

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 715 OF 2014

SHRI. SURYAKANT SADA KUTTIKAR AND
ANR.

... Petitioners

Versus

SHRI. PANDURANG SADA KUTTIKAR AND
7 ORS.

... Respondents

Mr. Sarvesh Dinker Kamat Malyekar, Advocate for the Petitioners.

Mr. Anthony D'Silva, Advocate for the Respondent No. 8.

None for the other Respondents.

CORAM:- C. V. BHADANG, J.

DATE:- 29th SEPTEMBER, 2015.

ORAL ORDER:

By this petition under Article 227 of Constitution of India, the petitioners who are the original plaintiffs are taking exception to the order dated 29.10.2014 passed by the learned Civil Judge Junior Division, Panaji in Regular Civil Suit No. 109/2010/D. By the impugned order, the application (Exhibit-18) filed by the respondent no. 8 herein, who is the mother of the petitioner no. 1, for impleadment as defendant has been allowed.

2. The brief facts are that the petitioners and some of the respondents except respondent no. 8 have purchased the subject matter of dispute from the Bhatkar under registered Sale Deed dated 11.03.2005. According to the petitioner no. 1, as he was not allowed to occupy the house (as the petitioner alongwith his wife) is staying at Bicholim, while the house in dispute is situated at Ribandar, a suit came to be filed against the respondent nos. 1 to 7 for declaration and partition, which is pending before the learned Civil Judge Junior Division, Panaji. In that suit, the respondent no. 8 filed an application (Exhibit-18), purportedly under Order 1 Rule 10 of the Civil Procedure Code (C.P.C., for short), for impleadment herein as party defendant. It was contended that the House No. 128/P-58 and/or P-58 situated at Sao Pedro, Tiswadi, Goa which is situated in the property under Survey No. 33/11 of Village Chimbhel, Tiswadi Taluka was belonging to Mr. Juze Filip Concessao De Souza, who was the original Bhatkar. It was contended that the house was constructed by late Sada Betu Kuttikar (husband of respondent no. 8), with permission of the Bhatkar, more than 50 years ago. It was the material contention that the respondent no. 8/intervener alongwith her late husband were in physical possession and enjoyment of the house without interruption. It

was contended that the intervener is staying in the suit house as Mundkar for more than 50 years with fixed habitation. It was next contended that sometime in January, 2013, the respondent no. 1 informed respondent no. 8/intervener about the suit being filed by the plaintiffs against respondent nos. 1 to 7 for partition of the house. It was thereafter that the intervener learnt of the Sale Deed of 11.03.2005, which according to her was executed to her exclusion. It was contended that she was a necessary party to the suit as her interest is likely to be adversely affected.

3. The application was opposed on behalf of the petitioners on the ground that issue of mundkarship does not arise in the suit and respondent no. 8 cannot seek her addition/impleadment.

4. The learned trial Court on the basis of the Sale Deed dated 11.03.2005 came to the conclusion that *prima facie* the house is a mundkarial house and it was also found that respondent no. 8/intervener was a necessary party. In that view of the matter, the application came to be allowed. Feeling aggrieved, the petitioners are before this Court.

5. I have heard Mr. Malyekar, the learned Counsel for the petitioners and Mr. D'Silva, the learned Counsel appearing for the respondent no. 8 (contesting respondent). There is no appearance on behalf of the rest of the respondents, though served.

6. It is submitted on behalf of the petitioners that the petitioners being *dominus litis*, can decide who should be the party to the suit. It is submitted that the application could not have been entertained under Order 1 Rule 10 of C.P.C. as the respondent no. 8 was neither a necessary nor a proper party. Insofar as recitals in the Sale Deed about the house being a mundkarial house is concerned, it is submitted that it was on account of an error and inadvertence that the said recital was inserted. It is submitted that the respondents nos. 1 to 7 with the connivance of the respondent no. 8, are trying to prolong the suit and the application for impleadment is an attempt threat. It is submitted that the finding recorded by the trial Court that respondent no. 8 would be a necessary party cannot be sustained.

