

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE JURISDICTION**

WRIT PETITION NO. 5216 OF 2015

Dr. Badri Prasad & Ors. Petitioners
Versus
Shri Shantaram Phundya Patil & Ors. Respondents

**WITH
WRIT PETITION NO. 5198 OF 2015**

Dr. Badri Prasad & Ors. Petitioners
Versus
Smt. Rajubai Undir Patil & Ors. Respondents

Mr. P.S.Dani, Senior Advocate a/w Akshay Shinde for Petitioners in both Petitions.

Mr. Rajesh Parab for Respondent Nos. 3 to 6, 10, 11,14 and 19 to 21 in WP No. 5216/15 and Respondent Nos. 2 to 5, 7, 8, 11 and 16 to 18 in WP No. 5198/15.

***CORAM : N. M. Jamdar J.
Thursday 13 October 2016***

ORAL ORDER

. Heard learned Counsel for the parties.

2. Considering the short controversy, the petition is taken up for final disposal. By order dated 16 June 2015 notices have been issued to the respondents. The learned Counsel for the

petitioners states that respondents are served and affidavit of service is filed.

3. The learned Counsel for the petitioners states that though in the body of the petition, the order dated 4 October 2011 is remained to be challenged, leave to amend for that purpose is granted. Amendment to be carried out forthwith.

4. The petitioners are the original plaintiffs. They have filed the Special Civil Suit No. 218 of 2007 in the Court of Civil Judge Senior Division, Panvel for specific performance of an agreement stated to be executed on 13 May 2005 between the petitioners/plaintiffs and defendant nos. 1 to 8. In this suit, the defendant nos. 1 to 6 were served but did not appear, hence suit proceeded ex parte against them. An application was filed by the respondent nos. 10 to 21 for impleadment in the suit on 4 March 2011. It was stated by the respondent nos. 10 to 21 that they have a right in the suit property and the original defendants do not have any right/title to dispose of the property, as the property is joint family property. This application was allowed by the learned Civil Judge on 4 October 2011. Thereafter an application was filed by the petitioners below Exh. 57 in Special Civil Suit No. 218 of 2007 for review of the order dated 4 October 2011. The application was rejected by the order dated 11 August, 2014. The petitioners have

challenged the orders dated 11 August 2014 and 4 October 2011 by this petition.

5. The learned Senior Counsel for the petitioners relying upon the decisions in the case of Anil Kumar Singh V/s Shivnath Mishra alias Gadasa Guru, (1995) 3 Supreme Court Cases 147 and Kasturi V/s Iyyamperumal and Others, (2005) 6 Supreme Court Cases 733 contended that the respondent nos. 10 to 21 cannot be joined in the suit against the wishes of the petitioners and if they have any cause of action, they will have to take out independent proceeding. It was submitted that the suit is for specific performance of contract not a suit for title. The learned Counsel for the respondents on the other hand submitted that the property is a joint family property and therefore, impleadment of these respondents is necessary.

6. The Apex Court in the case of *Kasturi V/s Iyyamperumal & Ors.* after taking review of an earlier decision held that the Court cannot convert a suit for specific performance of sale into a complicated suit for title. The Court has also stressed on the basic premise the plaintiff dominus litis and cannot be forced to add party against his wishes. In the present case, the stand of the respondent nos. 10 to 21 is that original defendants cannot sell the property and they have a share in the same. In view of this position, if the

respondent nos. 10 to 21 are not joined as defendants in the suit, the petitioner would be taking a risk as the outcome of the suit will not be binding on these respondents neither they will be affected by any adjudication or any observation made during the proceedings of the suit. Considering this position, the learned Counsel for the petitioners had taken time to take instructions whether the respondent nos. 10 to 21 can be impleaded to avoid future litigation. The learned Counsel for the petitioners submitted that he has taken instructions and the petitioners have taken a decision not to join respondent nos. 10 to 21 in the suit and are aware of the risk and consequences involved. In the circumstances following the law laid down by the Apex Court in the case of *Kasturi V/s Iyyamperumal & Ors.*, the impugned orders will have to be set-aside. The learned Counsel for the respondents submitted that the order dated 11 August 2014 was correct, as no review could have been filed to set aside the order dated 4 October 2011. Even assuming this position is correct, the petitioners have challenged the earlier order in this petition whereby leave is granted to respondent nos. 10 to 21 to be joined as a party to the petition.

7. In view of this above discussion, the petition deserves to be allowed. The impugned orders passed by the learned Civil Judge dated 4 October 2011 and 11 August 2014 are quashed and set aside.

8. It is clarified that not joining the respondent nos. 10 to 21 is purely at the risk of the petitioners, as the respondent nos. 10 to 21 will not be bound by the adjudication in the Special Civil Suit No. 218 of 2007 nor any observation or the outcome thereof. It is open to the respondent nos. 10 to 21 to take out whatever proceedings that are permissible in law in respect of their grievance, for which they have sought impleadment in the suit.

(N. M. Jamdar, J.)