

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 257 OF 2016**

SMT. RADHA NANDALAL KALRO POA FOR
PETITIONER NO. 2 AND 3 AND 2 ORS., Petitioners

Versus

M/S. RAGHUVIR R. PAIGINKAR AND CO.
THR. ITS MANAGING PARTNER MR.
RAGHUVIR R. PAIGINKAR AND 4 ORS., Respondents

Shri Jagannath Jayant Mulgaonkar, Advocate for the Petitioners.

Shri V.A. Lawande, Advocate for Respondent No.1(a).

Shri Ashwin D. Bhobe, Advocate for Respondent Nos.2(i) to
2(xii) and 2(xiii)(a).

CORAM:- C. V. BHADANG, J.

DATE:- 28th FEBRUARY, 2017

ORAL ORDER:

The petitioners are challenging the orders dated 29.01.2016 and 12.08.2015, passed by the learned Adhoc Senior Civil Judge at Bicholim in Regular Civil Suit No. 98/1994/A. By order dated 29.01.2016, application (Exhibit 63) filed by the petitioners for impleadment as defendants, has been dismissed. By the order dated 12.08.2015, application (Exhibit D-47), filed by the petitioners for substituting them as plaintiffs in place of M/s Raghuvir R. Painginkar and Company, has met with dismissal.

2. Although in the petition, there is challenge to both these orders, the learned Counsel for the petitioners has restricted the challenge to the dismissal of application (Exhibit 63), by order dated 29.01.2016. In other words, the petitioners are restricting their claim to be impleaded as defendants in the suit.

3. The brief facts necessary for the disposal of the petition may be stated thus:

That, M/s Raghuvir R. Painginkar and Company, claiming to be a partnership firm, filed Regular Civil Suit No.98/1994/A, against Shri Anant Naik and three others. That suit is filed for recovery of possession by removal of structures standing in the subject land. The case made out in the plaint is that the defendants amongst others, are holding a structure in land survey no.90/6 and they were continuing in possession by mere tolerance "as bare licensees". According to the plaintiff-partnership firm, the licences have been revoked by letter dated 19.07.1994 and since then, the defendants have lost their right, title and interest to hold the subject structure in the suit property.

4. The suit was filed in the name of the partnership firm through its managing partner, Mr. Raghuvir R. Painginkar, who died on 16.04.1998. After his death, the suit is continued by his son, Shri Rohit R. Painginkar, in the capacity of the partner of the partnership firm. The petitioners happen to be the sisters of Rohit Painginkar and daughters of Raghuvir Painginkar.

5. The petitioners sought impleadment as defendants in the suit by filing an application (Exhibit 63). According to the petitioners, after the death of Raghuvir Painginkar in the year 1998, his widow Shakuntala Painginkar also passed away in the year 2007.

6. It was further contended that on 18.10.2003, Rohit Painginkar and Rajendra Painginkar had instituted a Special Civil Suit No.121/2003 before the learned Civil Judge Senior Division, Margao against said late Shakuntala Painginkar, Savita Gianani (petitioner no.3) and other purported partners. In the said suit, late Shakuntala Painginkar and petitioner no.3, Savita Gianani had contended that the said partnership M/s Raghuvir R. Painginkar and Company, was a sham and fictitious entity and that the assets belonging to the said entity, were actually the

personal assets of late Raghuvir and Shakuntala Painginkar.

7. It was further contended that by judgment and decree dated 28.02.2013, the learned Senior Civil Judge has accepted that the said entity was a sham and bogus partnership. The petitioners have also filed a separate suit being Special Civil Suit No.131/2006 before the Civil Court at Margao, claiming a declaration that the firm, M/s Raghuvir R. Painginkar and Company, registered originally under no.636 (at page no.136 of Book E-3), in the office of the Registrar of Firms of Salcete at Margao, with its subsequent reconstitution, is a sham and fictitious firm, without any legal effect. In the alternative, the petitioners have sought a declaration that the said firm stands dissolved as on 18.10.2003.

8. It was thus contended that the petitioners have vital interest in the subject matter of Regular Civil Suit No.98/1994, in their capacity as heirs of late Raghuvir and Shakuntala Painginkar (as well as purported partners of the firm in question). It was in these circumstances that the petitioners sought impleadment as defendant nos.5 to 7.

9. The application was opposed on behalf of the plaintiffs.

10. The learned Trial Court found that the earlier application dated 14.03.2014 (Exhibit 43) filed by the petitioners alongwith their spouses, seeking substitution as plaintiffs, was dismissed on 12.08.2015. The Trial Court found that the substitution sought by the petitioners (now as defendants), is substantially identical to the earlier prayer, the only difference being that in the earlier application, they had sought to be added as plaintiffs and in the present application, they are seeking addition as defendants. The learned Trial Court noticed that the order dated 12.08.2015 was not challenged and has attained finality.

11. The learned Trial Court has further found that the plaintiffs are *dominus litus* and cannot be "compelled to fight against the person against whom they do not claim any relief". The Trial Court has noticed that the word "may" in Rule 10(2) of Order I of CPC, confers discretion on the Court, while considering such an application for addition. The Trial Court has

then relied upon the decision of this Court in the case of **Gonsalo de Filomena Luis Vs. Inacio Piedade Hindebert & Others, AIR 1977 Goa, Daman and Diu** (page 4), and has dismissed the application. Hence, this petition.