7. On the contrary, it is submitted by Mr. D'Silva, the learned Counsel for the respondent no. 8 that not only in the Sale

Deed, but in the plaint para 4 also, the petitioners have averred that the suit house was a mundkarial house. It is submitted that the trial Court has rightly considered the recitals in the Sale Deed in allowing the application and held that respondent no. 8 was a necessary party. The learned Counsel has placed reliance on a judgment dated 10.12.2014 of the Hon'ble Supreme Court in the case of **Baluram Vs. P. Chellathangam and others** (Civil Appeal Nos. 10940-10941 of 2014), in order to submit that there is wide discretion vesting in the Court under Order 1 Rule 10 of C.P.C., in order to add or strike off a party at any stage. It is submitted that the order does not call for interference.

8. I have considered the rival circumstances and the submissions made.

9. At the outset, it needs to be mentioned that *prima facie* at this stage, the submission that the recital about the house being a mundkarial house, having been erroneously incorporated in the Sale Deed cannot be accepted. This is also for the reason that in the plaint para 4 the plaintiffs have stated thus:

"4. The plaintiffs state that in the said property there existed a mundkarial house bearing House No. 128 admeasuring about 100 sq. mts. belonging to the plaintiffs and defendants and the said Cristiano D'Souza filed a Civil Suit for permanent and mandatory injunction against the plaintiffs and defendants in the Court of the Civil Judge Junior Division of Panaji under Regular Civil Suit No. 35/2004/C."

10. The learned trial Court after considering the recitals in the Sale Deed has found and to my mind rightly so that the respondent no. 8 is a necessary party to the suit.

11. The Hon'ble Apex Court in the case of **Baluram** (supra) has considered its earlier decision in the case of **Mumbai International Airport (P) Ltd. Vs. Regency Convention Centre and Hotels (P) Ltd.**, reported in **2010 (7) SCC 417**, in which it is held thus:

"13. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being

dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of the Code of Civil Procedure ("the Code", for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"10. (2) Court may strike out or add parties.-The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

14. *The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the questions involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.*

15. *A "necessary party" is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the court. If a "necessary party" is not impleaded, the suit itself is liable to be dismissed. A "proper party" is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in dispute in the suit, though he need not be a person in favour*

of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

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19. *Referring to suits for specific performance, this Court in Kasturi [(2005) 6 SCC 733], held that the following persons are to be considered as necessary parties: (i) the parties to the contract which is sought to be enforced or their legal representatives; (ii) a transferee of the property which is the subject-matter of the contract. This Court also explained that a person who has a direct interest in the subject-matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party on his application under Order 1 Rule 10 CPC. This Court concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he*

had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant vendor will not be a necessary party.

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22. *Let us consider the scope and ambit of Order 1 Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo motu or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice."*

12. It is thus clear that the normal rule is that the plaintiff being *dominus litis* may choose the persons against whom he wishes to litigate and he may not be compelled to sue a person against whom he may not seek any relief. This general rule is subject to the provisions of Order 1 Rule 10 of C.P.C. The circumstances in which the discretion under Order 1 Rule 10 of C.P.C. is justifiably exercised are set out in para 14, namely, when (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the Court is necessary in order to enable the Court to effectively and completely adjudicate upon and settle the question involved in the suit, the Court can exercise such discretion thereby directing addition/impleadment.

13. I have carefully gone through the impugned order and it does not suffer from any irregularity, so as to warrant interference in the exercise of the extraordinary jurisdiction of this Court under Article 227 of the Constitution of India. In that view of the matter, the petition is without any merits and is dismissed.

14. At this stage, the learned Counsel for the petitioners states that the suit is of the year 2010 and this Court may direct expeditious disposal of the suit. The learned Counsel appearing for the respondent no. 8 submits that appropriate orders be passed in this regard.

15. The learned trial Court shall decide the suit as expeditiously as possible and preferably within a period of one year from today. The parties to co-operate for the time bound disposal of the suit.

In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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