

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

**APPEAL FROM ORDER NO. 105 OF 2015
WITH
CIVIL APPLICATION NO.15334 OF 2015
IN
AO/105/2015**

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Pandharinath s/o Mahadu Patil,
Age : 70 years, Occu. Agriculture,
R/o : Talwel, Taluka Bhusawal,
District Jalgaon.

... Appellant...
(Orig. Plaintiff)

Versus

1. Chaitanya s/o Kashinath Patil
Age: 60 years, Occu. Retired,
R/o: 6th Sense, B-701,
Opp. Snack Park,
Near Manik Moti, Satara Road,
Katraj, Pune – 411046.
2. Devidas s/o Ramdas Patil
Age: 58 years, Occu. Agriculture,
R/o: Talvel, Taluka Bhusawal,
District Jalgaon.
3. Lala s/o Ramdas Patil,
Age: 51 years, Occu. Agriculture,
R/o: As above,
4. Mira w/o Devidas Patil,
Age: 47 years, Occu. Agriculture,
R/o: As above.

... Respondents

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Mr. Swapnil S. Patil, Advocate for appellant
Mr. A. M. Gholap, Advocate for respondent Nos. 2 to 4

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CORAM : V. K. JADHAV, J

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Reserved for order on : 05.04.2016**Order pronounced on : 16.04.2016****ORDER :-**

1. Being aggrieved by the order dated 23.10.2015 passed by the learned District Judge-2, Bhusawal below Exh.13 in RCA No.387/2014, the appellant in the said R.C.A-original plaintiff preferred this appeal from order.

2. Brief facts, giving rise to the present appeal from order are as follows :-

a] The appellant/original plaintiff instituted a suit bearing RCS No.386/1996 for declaration of title and a decree of perpetual injunction in respect of a landed property against present respondent no.1/original defendant. Learned Civil Judge S.D., Jalgaon, by its judgment and decree dated 28.11.1997, dismissed the said suit with costs. Being aggrieved by the same, the present appellant/original plaintiff preferred R.C.A. No.387/2014 before District Court, Bhusawal.

b] In the pending appeal bearing RCA No.387/2014,

present respondent nos. 2 to 4/third parties preferred an application at Exh.13 under Order 1 Rule 10 and Order 22 Rule 10 of the Code of Civil Procedure. According to them, they had filed a Special Civil Suit No.347/1994 for specific performance of contract in respect of the same property against present appellant and present respondent no.1. Both the suits were tried together but decided by the separate judgments. RCS No.386/1996 for declaration and injunction instituted by the present appellant came to be dismissed, however Special Civil Suit No.347/1994 instituted by present respondent nos. 2 to 4/third parties came to be decreed. In terms of the decree passed in Special Civil Suit No.347/1994, present respondent nos. 2 to 4 got the sale deed executed through the Court in Special Darkhast No.51/1998. They did not get the possession. Though they did not get the possession, their interest in the property is created. Consequently, in the pending appeal No.387/2014 preferred against judgment and decree passed in RCS No.386/1996, they filed an application at Exh.13 as stated above. Learned District Judge-2, Bhusawal, by its impugned order dated

23.10.2015 passed below Exh.13, allowed the application and thereby directed the appellant to join them as respondent nos. 2 to 4 and the appeal memo be amended accordingly. Being aggrieved by the same, the appellant/original plaintiff has preferred this appeal.

3. Learned counsel for the appellant submits that respondent nos.2 to 4 are not necessary parties in the light of nature of the suit and relief claimed therein under the provisions of the Bombay Tenancy and Agricultural Lands Act, 1948. Learned counsel further submits that, though respondents 2 to 4 have succeeded in the suit instituted by them for specific performance of contract, however, they did not get physical possession of the suit land and, the same is with the present appellant. Learned counsel submits that, even though learned District Judge-2, Bhusawal has observed in the impugned order that respondent nos. 2 to 4 (original applicants of Exh.13) deserve to be substituted as parties to the appeal, directed the present appellants to join them as respondent nos. 2 to 4 and further directed to give copy of the amended

appeal memo to them after they are formally added as respondents. Learned counsel submits that, at the most respondent nos. 2 to 4 herein may be substituted in terms of the provisions of Order XXII Rule 10 of Civil Procedure Code and in any way, they cannot be added as party respondents. Learned counsel submits that, by adding them as party respondents, they can set up a case independently, may be inconsistent with the case put forth by their assigner. Learned counsel submits that order XXII Rule 10 is based on the principle that trial of a suit cannot be brought to an end merely because interest of a party in the subject matter of the suit has devolved upon another during the pendency of the suit, but that suit may be continued against the person acquiring the interest with leave of the Court. Since the appeal is in continuation of the suit, the assignee can be impleaded in the appeal also. Learned counsel submits that bare language of Rule 10 of Order XXII indicates that, assignment, creation or devolution of interest, by leave of the Court, be continued by the person upon whom such interest has come or devolved. In other words, such person cannot set up any

independent plea inconsistent with the plea raised by the original party.

