

(1998) 12 GAU CK 0032
In the Gauhati High Court
Case No : Civil Revision No. 522 of 1994

Rajiba Khatoon and Others

APPELLANT

Vs

Rafiqul Hussain Bhuyan

RESPONDENT

Date of Decision : 01-12-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2)

Citation : (1998) 4 GLT 464

Hon'ble Judges : J.N. Sharma, J

Bench : Single Bench

Advocate : C. Baruah and P.J. Saikia, for the Appellant; A.C. Sarmah, for the Respondent

Judgement

J.N. Sarma, J.—This revision application has been filed against Ifae order dated 22.8.94 passed by the Sadar Munsiff No. 1, Dibrugarh, now Civil Judge (Junior Division) No. 1 in title suit No. 48/91.

2. A suit was filled the wife and sons of one Mofizul Hussian Bhuyan against his own brother Rafiqul Hussian Bhuyan as the defendent. Some other persons were made parties, who were the pattadars of the land. The Suit was for declaration, confirmation of possession injection and partition The prayer made in fiie suit are putition of property described in schedule D, and partition of the property described in Schedule-B and also partition of property described in Schedule-A.

3. Schedule-A of the property belonged to one Late Mokbul Hussian Bhuyan and the Schedule-B properties are properties sold by the Defendant No. 1 to different persons. Schedule-C are the properties in possession of parties, diat is, defendent No. 1 and the Plaintiff and Schedule-D are the properties in joint possession by the Defendant No. 1 and tibe Plaintiff and the are claiming same share. The only land which is claimed to be in possession and fell in share of Defendant No. 1 is only 4 Bigjhas-3 Kathas after the sale of 7 Bighas-3 Kathas-4 Lechas made by him. The written statement was filed by the Defendant No. 1 and there the plea of non-joinder of necessary parties was not taken. But during

die trial of the suit it was found that these two brothers that is, Mafizul Hussian Bhuyan and Rafiqid Hussian Bhuyan had five sisters and two sisters came on their own deposed and claimed that die sisters had also shares in the land. Therp can not be any dispute that a sister diall have a right to property left by their father. The learned Munsiff on consideration of the materials on record held that in a partition suit all the co-sharers must be In out before the Court. But it appeared to the Court from the evidence and other materials that five daughters of late Maqbul Hiissian were not in leaded as party in the suit, and it was further found that impleament of five sisters are necessary to enable the court to effectually and completely adjudicate and settle all the questions involved in suit. Therefore in exercise of the power Under Order 1, Rule 10(2) of the Code of Civil Procedure, is learned Munsiff ordered to implead all the sisters as party to the suit and the Plaintiffs were directed to take necessary steps with regard to that. Hence this revision application.

4. I have heard Shri C. Barua, learned Advocate for the Plaintiff/Petitioner and Shri A.C. Sarma, learned advocate for the Opposite-party. Shri Barua, learned advocate for the Petitioner placed reliance on the following decisions regarding the principle of what is necessary parties.

5. (i) Razia Begum Vs. Sahebzadi Anwar Begum and Others, where in the Superme Court in paragraph-13 pointed out that in a suit relating to property in order that a person may be added as a party he should have a direct interest as distinguished from a commercial interest in the subject matter of the litigation. That is a minority judgment. But we are not concerned with the minority judgment. That case was subsequentiy relied on in Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others, where the same principle was retierated in a paragraph-14, and that paragraph-14 in its entirity is quoted below to appreciate tiie contention of the parties.

The object of Rule 10(2) of Order 1 is not to prevent multiplicity of actions though it may incidentally hffve that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The persons to be joined must be one whose presence is necessary as a party. What makes a persons a necessary party is not merely that he has relevant evidence to give on some of the questions involved, that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has though to relevant arguments to advance the only reason which makes it necessary to make a person a party to an actioii is so that he should be bound by the result of the action and the question to be settled, therefore must be a question in the action which can not be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. A clear distinction has been drawn suit relating to property and those in which the subject matter of lititgation is a declaration as regards status or legal character, in the former category the rule of present 2 rest as distinguished from the

commercial interest is required to be shown before a person may be added as a party. It is therefore, necessary that the person must be, directly or legally interests in the action in the answer, i.e. he can say that the litigation may lead to a result. Which will effect him legally that is, by curtailing his legal rights. The rule does not contemplate joining as a Defendant a persons whose only object is to prosecute his own cause of action.

6. Regarding who is a necessary party Shri Barua relies of the following two decisions: The General Manager, South Central Railway, Secunderabad and Another Vs. A.V.R. Siddhantti and Others, . Respondents that was a writ application and the Supreme Court in paragraph-15 pointed out as follows: "In such proceeding the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court." The next case is AIR 1990 SC. 185 . That also was a decision on the writ side and there the Supreme Court pointed out in paragraph-17 "that if the relief is claimed against a particular person and if the matter can be properly adjudicated in the absence of that person such a person is not a necessary party." The question in this case is the sisters have definite share in the suit land, they must be made parties inasmuch as in their absence no effective decree can be passed, no share can be determined and as such they were held to be necessary party. So the exercise of power of Order 1, Rule 10(2) of the Code of Civil Procedure. was a proper exercise of jurisdiction. In support of the contention Sri Barua places reliance on the decision reported in Mohammad Subhan Vs. Dr. Misbahuddin Ahmad and Others, Wherein the single Judge of Rajasthan High Court pointed out that in a suit by a Mohamedan heir for partition of his share is maintainable even without impleading other heirs who are not in possession. The reason given is that the shares of Mohamedan heirs are definite and specified. This case/came up for consideration before the Gujrat High Court in Ali Amad represented by L. Rs. Vs. Sindhi Ebrahim Kasam and Others, Wherein the Gujrat High Court did not accept this position and pointed out that in a partition suit all persons entitled to share in property by inheritance are necessary parties. Non-impleading any necessary party renders suit liable to be dismissed. It was further pointed out that the same principles are applicable to Muslims also. Reliance was placed in the case by Gujrat High Court in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, . In the case before the Supreme Court there the mother's share the subject matter of the litigation. The Supreme Court stated that without impleading the brothers in the suit, the suit is liable to be dismissed. Under the Mohamedan Law, there is not joint tenancy and the tenancies are only tenancy common. So the principle which has been enunciated by the Apex Court in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, shall apply to the Mohamedans in a suit for partition. It is not only applicable to Hindu Coparcenary but Muslims also. Under the Mohammedan Law the heirs of a deceased Mohamedan succeeds to a definite part of share. There is nothing to preclude one of the heirs to partition some of the items of the property but only by impleading the shares, with respect I agree with the decision of the Gujrat

High Court and I do not accept the law laid down by Rajasthan high Court. Accordingly, there is no merit in this Revision plication and the same is dismissed. The stay order, if any, passed earlier shall stand vacated. The record shall be sent down immediately to the court below and the parties appear before the Civil Judges(Junior Division), Dibrugarh on 19th of January, 1999.