

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 728 OF 2017**

1. Natasha Dilip Singh,
d/o Mr. Padam Singh,
aged 36 years old, housewife,
and her husband,
2. Dilip Singh,
Son of Manbahadur Singh,
aged 32 years, business,
Both Indian Nationals and
Residents of B-126, Gayatri
Krupa Bungalow,
Opp. Choksiwadi, Render Road,
Veluk, Surat, Gujrat-395005

.... Petitioners

Both through POA,
Pascoal Fernandes,
45 years of age,
Resident of Corlim,
Ilhas – Goa.

V e r s u s

1. Michael Tony Ferns,
s/o late Austin Philip Ferns,
aged 42 years, businessman,
resident of H. Number 45/46,
Rua Bernardo da Costa, Margao,
Salcete-Goa.
2. Bruno Noronha,
s/o William Noronha,
aged 63 years, service, widower,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.
3. Francis Bruno Noronha,

s/o Bruno Noronha,
aged 37 years, service, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

4. Vailankanni Francis Noronha,
w/o Francis Noronha,
aged 30 years, service, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

5. Cleonice Cardozo,
d/o Bruno Noronha
aged 38 years, service, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

6. Benny Cardozo,
s/o Pascoal Cardozo,
aged 34 years, service, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

7. Padam Singh,
s/o Mohan Singh,
aged 49 years, service, widower,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

8. Michael Singh,
s/o Padam Singh,
aged 28 years, service, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

9. Kalpana Michael Singh,
w/o Michael Singh,
aged 26 years, housewife, married,
R/o Flat Number 101, Janardhan Niwas,
First Floor, Laxmi Nigar, Khar Danda,
Khar (West), Mumbai, 52.

..... Respondents

Shri S.G. Desai, Senior Advocate with Advocate S. Naik for the Petitioners.

Shri G. Agni with E. Usapkar, Advocates for Respondent no.1.

Shri R. Rao, Advocate for Respondents no.2 to 9.

CORAM: C. V. BHADANG, J.

Reserved on: 19/03/2018.

Pronounced on: 03/04/2018.

JUDGMENT :

The challenge in this petition is to the order dated 20/6/2017 passed by the learned trial court in Civil Misc. Application no.41/2014/A thereby refusing to implead the petitioners as defendants in Special Civil Suit No.25/2011/A.

2. The first respondent has filed Special Civil Suit no.25/11/A against the respondents no.2 to 9 for specific performance of an agreement to sell in respect of the property known as “Nanorem or Naikiniche Bata” surveyed under no.156/1 approximately admeasuring 4,10,296 sq.mtrs. under no.156/1 along with an existing house, more specifically described in para 8 of the plaint. That suit is pending before the learned Civil Judge Senior Division at

Mapusa. The petitioners filed an application for their impleadment as party defendants in the suit purportedly under Order I Rule 10 (2) of the Code of Civil Procedure (Code, for short). It was contended that the petitioners are the co -owners in possession and enjoyment of the suit property along with the respondents no.2 to 9 who are the defendants in the suit. It was contended that the petitioners are presently residing in Surat from the time the petitioner no.1 got married with the petitioner no.2. The petitioners have then set out the details under which they are claiming to be the co owners of the suit property. It was contended that the consideration of Rs.50.00 lakhs is also inadequate as the property is worth approximately Rs.124 crores. It was contended that there is collusion between the original defendant no.1 and the other defendants interse, and as such, the petitioners are entitled to be joined as party defendants to the suit.

3. The application was opposed on behalf of the respondent no.1/plaintiff on the ground that a third party has no locus standi to get impleaded in a suit for specific performance. It was contended that that the defendants in their written statement filed in the suit have not mentioned about the petitioner no.1 being the daughter of Padam Singh and the petitioners have now suddenly surfaced and filed an application in order to cause prejudice to the respondent no.1. It was contended that the respondent no.1 in his capacity as

a plaintiff is entitled to choose who should be made parties to the suit.

4. The learned trial court has found that a third party who is a stranger to the agreement cannot seek impleadment in a suit for specific performance on the ground that they are co-owners. It has been held that such co -owners, who are not parties to the agreement, are neither necessary nor proper parties to determine the controversy in the suit. In that view of the matter the application came to be rejected.

5. I have heard Shri Desai, the learned Senior Counsel for the petitioners and Mr. Agni, the learned counsel for the respondent no.1. With the assistance of the learned counsel for the parties, I have gone through the record.