4. Learned counsel for the appellant, in order to substantiate his submissions placed his reliance on the following cases :-

1. ***Parwatibai w/o Namdeo (since deceased through L.R. Anna s/o Sheku Chavan)***, reported in ***2002 (5) Mh.L.J. 515*** and
2. ***Sharadamma vs. Mohammed Pyrejan (D) through LRs. & another***, reported in ***2015 AIR SCW page 6011***.

5. Learned counsel for respondent nos. 2 to 4 (original applicants of Exh.13 in RCA No.387/2014 before the Lower Appellate Court) submits that, by way of Judgment and Decree passed in Special Civil Suit No.347/1994, the interest of present respondent no.1 in the subject matter of the suit has devolved upon present respondent nos. 2 to 4 and they are required to be impleaded in the appeal as party respondents. Learned counsel submits that in terms of provisions of Order XXII Rule 4, in case of death of several defendants or of a sole defendant, for the conditions enumerated in Rule

4, the Court shall cause the legal representatives of defendants to be made as a party and any person so made as party may make any defence appropriate to his character as legal representative of the deceased defendant. The learned counsel submits that, in view of Sub Rule 2 of Rule 4 of Order 22 a person substituted of legal representative of defendant can only take a defence which was open to the deceased-defendants. Learned counsel submits that, so far as Order 22 Rule 10 is concerned, no such restrictions are prescribed and in appropriate cases such person in whose favour interest is created in respect of the subject matter of the suit property could be permitted to raise any new plea to avoid the multiplicity of the proceedings etc. learned counsel submits that respondents No. 2 to 4 filed an application at Exh.13 under Order 22 Rule 10 of Code of Civil Procedure as well as Order 1 Rule 10 of Civil Procedure Code. Learned counsel submits that, in view of this, impugned order passed by the District Judge-2, Bhusawal, directing the the present appellant to join the respondents 2 to 4 as a party respondent to the appeal is proper, correct and legal and calls for no interference.

6. In order to substantiate his submissions, learned counsel for the respondents No. 2 to 4 places his reliance on the following Judgments :-

1. **Manohar Yadavraoji Belge and others Vs. Kamlabai wd/o Manohar Raut and others** reported in **[2013 (2) Mh.L.J. 312]**.
2. **Monghibai Vs. Cooverji Umersey** reported in **BLR 1939 41 1127**.
3. **Abaji Daulata Yadav since deceased by his heirs and others Vs. Dhondiram Jagedevrao and others** reported in **[1993 (1) Mh.L.J. 588]**.
4. **Amit Kumar Shaw and another Vs Farida Khatoon and another** reported in **[2005 (3) Mh.L.J.]**
5. **Dr Niranjan Nath Vs. Sardar Mal and another** reported in **AIR 1950 RAJASTHAN 31**.
6. **Shri Bhagwan Dass Chopra Vs. United Bank of India and others** reported in **AIR 1988 Supreme Court 215**.
7. **Nawab John and Ors. Vs. V.N.Subramaniam** reported in **2012 AIR SCW 4248**.

7. Order 22 Rule 10 of the Code of Civil Procedure being relevant is reproduced herein below :-

10.Procedure in case of assignment before final order in suit :-

“(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a Suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal there from shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

8. The present appellant has instituted a suit bearing RCS No.346/1993 which is renumbered as RCS No.386/1996 for the relief of declaration of title and perpetual injunction against present respondent No.1 in respect of the landed property. The present respondents No.2 to 4 have instituted the suit bearing Special C.S No.347/1994 for the specific performance of contract and for delivery of possession in respect of the same suit property against the present appellant and present respondent no.1. Both the suits were tried together, however, decided by the Trial Court by two separate judgments. So far as RCS No.386/1996 (old 346/1993) instituted by the present appellant for declaration and

decree of perpetual injunction is concerned, same is dismissed. However, Special Civil Suit No.347/1994 instituted by the present respondents No. 2 to 4 came to be decreed. Being aggrieved by the same, the present appellant has preferred this appeal against dismissal of RCS No.386/1996 and also preferred another appeal for the decreeing of Spl CS No.347/1994. Both the appeals are pending before the District Court, Bhusawal.

