

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

WRIT PETITION NO. 1202 OF 2016

Dashrath Baburao Naik	...	Petitioner
V/s.		
Shivaji Fakira Bhambare & Anr.	...	Respondents

**WITH
WRIT PETITION NO. 1204 OF 2016**

Dashrath Baburao Naik	...	Petitioner
V/s.		
Shivaji Fakira Bhambare & Anr.	...	Respondents

- Mr.Suresh M. Sabrad for the Petitioner.
- Mr.Sandip Shinde for the Respondents.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 6th MARCH, 2018.

P.C. :

1] Heard learned counsel for the Petitioner and the Respondents.

2] By these Writ Petitions, filed under Article 227 of the Constitution of India, the Petitioner is challenging the common order dated 2nd December 2015 passed by the District Judge-2, Niphad, below Exhibit- 11 and 20 in Regular Civil Appeal No. 78 of 2012.

3] The Application at Exhibit-11 was filed by the Respondent No.2-daughter and the Application at Exhibit-20 was filed by the son of the Original Appellant-Shivaji contending *inter-alia* that the suit properties are their ancestral properties and they are having undivided share in the same. They are also having joint possession thereof and therefore, they are necessary parties to the Appeal pending before the Appellate Court.

4] Despite the objection raised by the present Petitioner/the Plaintiff of the Original suit, the Appellate Court has allowed both these applications by a common order and this common order of the Appellate Court is challenged in these two Writ Petitions.

5] Admittedly, the suit before the trial Court was filed by the Petitioner herein, seeking specific performance of the agreement of sale dated 23rd April 2004 executed by Shivaji in favour of the Petitioner, in respect of the suit land. In that suit, the evidence was led by both the parties. The Defendant-Shivaji, who is the Appellant before the Appellate Court has filed his own Affidavit-of-evidence, the copy of it is produced at page (14) and in paragraph (1) of the Affidavit-of-evidence, has deposed as follows:

“I reside at village Chitegaon and does agriculture. The property mentioned in the plaint is my self acquired

property and is in my possession. I was in need of money for the purpose of payment of Govt. and Co.Op. loans and for the performance of the marriages of my daughter, therefore, I had decided to sell the property.”

6] Thus, he has categorically stated that the suit property is his self acquired property. He was in possession thereof and as he was in need of money for the purpose of payment of Government and Co-operative loans and for the performance of the marriage of his daughter, he has agreed to sell the property.

7] In view of this categorical admission given by the Original Appellant-Shivaji, Respondent No.1 herein, there hardly remains any substance in the contention raised by his children i.e. son and daughter, that the suit property is ancestral family property and they are in possession thereof or having share therein.

8] Moreover, it is pertinent to note that the agreement of sale was executed on 23rd April 2004; the suit for specific performance was filed on 10th June 2004; the suit was decreed on 1st April 2006 and these applications are filed in the year 2014. Thus, Applications are filed at a very belated stage and that too at the Appellate stage. Hence, it was not at all proper on the part of the Appellate Court to allow such applications; especially in the light of the fact that the daughter of the

Appellant-Shivaji had already filed suit bearing R.C.S. No.245 of 2012 for partition and separate possession of the property; whereas son has also filed a separate suit bearing R.C.S. No.109 of 2011. So whatever rights they may be having in the suit property will be decided independently in the suits which they have filed, but without there being any evidence on record, showing that they are having their independent rights over the suit property and in the light of categorical admission given by their father that the suit property is his self acquired property, at this stage, they cannot be joined or impleaded in the proceeding and that too at the appellate stage. As a matter of fact, as observed by this Court in the case of *Ajay Kumar vs. Smt. Tulsabai And Another*, AIR 1973 Bombay 330, in paragraph Nos.8 and 9 :

“8. The power of the Court to add parties in such matters is referable to Order 1, Rule 10, Civil Procedure code. Sub-rule(2) empowers the Court either upon or without application to direct parties to be joined who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The provisions which are ex facie enabling clearly indicate the conditions for exercise of that power. It is only when the Court comes to the conclusion that for the purpose of full adjudication of the matters in issue or to settle the controversies, a party which is not

added is necessary, the provision of sub-rule (2) are attracted. It is plain that unless the party proposed to be added has directly or indirectly an interest in the controversy or its adjudication, the power cannot be invoked.

9. *Now, in the present case, it is a simple suit for specific performance of an agreement to sell certain property. That agreement will have to be established as pleaded by the plaintiff himself. Not only, (sic) before the Court can be asked to pass a decree for specific performance the plaintiff is bound to establish all the conditions that are requisite for completing such a sale transaction. It is implicit in such a controversy that if the evidence indicates or if a plea is raised that there is no title under which such an agreement could have been at all entered into, the suit would fail. That does not mean that the Court is enjoined to enter upon the questions which are neither pleaded nor are in issue. If the defendant against whom such a suit is filed has a defective title but agreement is properly enforceable, the plaintiff may choose to take even the defective title in such a suit. Similarly, there may be a title in part with the defendant and that may part with the defendant and that may ultimately pass to the plaintiff. In neither of these cases a stranger to the agreement and hence to the controversy who claims to be entitled to the property as such can come before the Court either as necessary or proper party.*

(Emphasis supplied)

9] Therefore, assuming that the children of the Appellant/Respondent No.1 herein are having some independent

rights or they are having the rights as legal heirs and properties are the ancestral properties, in that case also, if the Petitioner is ready to take the defective title, then he is at liberty to do so, but that may not make the children of the Appellant/Respondent No.1 as necessary parties or even the proper parties to the Appeal, unless and until they establish their rights over the suit property.

10] In view thereof, the impugned common order passed by the Appellate Court, impleading the Respondent No.2 as necessary parties in the appeal, though the clear admission was given by their father that it was his self acquired property, cannot be sustained; hence it needs to be quashed and set-aside.

11] Both the Writ Petitions accordingly allowed. The impugned order passed by the Appellate Court is quashed and set-aside. As a result, the Applications at Exhibit-11 and Exhibit-20 filed by the Respondent No.2 before the Appellate Court stand dismissed.

[DR.SHALINI PHANSALKAR-JOSHI, J.]