

The Great Books on Law of Banking

2. Tannan's Banking Law and Practice in India.

3. The Banking Law in Theory and Practice by *S.N. Gupta*. and

4. Eenadu News Paper District Supplement Paper pages of 5.5.2007 and 19.12.2009.

IS THERE ANY LEGAL OBLIGATION ON THE PART OF DEFENDANT AS PER PROVISIO OF ORDER 1 RULE 9 OF C.P.C. TO TAKE THE PLEA THAT THE SUIT MUST FAIL FOR NON-JOINDER OF A NAMED NECESSARY PARTY?

By

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1. This question usually arises in the case of partition suits. It is an admitted legal Principle that every one must be deemed to have knowledge of law and even if a person without knowledge of law violates it, he must suffer for it and is not exempted from its application.

2. As per Section 6 of Hindu Succession Act, as amended by Act 39/2005, which came into force on 9.9.2005, daughters whether married or not are also equally entitled to share in co-parcenary property, along with sons.

3. Suppose one son files a suit for partition of co-parcenary property against other male co-parcenars only, leaving, female co-parcenars who are necessary parties to the suit. It cannot be expected that the plaintiff does not know the existence of sisters.

4. Suppose, the plaintiff does not mention about the existence or non-existence of the sisters and also does not mention about their disentitlement to share in co-parcenary property.

5. Then, is there any legal obligation on the male co-parcenar who figured as a defendant in the suit, to make mention in his pleadings, that the suit is not maintainable

as the sisters who are legally entitled to shares are necessary parties to the suit and that suit must fail, because of that infirmity in the suit.

6. Section 3 of Limitation Act says that suit, or other proceedings filed after prescribed time shall be dismissed, although limitation has not been set up as defence.

Suppose, there is no assertion in plaint that suit is in time or is not barred by time. Then there is no obligation or necessity for defendant to assert that suit is barred by time in his pleadings.

But, the suit must be dismissed, even if defendant has not taken plea of limitation in his written statement, if the said fact is brought to the notice of the Court at any stage of the suit, even after closure of evidence, before judgment.

7. Naturally, when there is no averment about sisters and their entitlement to share either in the plaint or in the written statement, the Court will not frame issue. As per Order 14 Rule 1 of C.P.C, issues arise when a material proposition of fact or law is affirmed by one party and denied by the other. So there will be no issue as to whether suit is maintainable or not for not adding

necessary party as defendants, if there is no affirmation and denial.

8. Suppose, existence of sisters of plaintiff is admitted in pleadings by plaintiff or proved in evidence. Then, suppose the entire evidence is closed and the suit is posted for arguments.

At this stage, can a co-parcenar defendant or alienee defendant file an application or not for framing additional issue "Whether suit is liable to be dismissed under Proviso to Order 1 Rule 9 of C.P.C for not adding necessary parties to the suit" Under Order 14 Rule 5 of C.P.C. and pray the Hon'ble Court to give a finding on that issue.

I am of opinion that the defendant is entitled to do so.

9. It may be argued that as the defendant has not raised the said objection, in his pleadings, he is not entitled to raise it in arguments. I am of opinion that this reasoning is not correct.

(A) Order 8 Rule 1 of C.P.C. provides "Every allegation of fact in the plaint if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted".

If there is no averment in plaint about sisters, naturally the defendant also does not refer to sisters.

That fact alone does not disentitle the defendant to pray for the said additional issue and decision on it.

(B) There is another angle through which this aspect may be viewed.

Plaintiff and defendant are opposite parties and each wants to see the defect of the other.

Suppose, even if the plaint is silent about sisters, the defendant in his pleadings raises

the question of non-joinder of sisters. Then the plaintiff will have an Opportunity, to fill up the lacuna and correct his mistake and for doing so, he may file a petition under Order 1 Rule 10 of C.P.C. So the pleading in written statement makes the plaintiff to fill up legal lacuna and the defendant will lose an Opportunity of defeating the plaintiff on the ground of non-joinder of necessary parties. Then, is there any legal obligation on the part of the defendant to show the lacuna of plaintiff in the written statement? I am of opinion, there is no such obligation on the defendant. The additional issue sought to be framed is purely a legal issue and the Court has to frame it and decide it.

10. Order 1 Rule 9 excluding proviso relating to necessary parties and Order 1 Rule 13 relates to only-joinder or mis-joinder of only proper parties.

This is very clear from the Full Bench Decision of Assam High Court reported in AIR 1953 Ass. 193 where, it is laid down "Rule 13 of Order 1 has no application to a case where a necessary party to the suit is not before the Court and no effective decree can be made in the absence of such a party. The suit in such cases is inherently defective and the point can be taken at any stage provided no new facts have to be alleged or proved.

The said decision of Assam High Court was approved by Calcutta High Court in a decision reported in AIR 1969 Cal. 360 (Para 6).

11. Our High Court of A.P. also in a decision reported in 2013 (5) ALT 13 held that the defendant need not insist the plaintiff to bring any person as a co-defendant and the defendant may take advantage of the non-impleading of necessary party for dismissal of the suit and that trial Court also is entitled frame an issue regarding the non-joinder of necessary parties as a preliminary issue and decide the same.