12. I have heard Shri Mulgaonkar, the learned Counsel for the petitioners, Shri Lawande, the learned Counsel for the respondent no.1(a) (original plaintiff in the suit) and Shri Bhobe, the learned Counsel for the respondent nos.2(i) to 2(xii) and 2(xiii)(a) (original defendants in the suit).

13. On behalf of the petitioners, reliance is placed on the decision of the Hon'ble Supreme Court in the case of **Vidhur Impex and Traders Private Limited & Others Vs. Tosh Apartments Private Limited & Others, (2012) 8 SCC 384** and in particular, para 41 thereof. It is submitted that the Court has wide powers under Order I, Rule 10(2) of the Code of Civil Procedure, 1908 (CPC, for short), while allowing addition/impleadment of a party. It is submitted that whenever a Court finds that a party is a necessary or a proper party, the Court can always permit such addition. According to the learned Counsel for the petitioners, the petitioners are proper parties to the suit.

It is submitted that a proper party is one, whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of, or against whom, a decree is to be made. It is submitted that the competent Court has already held that the plaintiff-partnership firm, is a sham and bogus entity and as such, the property would be a personal asset of late Raghuvir and his widow Shakuntala Painginkar, in respect of which, the petitioners would be the co-sharers.

14. On the contrary, Shri Lawande, the learned Counsel for the respondent no.1(a), has submitted that the suit is essentially for recovery of possession against the defendants, who according to the plaintiffs, have ceased to have any right on termination of the licence. It is submitted that assuming for the sake of argument that the petitioners are co-sharers in respect of the property, one of the co-sharers can always protect and act for the benefit of the estate. It is submitted that the impleadment sought on the basis of finding in Regular Civil Suit No.98/1994/A, is not justified and the petitioners are neither necessary nor proper parties in the suit.

15. Shri Bhobe, the learned for the respondent nos.2(i) to 2(xii) and 2(xiii)(a), has nothing much to say, as essentially the present dispute is between the respondent no.1(a) (original plaintiff) and the present petitioners.

16. I have carefully considered the rival circumstances and the submissions made. There cannot be any manner of dispute with the proposition that the plaintiff being the *dominus litus*, can decide as to who should be added as defendant/s. This privilege enjoyed by the plaintiff is however subject to the power of the Court under Order I, Rule 10(2) of CPC. Under the said provisions, the Court may strike out or add party, 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. It can thus be seen that the powers of the Court under Order I, Rule 10 of CPC are wide and can be exercised at any stage of the proceedings, provided the Court finds that the party to be joined is either a necessary or a proper party. In other words, the findings that a party is a necessary or a proper party, is *sine qua non* for the exercise of jurisdiction discretion under Order I, Rule 10 of CPC. The question whether, a particular party is a necessary or a proper party, would evidently

depend upon facts and circumstances of each case, namely the nature of the suit, the relief claimed, the nature of dispute involved and also the grounds and reasons on the basis of which the impleadment/addition is sought.

17. The Hon'ble Apex Court in the case of **Vidhur Impex and Traders Private Limited** (supra), after taking a survey of various decisions holding the field has culled out broad principles, which should govern the disposal of application for impleadment, in para 41 of the judgment, which reads thus:

41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

41.1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the suit.

41.2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the Court.

41.3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

41.4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.

41.5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

41.6. However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.

18. In the present case, according to the petitioners, they are proper parties to the suit in as much as the plaintiff-partnership firm is a sham and bogus entity, and therefore, the

petitioners are co-owners of the property.

19. A necessary party is one who ought to be joined to the suit and in whose absence a effective decree cannot be passed. A proper party is one whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though no relief is claimed for or against such a party.

20. As noticed earlier, the suit is simpliciter for possession against the defendants, whose licences have professedly been terminated. The question is whether, the presence of the petitioners in the context of the nature of the suit, would be required by the Court to completely, effectively and properly adjudicate upon all the matters in the suit. In my considered view, the answer has to be in the negative.

21. At the cost of repetition, it needs to be stressed that the claim is essentially against third parties, who are in possession of certain structures standing on the subject land. The inter se dispute between the plaintiffs and the petitioners about the nature of the partnership, is not the subject matter of

dispute in the suit. In fact assuming that the petitioners are co-sharers (on the ground that the partnership is a sham and bogus entity), still one of the co-sharer can institute and prosecute the suit for the benefit of the estate. As noticed earlier, the question whether the party is a necessary or a proper party has to be examined in the context of the claim made in the suit and the scope of the dispute. In the present case, considering the claim involved in the suit, I do not find that the petitioners can be said to be either necessary or proper parties.

22. The learned Counsel for the petitioners submitted that subsequent to filing of the application, the defendants have obtained a favorable order in the mundkarial proceedings, which respondent no.1(a) has challenged, which would indicate collusion between the plaintiffs and defendants.

The case about the collusion is for the first time tried to be made out before this Court. The application for impleadment does not show that any such case was made out before the Trial Court. In my considered view, the ground on the basis of collusion cannot be accepted, as it was neither made out before the Trial Court nor is a ground made out in the petition.

23. For these reasons, I do not find that any case for interference is made. The petition is accordingly dismissed with no order as to costs.

C. V. BHADANG, J.

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