6. Shri Desai, the learned Senior Counsel for the petitioners has submitted that in Inventory proceedings the petitioner no.1 has been held to be a co-owner of the suit property to the extent of 1/8th share. It is thus submitted that the petitioner no.1 and her husband would be necessary parties to the suit. The learned Senior Counsel has taken me through the genealogy starting from the original owner, Manuel Noronha, who died on 9/7/1945 in order to demonstrate that the petitioner no.1 who is the Great Grand Daughter in-law

of Manuel Noronha has a share in the suit property. The learned Senior Counsel has also relied upon the provisions of the Portuguese Civil Code in order to urge that the petitioners will have a share and are co owners of the suit property along with respondents no.2 to 9.

On behalf of the petitioners reliance is placed on the decision of the Division Bench of this Court in the case of **Prem Kaliaandas Daryanani Vs. Natvarlal C. Modi & others 2015 (4) ALL MR 346**, in order to submit that the petitioners would be necessary parties to the suit. In the alternative it is submitted that the petitioners would be proper parties and need to be joined as party defendants in the suit. It is submitted that there is no universal rule that a stranger to the agreement of sale cannot be joined as a party defendant in a suit for specific performance. It is submitted that the question essentially depends on the fact whether a party seeking impleadment is either a necessary or a proper party. It is submitted that the learned trial court was in error in coming to the conclusion that the petitioners are neither necessary nor proper parties. The learned Senior Counsel was at pains to point out that the petitioners have been declared to be the co owners by the Inventory Court and thus the impleadment could not have been refused.

It is submitted that although Section 19 of the Specific Relief Act enumerates the parties against whom a specific performance of a contract may be enforced, no prohibition can be read into section 19 of the Specific

Relief Act against impleadment of a person who is not a party to the agreement to sell. It is thus submitted that section 19 of the Specific Relief Act cannot be pressed into service to refuse such impleadment.

7. On the contrary, it is submitted by Shri Agni, the learned counsel for the respondents that a stranger to the agreement of sale cannot be impleaded as a party defendant, as has been rightly held, by the learned trial court. The learned counsel has placed reliance on the decision of the Hon'ble Supreme Court in the case of (i) **Anil Kumar Singh Vs. Shivrath Mishra alias Gadasa Guru 1995 3 SCC 147** (ii) **Kasturi Vs. Iyyamperumal & Ors. 2005 (5) ALL MR (S.C) 721** in order to submit that the petitioners are neither necessary nor proper parties. It is submitted that the inventory proceedings were instituted subsequent to the filing of the suit, in order to frustrate the suit for specific performance. It is submitted that there is no whisper in the written statement filed by the defendants about the existence of the rights of the petitioner, as co owners in the suit property. It is submitted that the presence of the petitioner is not necessary to effectively and to completely adjudicate upon and settle the questions involved in the suit.

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

9. In order to decide the question involved in this petition, the legal position as emanating from the decisions cited may be briefly noticed. It is now well settled that plaintiff being dominus litus, is entitled to decide who should be arrayed as defendants in a suit instituted by him. This is however subject to the powers of the court under Order 1 Rule 10 (2) of the Code where the court can add or strike off parties. Presently we are concerned with a prayer for addition of party. The court can direct addition of a party if the court finds that the presence of such a party may be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit. Whether such addition is necessary is a question which depends upon facts and circumstances of each case. The discretion in this regard has to be exercised judiciously. A party may be added where it is either found to be a necessary or a proper party. A necessary party is one in whose absence no effective decree can be passed by the court or where there is a right in the plaintiff to some relief against such a party. A proper party is one whose presence before the court would be necessary to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although no relief is claimed against such a party in the suit. The question in the present case has also to be considered in the context of section 19 of the Specific Relief Act which enumerates the

persons against whom specific performance of a contract may be enforced.

10. A three Judge Bench of the Supreme Court in the case of **Kasturi (supra)** has held that section 19 is exhaustive as to the persons against whom a contract can be specifically enforced. In that case a person claiming title adverse to that of the vendor had sought impleadment. The Supreme court held that such a person claiming a title adverse to that of the vendor, cannot be impleaded, as it would enlarge the scope of the suit from one of specific performance to that of a title suit. In a later, two Judge bench decision, in the case of **Sumatibai (2007) 10 SCC 82** the Supreme court held that **Kasturi (supra)** does not lay down as an absolute proposition that a stranger to the agreement can never be joined as a party defendant in a suit for specific performance. It has been held 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**.

11. In the case of **Mumbai International Airport Private Ltd. (2010) 7 SCC 417** the Supreme court reiterated that the discretion of the court to add a person as a party is limited to persons found to be necessary or proper parties. In the facts of that case it was held that a mere likelihood of a party to secure a right/interest in the suit property in case of dismissal of suit for specific

performance, does not make the person a necessary or a proper party. In that case it was urged before the Supreme court that there is an apparent conflict between the decisions in the case **Kasturi (supra)** and the case of **Sumatibai (supra)**. The Supreme court in para 21 of the judgment found that there is no conflict between the two decisions, in as much as the Court in the two decisions was dealing with different situations. The Supreme court in the case of **Mumbai International Airport Private Ltd. (supra)** has set out some illustrations in para 24 of the judgment regarding exercise of discretion to add parties, as under:

“24.1) 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 I. 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.

