissed.

12. Both the parties are directed to appear before the Trial Court on 17th September 2018.

13. All the contentions of both the parties are expressly left open.

14. In view of the above, Civil Application No.1034 of 2016 pending in the Appeal does not survive and the same stands disposed off as infructuous.

[DR. SHALINI PHANSALKAR-JOSHI, J.]