9. In terms of the decree passed in Special Civil Suit No.347/1994 present respondents No. 2 to 4 filed Special Darkhast No.51/1998 and accordingly, on Court motion in terms of the decree of Specific Performance of the Contract, sale deed came to be executed in favour of the present respondents No. 2 to 4 in respect of the suit property. In view of the above, the provisions of Order 10 Rule 22 of Code of Civil Procedure are rightly attracted in the facts and circumstances of the present case and the Lower Appellate Court has committed no error in allowing the application at Exh.13.

10. It appears from the submissions of learned

counsel for the parties, the appellant apprehends that, by addition of present respondents No. 2 to 4 in the pending appeal as party respondents before the Appellate Court, they may set up a new plea inconsistent with the one put forwarded by the present respondent No.1 and the Lower Appellate Court in that event would be constrained to remand the matter to the Trial Court with no other alternative. On the other hand, the learned counsel for respondents 2 to 4 submits that, in exceptional cases respondents No. 2 to 4 can be permitted to raise a new plea for avoiding multiplicity of proceedings etc.

11. It is true that in view of the provisions of Sub Rule 2 of Rule 4 of Order 22 a person substituted of a legal representative of a defendant can only take a defence which was open to the deceased and he is bound to adopt the pleadings of the deceased defendants and cannot make a new case inconsistent with the case made out by the deceased defendants. However, in rule 10 of Order 22 when there has been devolution of interest during the pendency of the suit or the appeal as

the case may be, with the leave of the Court be continued by person upon whom such interest has devolved and entitled the person who has acquired the interest in the subject matter of the litigation to apply to the Court for leave to continue with the suit. There is a clear cut distinction in Rule 3, 4 and 10 of Order 22 of the Code of Civil Procedure. In cases covered by Rule 3,4 if right to sue survives and no application for bringing legal representatives of deceased on record is filed within time prescribed, there is automatic abatement and procedure has been prescribed for abatement in Rule 9 on the grounds postulated therein. In the cases covered by Rule 10, no such procedure is prescribed in the event of failure to apply for leave to the Court to continue the proceeding. Same appears to be for the reason that if the original party ceases to have interest in the subject matter of the dispute, the person upon whom interest has been devolved may file an application seeking leave of the Court to continue with the suit.

12. In a case of **Shri Bhagwan Dass Chopra Vs.**

United Bank of India and others reported in **AIR 1988**

Supreme Court 215 (supra) relied upon by the learned counsel for respondents no. 2 to 4, in paragraph No.7 of the judgment, the Supreme Court has made observations. Relevant part of paragraph no.7 is reproduced below :-

“7. In view of the terms of the agreement of merger and in particular clause 22 thereof the United Bank of India was rightly impleaded as a party to the proceedings before the Tribunal in the place of the Narang Bank of India Ltd. By reason of impleading of the United Bank of India as a party there was no change in the character of the proceedings pending before the Tribunal. The United Bank of India only stepped into the shoes of the Narang Bank of India Ltd. and all proceedings that had gone on till the date on which the United Bank of India was so impleaded were binding on the United Bank of India. The proceedings before the Tribunal could thereafter be continued against the United Bank of India. The United Bank of India could thereafter take part in the further proceedings before the Tribunal in the same capacity in which the Narang Bank of India Ltd. was appearing in the case. It was bound by all proceedings which had taken place till then. It could not go back on the proceedings. Generally speaking an assignee cannot set up a case inconsistent with the one put forward by his assignor and it is only in exceptional cases an assignee could be permitted to raise any new plea and that too only for avoiding multiplicity of the proceedings.”

13. In view of the Judgment and decree passed in Special Civil Suit No.347/1994, respondents No. 2 to 4

herein were rightly impleaded as a party respondents in a pending appeal before the Lower Appellate Court Under Order 22 Rule 10 of the Code of Civil Procedure, no detailed inquiry at the stage of granting leave is contemplated. The Supreme Court in case of Amit Kumar Shaw and another Vs. Farida Khatoon and another (supra) relied upon by learned counsel for respondent, in paragraph No.12 of the Judgment has made following observations.

“12.Under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit.”

14. In view of the above observations, the Court is only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing the suit and validity of the same can be considered at the time of final hearing of the proceedings. Furthermore, generally

a person upon whom such interest has come or devolved cannot set up a case inconsistent with the one put forward by the original party and it is only in exceptional cases, he could be permitted to raise any new plea for avoiding multiplicity of the proceedings.

15. The Lower Appellate Court though observed in the impugned order about substitution of the present respondents no. 2 to 4 in the pending appeal, in the operative part of the order directed the appellant to add them as party respondents. In view of above discussion, I do not find any fault in the impugned order. Appeal is accordingly disposed of. No costs.

(V.K. JADHAV, J.)

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