24.2) 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.

24.3) 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.

24.4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonfides 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."

12. Coming to the facts of the present case, according to the respondent no. 1/plaintiffs, the property is agreed to be sold for a consideration of Rs.50,00,000/- as per the memorandum of understanding entered into on

3.1.2011 and the subsequent agreement to sell dated 14.6.2011. The trial court has found that the plaintiffs in their wisdom have entered into transaction to purchase the property which was not in the name of the defendants but in the name of the ancestors and therefore according to the learned trial Court “looking from one angle it appears that all the parties connected to the family of the defendants have say in their family property”. The trial court has then noticed that the petitioners have produced the order in the inventory proceedings where the petitioner no. 1 (applicant no.1) is shown as the heir. The trial court has also found that the final order in the inventory proceedings no 144/2014/E cannot be overlooked while deciding the application for impleadment. Thus it appears that on facts, the trial court found some favour with the prayer for impleadment. The application however came to be rejected mainly on the basis of the decision of the supreme court in the case of **Anil Kumar Singh (supra)**. In that case a person claiming to have subsequently acquired an interest by virtue of a decree of the court, in a matter not arising out of, or in respect of the same act or transaction in the suit, was seeking impleadment. In such circumstances, it was held that impleadment was not permissible. It would be significant to note that the decision in the case of **Anilkumar (supra)** has been considered in the case of **Kasturi (supra)**. As noticed earlier in a subsequent decision in the case of **Sumatibai (supra)** the Supreme court has held that **Kasturi (supra)** does not

lay down as an absolute proposition that a third party can never be joined as a party defendant in a suit for specific performance. In a later decision in the case of **Mumbai International Private Ltd. (supra)**, it has been held that there is no conflict of opinion in the decisions in the case **Kasturi** and **Sumatibai (supra)**. The decision in the case of **Mumbai International Private Ltd** makes it explicit that there may be situations where such impleadment can be ordered and the court while allowing such impleadment can impose appropriate conditions. Para 24.2 of the said judgment would show that in a given case a tenant in possession can be impleaded as party, being a necessary party in so far as prayer for delivery of actual possession is concerned. Para 24.4 would show that in a given case a co -owner can be impleaded, subject to the condition that only issues relating to the specific performance will be gone into, i.e. whether the contract should be specifically enforced or not.

13. It can thus clearly be seen that the question entirely depends on facts and circumstances of each case. In the present case the trial court as noticed earlier had found some favour with the case set up, based on the final order passed in the inventory proceedings in which the applicant no.1 is shown to be the heir in respect of the suit property. In my considered view the petitioners would be proper parties to the suit which would enable the court

to effectually and completely to adjudicate upon and to decide the controversy in the suit namely whether the relief of specific performance should be granted and if granted in which form i.e. whether or not restricting it to a certain share and the like. This is not a case where, unlike the case of **Kasturi (supra)** (where the impleadment was sought on the basis of an adverse title against the Vendor) would enlarge the scope of the suit. More over the impleadment can be allowed subject to appropriate conditions as set out in the case of **Mumbai International Airport Private Ltd. (supra)**. This is not a case where, prima facie, it can be said that the petitioners do not have a 'semblance of a title' as held in the case of **Sumatibai (supra)** so as to refuse impleadment.

Section 19 of the Specific Relief Act also cannot come in the way of such impleadment. This is because Section 19 of the Act enumerates the persons against whom specific performance of a contract can be enforced, which would mean that section 19 set outs the party/parties who can be arrayed as necessary party to the suit, inasmuch as, for enforcing such specific performance, the presence of the parties as enumerated in the said section would be necessary. As noticed earlier, no relief need be claimed against a proper party. Thus, if the considerations as set out in Order I Rule 10 (2) of the Code are satisfied, a party can be added as a proper party.

14. Although on facts I have held that the impleadment needs to be granted, I find that the reliance placed on behalf of the petitioners in the case of **Prem Daryanani (supra)** is misplaced. In that case the agreement for sale was executed in the year 1986 and the person sought to be impleaded was a subsequent purchaser of the year 1991. Thus the said case was clearly covered by clause (b) of section 19 of the Specific relief Act. This is just to put the record straight.

15. In the result the petition is allowed. The impugned order is hereby set aside. The application for impleadment filed by the petitioners is allowed. This will however be subject to the condition that only issues relating to the grant of specific performance of the contract, will be gone into in the suit . Rule is made absolute in the aforesaid terms with no order as to costs.

C. V. BHADANG, J.

Ap/