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

APPEAL FROM ORDER NO.65 OF 2017
WITH
CIVIL APPLICATION NO.15039 OF 2017

Shamsunnisabegum w/o Abdul Rauf
and others ... APPELLANTS

VERSUS

Abdul Wali s/o Usman Naik ... RESPONDENT

.....
Shri H.I. Pathan, Advocate for appellants
Shri P.P. Mandlik, Advocate for respondent
.....

WITH

WRIT PETITION NO.3875 OF 2018

Shamsunnisabegum w/o Abdul Rauf
and others ... PETITIONERS

VERSUS

Abdul Wali s/o Usman Naik ... RESPONDENT

.....
Shri H.I. Pathan, Advocate for petitioners
Shri P.P. Mandlik, Advocate for respondent
.....

CORAM: R.G. AVACHAT, J.

DATED : 3rd OCTOBER, 2019.

ORDER:

. Heard learned counsel for the parties. The challenge in the Appeal from Order No.65/2017 is to the judgment and order dated 19.11.2017, passed by the Court of District Judge-1, Hingoli below Exh.27 in Regular Civil Appeal, being Appeal No.60/2011. By the impugned judgment and order, the judgment and decree passed in Regular Civil Suit No.8/2010 has been set aside. The application Exh.27 was allowed. The parties were directed to appear before the trial Court on 15.12.2017. The plaintiff was directed to carry out necessary amendment in the plaint.

2. By filing Writ Petition No.3875/2018, the order passed by learned District Judge-1, Hingoli below Exh.27 in Regular Civil Appeal No.60/2011 has been separately challenged.

3. The respondent/ plaintiff filed a suit for partition and separate possession. The relief of cancellation of sale deed was also asked for as against the defendant No.2. It was the contention of the respondent/ plaintiff that the properties in the suit were the ancestral properties.

4. The petitioner and defendants No.1 and 2 appeared in the suit. It was their case that, the properties belonging to late Osman Naik were partitioned long back. Be that as it may, the suit was also assailed on the ground of non-joinder of necessary parties to the suit. The plaintiff failed to add sisters of deceased Abdul Rauf as parties to the suit. The suit was dismissed on 5.10.2011 on the ground of non-joinder of necessary parties and the plaintiff's failure to prove that the sale deed dated 22.6.2018, executed by deceased Abdul Rauf Naik in favour of defendant No.2 is illegal, null and void.

5. The plaintiff, therefore, preferred appeal being Regular Civil Appeal No.6/2011. The plaintiff filed application (Exh.27) to bring on record legal representatives of the deceased sister of deceased Abdul Rauf. The appellate Court allowed the application and remanded the suit to the trial Court. The said order is under challenge before this Court.

6. Shri H.I. Pathan, learned counsel for the petitioners/defendants would submit that, the suit was dismissed for non-joinder of necessary parties. The said defect now cannot be cured. He would also submit that the deceased Abdul Rauf did not leave behind any property on his death.

7. In a suit for partition, all persons who have right, title and

interest in the subject matter of the suit need to be before the Court. According to the appellants/ defendants, the sisters of deceased Abdul Rauf, were necessary parties to the suit. The suit was dismissed on the ground of want of necessary parties before the Court. The respondent/ plaintiff, therefore, moved application Exh.27 before the appellate Court. The appellate Court has rightly allowed the application.

8. Legal position is very much clear that, at the first instance, the suit cannot be dismissed for non-joinder of necessary parties. Plaintiff, at the first instance, needs to be given an opportunity to implead in the suit, persons who are necessary parties thereto. Appeal is nothing but continuation of a suit. True, the plaintiff moved application very late, that too in the first appeal. It needs no mention that a decree passed in a suit binds parties thereto and persons claiming thereunder. Had the appeal been allowed to be decided without there being necessary parties on record, the decision therein would not have been binding on the legal representatives of the deceased sisters of deceased Abdul Rauf. Should those legal representatives bring a separate suit, the parties would have been back to square one. Be that as it may, the appellate Court has rightly allowed the application and remanded the matter to the trial Court.

9. Here the parties came around to make a few submissions so as to avoid delay in hearing of the suit before the trial Court. It is also informed that, some of the defendants have sold the suit property to stranger. The purchaser may be required to be brought on record. The plaintiff is at liberty to do the same.

10. On impleadment of the legal representatives of the deceased sisters of deceased Abdul Rauf, they would be at liberty to file their written statement. If the written statement is filed by them, then the parties to the suit would be given an opportunity only to lead evidence to meet the case that may be pleaded by the legal representatives to be brought on record.

11. On impleadment of the third party purchasers, they may propose to file their written statement. The purchaser would stand in the shoes of their vendors. In such a position, the trial Court would be guided by known legal principles and deal with the situation.

12. The Appeal from Order is allowed in the aforementioned terms.

13. The trial Court is expected to decide the suit as expeditiously as possible.

14. In view of disposal of the Appeal from Order, Civil Application No.15039/2017 stands disposed of.

15. In view of disposal of the Appeal from Order, the Writ Petition also stands disposed of.

(R.G. AVACHAT)
JUDGE

fmp/-