

(2014) 01 GUJ CK 0116
In the Gujarat High Court

Case No : Special Civil Application No. 12320 of 2009

Aisabhai Haji Noormamad Deceased through Heirs and Others	APPELLANT
Vs	
Abdul Kadar Haji Noormamad and Others	RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Limitation Act, 1963 — Section 21

Citation : (2014) 01 GUJ CK 0116

Hon'ble Judges : R.D. Kothari, J

Bench : Single Bench

Advocate : Sureshmshah and Mr. Mehul S. Shah, for Petitioners No. 1-6, for the Appellant;

Judgement

R.D. Kothari, J.—The petitioners are challenging the order dated 30.09.2009 passed by learned trial Court in Special Civil Suit No. 77 of 2005 at Exh. 116, whereby, learned trial court was pleased to reject the application of petitioners-plaintiffs to join the daughter of deceased as a party-defendant in the said suit. It appears that petitioners had filed suit for "administration and separation of share from the properties...". The respondents-defendants had filed a written statement at Exh. 44 and have raised defence of non-joinder of necessary party i.e. one sister as a party-defendant in the suit. It further appears that trial was proceeded and during the course of trial, petitioners-plaintiffs have filed present petition to join one of the sister as a party-defendant in the said suit.

2. Learned trial Court was pleased to reject the application after hearing learned advocates for the parties and considering the case law relied on by the learned advocates for the parties, learned trial Court has rejected the application of the petitioners-plaintiffs mainly on the ground that though the defendants had raised an objection as non-joinder of necessary party in its reply itself, the petitioners-plaintiffs have filed the application after more than three years. Therefore, it amounts to waiver on the part of the petitioners-plaintiffs. It has also held that after framing the issue and recording of evidence, filing of application by the

petitioners-plaintiffs is bad.

3. Heard learned advocate Shri Mehul Shah for the petitioners. The respondents, though served, remained absent.

4. Learned advocate Shri Shah for the petitioners points out that along with other case law, learned trial Court has considered and relied on the decision in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, It was submitted that careful reading of the said decision would show that learned trial Court has committed a serious error in rejecting the application of the plaintiffs by relying on the said decision. Learned trial Court has referred para 14 of the said decision. The Supreme Court has held in para 14 of the above decision which reads as under:

(14) We do not think there is any justification for allowing the appellant to amend her plaint by adding her brothers at this late stage. We have already noticed that the plea of non-joinder had been expressly taken by respondents 1 and 2 in the trial Court and a clear and specific issue had been framed in respect of this contention. While the suit was being tried, the appellant might have applied to the trial Court to add her brothers, but no such application was made. Even after the suit was dismissed by the trial Court on this ground it does not appear that the appellant moved the High Court and prayed that she should be allowed to join her brothers even at the appellate stage, and so, the High Court had no occasion to consider the said point. The fact that the High Court came to the contrary conclusion on the question of title does not matter, because if the appellant wanted to cure the infirmity in her plaint, she should have presented an application in that behalf at the hearing of the appeal itself. In fact, no such application was made even to this Court until the appeal was allowed to stand over after it was heard. Under the circumstances, we do not think it would be possible for us to entertain the said application. In the result, the application for amendment is rejected.

5. It would appear in that case before the Supreme Court that the party had applied for joining appellant's brothers as a party after the appeal was heard by the Supreme Court. Filing of the application at that stage did not find favour with the Court. However, the Court did observe that the party had failed to join the brothers as a party to the proceedings when the suit was dismissed on the said ground. The party had not exercised an option available to him.

6. In the present case, the suit is pending before learned trial Court. If that being so, learned trial Court ought to have allowed the application. Rejection of application of the petitioners-plaintiffs was on the ground that it was delayed one. This ground does not appear to be just, legal and proper. Therefore, interference of this Court with the order dated 30.09.2009 of learned trial Court passed in Special Civil Suit No. 77 of 2005 is called for. The order dated 30.09.2009 of learned trial Court passed in Special Civil Suit No. 77 of 2005 is quashed and set aside.

7. It may be stated at once that merely allowing of the application does not in any way affect the defendant's right to raise the plea of non-maintainability of the suit on account of non-joining of necessary party and to be precise, joining necessary party after expiry of period of limitation, if such plea is available. In other words, learned trial Court may frame the issues on this line and maintainability of the suit alongwith other issues may be decided. At this stage, learned advocate Shri Shah for the petitioners has drawn attention of this Court to Section 21 of the Limitation Act, particularly, proviso to Section 21 of the Limitation Act. Relying on the same, it was urged that in the circumstances of the present case, joining of the party should be considered from the date of institution of the suit. In absence of record i.e. complete pleadings etc. before this Court, it is not possible to accept this plea in this petition. It would be open for the petitioners to invoke proviso to Section 21 of the Limitation Act before learned trial Court in case of necessity, and, accordingly, learned trial Court would adjudicate the said plea in accordance with law. This Court has not expressed any opinion on the applicability of proviso to Section 21 of the Limitation Act in this petition. The question of maintainability of the suit as also the question that newly added party to the proceedings be considered as added to the proceedings from the date of institution of the suit or not are kept open. This petition is allowed to the above extent. Rule is made absolute to the aforesaid extent with no order as to costs.