

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.796 of 2011
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ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful petitioners/plaintiffs is directed against the orders dated 23.11.2010 of the learned II Additional District Judge, Ranga Reddy at L.B. Nagar, Hyderabad passed in IA.no.2804 of 2010 in OS.no.689 of 2006 filed by the plaintiffs under Order I Rule 10 of the Code of Civil Procedure, 1908 ('the Code', for short) requesting for permission to implead the proposed party as defendant no.12 in the suit and to permit the plaintiffs to consequentially amend the plaint.

2. I have heard the submissions of the learned counsel for the revision petitioners/plaintiffs ('the plaintiffs', for brevity). Despite granting sufficient time for the respondent no.11, there is no representation and no submissions are made on its behalf. Therefore, it is treated that there are no submissions to be made on the side of the 11th respondent in this revision. None appeared for the other respondents, though served with notices. I have perused the material record.

3. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

The plaintiffs brought the suit initially against the defendants 1 to 10 for specific performance of an agreement of sale dated 13.03.2005. During the pendency of the suit, having come to know that the defendants 1 and 2 had entered into an agreement of sale-cum-general power of attorney dated 06.12.2006 with the 11th defendant, the plaintiffs

have taken steps for the impleadment of the 11th defendant as party defendant to the suit and the said request was granted by the trial Court. Subsequently, the trial in the suit had progressed. When the matter stood for adduction of evidence on the side of the defendants, the 1st defendant was examined as DW1. Thereafter, the 11th defendant had filed certain documents before the trial Court and also his chief affidavit and got marked exhibit B5, which is a development agreement-cum-irrevocable GPA dated 30.07.2008 which was entered into with the proposed defendant no.12 during the pendency of the suit. Having come to know of the said document, the plaintiffs had filed the aforementioned application to implead the proposed 12th defendant as a party defendant in the suit as according to the plaintiffs, exhibit B5 was brought into existence to delay and defeat the just claim of the plaintiffs in the suit for specific performance and that the said document is brought into existence with an oblique motive to subject the property to further litigation. That application was resisted orally by the defendants 1 and 11, without filing any counters. The learned counsel for the 11th defendant had also filed written submissions before the trial Court. However, at the hearing of the IA, no oral and documentary evidence was adduced. On merits and by the order impugned, the trial Court had dismissed the application of the plaintiffs. Therefore, the plaintiffs are before this Court.

4. The learned counsel for the plaintiffs while reiterating the case of the plaintiffs, which is stated supra, would further contend as follows:

The Court below ought to have seen that none of the contesting defendants filed a counter resisting the application filed for the impleadment of the proposed defendant no.12. The Court below ought to have seen that the suit is one for specific performance of an agreement of sale dated 13.03.2005 and that during the pendency of the suit exhibit

B5 document was entered into with the proposed 12th defendant and that it is the case of the contesting defendants that the property was also delivered to the proposed 12th defendant and that, therefore, to avoid multiplicity of proceedings and to give a quietus to the litigation once and for all in the present suit, the 12th defendant is a necessary party. The trial Court ought to have seen that the proposed 12th defendant is claiming right and interest and that when a party claims a semblance of right and interest in the property involved in a suit for specific performance, he is a necessary party to the suit. The Court below ought to have seen that since the document entered into with the proposed 12th defendant is subsequent to the suit, the rights, if any, of the proposed 12th defendant are subject to the final result of the suit and that the plaintiffs have parted with valuable consideration under the suit agreement of sale and that, therefore, it is, in the interests of justice, to grant the relief and permit them to espouse their cause in the present suit and obtain a comprehensive decree and judgment in the presence of the proposed 12th defendant to avoid any complexities in future or at the time of the execution of the decree that may ultimately be passed in the suit. The Court below ought to have seen that if the proposed 12th defendant is not impleaded, the plaintiffs would be put to serious and irreparable loss.

5. As already noted, no submissions are made on behalf of the 11th defendant. The only contention of the 11th defendant before the trial Court appears to be is that the petition is intended to drag on the proceedings and that the impleadment of the proposed 12th defendant as a party defendant no.12 to the suit is not necessary as it is settled law that the judgment binds not only the parties but also the third parties claiming through the parties to the suit.

6. I have given earnest consideration to the facts and the submissions. The question for consideration is – “Having regard to the facts and circumstances of the case, whether, in the instant suit for specific performance, the proposed 12th defendant can be permitted to be impleaded as a party defendant no.12 as desired by the plaintiff? Now that the facts and submissions are noted supra, it is profitable to first refer to the decisions cited and the legal position obtaining.

7. In **Thomson Press (India) Limited v. Nanak Builders & Investors Pvt. Ltd.**^[1], the question that fell for consideration is this:

“Whether the Appellant who is the transferee *pendente lite* having notice and knowledge about the pendency of the suit for specific performance and order of injunction can be impleaded as party under Order 1 Rule 10 on the basis of sale deeds executed in their favour by the Defendants Sawhneys’.

It is trite to mention that the facts of the cited case disclose that after the institution of the suit for specific performance, the counsel who had appeared for the defendants gave an undertaking not to transfer and alienate the suit property and that notwithstanding the order passed by the Court recording the undertaking given on behalf of the defendants and having full notice and knowledge of all these facts the sister concern of the appellant entered into series of transactions and finally the appellant M/s. Thomson Press got a sale deed executed in their favour by the defendants in respect of the suit property. Therefore, the alienation in that case was made in violation of an undertaking given to the Court and recorded by the Court.

Hon’ble Sri Justice M. Yusuf Eqbal, in his Lordship’s judgment rendered in the cited case finally held as under:

Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the Appellant is to be added as party-Defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed

by the High Court are set aside.

Before parting with the order, it is clarified that the Appellant after implement as party-Defendant shall be permitted to take all such defences which are available to the vendor Sawhneys' as the Appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the Plaintiff and during the pendency of the suit.

Hon'ble Sri Justice T.S. Thakur, (as his Lordship then was) in his Lordship's judgment rendered in the cited case held as under:

There is, therefore, little room for any doubt that the transfer of the suit property *pendete lite* is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the Plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.

We are not on virgin ground in so far as that question is concerned. Decisions of this Court have dealt with similar situations and held that a transferee *pendente lite* can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post transfer.

His Lordship having then referred to the ratio in the decision in **Khemchand Shanker Choudhary v. Vishnu Hari Patil** [(1983) 1 SCC 18], further held as under:

To the same effect is the decision of this Court in *Amit Kumar Shaw v.. Farida Khatoon* (2005) 11 SCC 403 where this Court held that a transferor *pendente lite* may not even defend the title properly as he has no interest in the same or collude with the Plaintiff in which case the interest of the purchaser *pendente lite* will be ignored. To avoid such situations the transferee *pendente lite* can be added as a party Defendant to the case provided his interest is substantial and not just peripheral.

Finally, his Lordship referred to the decision in **Rikhu Dev, Chela**

Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiama Dass [(1976) 1 SCC 103] and summed up the findings as follows:

- (1) The Appellant is not a bona fide purchaser and is, therefore, not protected against specific performance of the contract between the Plaintiff's and the owner Defendants in the suit.
- (2) The transfer in favour of the Appellant *pendente lite* is effective in transferring title to the Appellant but such title shall remain subservient to the rights of the Plaintiff in the suit and subject to any direction which the Court may eventually pass therein.
- (3) Since the Appellant has purchased the entire estate that forms the subject matter of the suit, the Appellant is entitled to be added as a party Defendant to the suit.
- (4) The Appellant shall as a result of his addition raise and pursue only such defenses as were available and taken by the original Defendants and none other.

7.1 The learned counsel for the plaintiffs placed reliance on a decision of this Court in **Basant Kumar Soni v. Mukund Das Soni**^[2]. I have gone through the decision. This Court in the cited decision had referred to the decision of the Supreme Court in **Sumtibai and others v. Paras Finance Co.**^[3] and also **Kasturi v. Iyyamperumal**^[4].

7.2 In **Kasturi** case the facts disclose that in a suit for specific performance of contract for sale an impleadment petition was filed for addition as party Defendant on the ground that the Petitioners were claiming not under the vendor but adverse to the title of the vendor. In other words, on the basis of independent title in the suit property the Petitioner sought to be added as a necessary party in the suit. Rejecting the petition it was held by a three Judges' Bench of the Supreme Court as under:

As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of contract for sale. For deciding the question who is a proper party in the suit for specific performance the guiding

principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all.

Be it noted that in Sumtibai case (3rd supra), the Supreme Court having referred to the earlier decision in Kasturi (4th supra) held as follows:

“Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in Kasturi v. Iyyamperumal and Ors.: AIR2005SC2813. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute.”

7.3 Placing reliance on the above observations and findings in Sumtibai case (3rd supra) it was sought to be contended on behalf of the plaintiffs that a person having semblance of interest or title is entitled to

be impleaded as a party to a suit for specific performance, in appropriate cases. However, in *Kasturi* (4th supra) it has been held that in that suit for specific performance of contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. Be that as it may.

7.4 In *Mumbai International Air port Pvt. Ltd. Vs. Regency Covention Centre and Hotels Pvt. Ltd. And others* ^[5] it was contended before the Supreme Court that the decision in *Sumtibai* case is not good law in view of an earlier three-Judge Bench decision of the Supreme Court in *Kasturi* case. The Supreme Court having considered the facts and the ratios in the said two decisions had held as follows:

“On a careful consideration, we find that there is no conflict between the two decisions. The two decisions were dealing with different situations requiring application of different facets of Sub-rule (2) of Rule 10 of Order 1. This is made clear in *Sumtibai* itself. It was observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The decisions in *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay* [1992 (2) SCC 524] and *Anil Kumar Singh v. Shivnath Mishra* [1995 (3) SCC 147] also explain in what circumstances persons may be added as parties.”

Let us consider the scope and ambit of Order 1 of 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. This Court in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import*: 1981 (1) SCC 80 reiterated the classic definition of 'discretion' by Lord Mansfield in *R. v. Wilkes* 1770 (98) ER 327 that 'discretion' when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. We may now give some illustrations regarding exercise of discretion under the said Sub-Rule.

12.1) If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order 1. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party.

12.2) If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party. But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant in possession, then the tenant will be a necessary party in so far as the prayer for actual possession.

12.3) If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

12.4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bona fides etc., the court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if 'D' claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of 'P'

representing that he is the co-owner with half share, and 'P' files a suit for specific performance of the said agreement of sale in respect of the undivided half share, the court may permit the other co-owner who contends that 'D' has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the vendor-defendant to be decided in an independent proceeding by the other co-owner, or the plaintiff; alternatively the court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject matter of the suit for specific performance, and that it will decide in the suit, only the issues relating to specific performance, that is whether the defendant executed the agreement/contract and whether such contract should be specifically enforced. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party."

"If the principles relating to impleadment, are kept in view, then the purported divergence in the two decisions will be found to be non-existent. The observations in Kasturi and Sumtibai are with reference to the facts and circumstances of the respective cases. In Kasturi, this Court held that in suits for specific performance, only the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In Sumtibai, this Court held that a person having semblance of a title can be considered as a proper party. Sumtibai did not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did Kasturi lay down that no one, other than the parties to the contract and their legal representatives/transferees, can be impleaded even as a proper party."

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 Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

Court may strike out or add parties.

(2) 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.

“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 question 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. 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 disputes 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.”

8. Keeping in view the above said legal position that is summed up by the Supreme Court, the question involved in the present case has to be determined having regard to the facts of the instant case. In the instant suit for specific performance, the plaintiffs are seeking impleadment of the proposed party as the 12th defendant *inter alia* contending that during the pendency of the suit, the defendants 1 and 2 had sold the property to the 11th defendant and that on that the 11th defendant is brought on record as party 11th defendant in the suit and

that during the course of the evidence of the defendants, exhibit B5, the development agreement-cum-irrevocable general power of attorney dated 30.07.2008 is marked and that from that document, the plaintiffs came to know that the development agreement-cum-irrevocable general power of attorney was entered into by the 11th defendant with the proposed 12th defendant pending suit in order to defeat and delay the just claim of the plaintiffs and that, therefore, they are constrained to seek impleadment of the proposed party as 12th defendant to the suit. It is also their contention that the proposed 12th defendant is not only claiming rights over the subject property under the said document but is also claiming possession and that if the decree for specific performance is not obtained in his presence it would be difficult to avoid any complexities that may arise or that may be created in future or at the time of the execution of the decree that may ultimately be passed in the suit and that to give a quietus to the dispute once and for all in one suit it is just and necessary to implead the proposed party as otherwise it may lead to multiplicity of litigation. As already noted, none of the defendants filed counters before the trial court resisting the application.

The law is well settled that the object of Order I Rule 10 of the Code is to bring before the Court at the one and the same time all parties interested in dispute and finally determine all controversies once and for all in the presence of all parties without delay, inconvenience and expenses of the several actions, trials and inconclusive adjudication. Having regard to the facts peculiar to this case, this Court is of the opinion that the addition of the proposed party as the 12th defendant is necessary for the purpose of resolving the controversy between the parties once and for all and to set at rest the controversy and that the refusal to grant the request of the plaintiffs for impleadment of the party would only create needless complications at the stage of the execution in the event of the plaintiffs-revision petitioners succeeding in the suit.

9. In the considered view of this Court, the facts and the legal position applicable to the facts are overlooked by the trial Court while dismissing the application of the plaintiffs. For the aforesaid reasons, this Court finds that the order impugned brooks interference.

10. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.2804 of 2010 in OS.no.689 of 2006 stands allowed. The plaintiffs are permitted to implead the proposed party as the 12th defendant to the suit and make necessary consequential amendments to the plaint as prayed for in the petition by following the procedure.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

14th June 2016
Vjl

[1] 2013(3) ALD 111

[2] 1020(4) ALD 490

[3] (2007) 10 SCC 82

[4] (2005) 6 SCC 733

[5] AIR2010SC3109