

WRIT PETITION NO. 4 OF 2019

Orenstein D'Souza & Another Petitioners
Versus
Vijitsikand @ Vijit Singh Sikand & 4
others Respondents

Mr. R.G. Ramani, Advocate for Respondent No. 1.

DATE : 4th June, 2019

2. The brief facts are that the respondent no. 1 has filed the aforesaid suit, against the respondent nos. 2 to 5, for specific performance of an agreement of sale dated 06.02.2008, allegedly executed by the respondent nos. 2 to 5.

3. The petitioners filed an application (Exhibit-52) for their impleadment, on the ground that the suit property, comprising of survey nos. 83/2 and 84/12 of village Carmona, Tehsil Salcette, came to be owned by original defendants as heirs and successors of Mr. Antonio Pereira and his wife, Mrs. Filomena Carvalho or Victoria Filomena Carvalho alias Philomena Pereira. The original defendant no. 1, Ms. Susan D'Souza alias Susan Laura Nutan Pereira was married to Mr. Oliveiro Henry D'Souza and their marriage was celebrated in St. Blaise Church at Mumbai on 28.12.1985. It was contended that although, the said marriage was not registered in Goa since, Ms. Susan D'Souza and Oliveiro D'Souza were both of Goan origin, their marriage was governed by regime of communion of assets. The petitioners happen to be the children of Ms. Susan D'Souza and Mr. Oliveiro D'Souza.

4. It was contended that the marriage between Ms. Susan D'Souza and Mr. Oliveiro D'Souza was dissolved by a decree of divorce dated 23.07.2002, passed by the Family Court at Mumbai and subsequent to the said divorce, no partition or inventory of the estate belonging to them was held, separating the property by metes and bounds. Mr. Oliveiro

D'Souza expired on 04.05.2013 and the applicants, as his heirs have inherited the said property, which is jointly owned by the petitioners and the original defendant no. 1, Ms. Susan D'Souza. It was thus contended that the petitioners being the co-owners of the property, are necessary parties to the suit for specific performance.

5. The application was opposed by the respondent no. 1/original plaintiff. It was denied that the petitioners are the children of Ms. Susan D'Souza and Mr. Oliveira D'Souza or that the marriage between Ms. Susan D'Souza and Mr. Oliveira D'Souza was governed by regime of communion of assets. It was contended that the said marriage is not registered under any law in force, either in Goa or in Mumbai. The factum of marriage was also denied. It was contended that the suit is for specific performance of the agreement between the respondent no. 1 and respondent nos. 2 to 5, to which, the petitioners are not parties and thus, they are neither necessary nor proper parties to the suit.

6. The learned Trial Court by the impugned order has dismissed the application. Hence, this petition.

7. I have heard Mr. Padgoankar, the learned Counsel for the petitioners and Mr. Ramani, the learned Counsel for the contesting respondent no. 1. Perused record.

8. Mr. Padgoankar, the learned Counsel for the petitioners has placed reliance on the decision of the Supreme Court in the case of **Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Ors. AIR 2010 SC 3109**, in order to submit that it is not an absolute rule that in no case, a third party can be added as a defendant in a suit for specific performance. It is submitted that such a party seeking impleadment can show a “fair semblance of title/interest in the suit property” and can be impleaded in the suit. It is submitted that the petitioners being the children of Ms. Susan D'Souza and Mr. Oliveira D'Souza have inherited the property after the death of Mr. Oliveira D'Souza, as the marriage between Ms. Susan D'Souza and Mr. Oliveira D'Souza was governed by regime of communion of assets. He, therefore, submits that clearly there is semblance of title shown, which was sufficient to allow the impleadment of the applicants.

9. Mr. Ramani, the learned Counsel for the contesting respondent no. 1 has supported the impugned order. It is submitted that the Trial Court after consideration of the circumstances, as obtaining from the record, has rightly come to the conclusion that the petitioners are neither necessary nor proper parties. It is submitted that there is no material to show that the alleged marriage between Ms. Susan D'Souza and Mr. Oliveiro D'Souza was governed by regime of communion of assets or that they were governed by the family laws, as applicable in Goa. It is submitted that significantly, the decree of divorce between Ms. Susan D'Souza and Mr. Oliveiro D'Souza has not been produced on record and thus, the learned Trial Court was justified in refusing to grant the impleadment. The learned Counsel was at pains to point out that ultimately, it is the respondent no. 1, who runs the risk and the issue about non-joinder of necessary party, as raised by the respondent no. 2, having been framed, no case for impleadment is made out.

10. I have carefully considered the rival circumstances and the submissions made. Normally, the rule is that a person, who is not a party to the agreement for sale, cannot be impleaded in a suit for specific performance. This rule is

subject to well known exceptions, as culled out by the Hon'ble Supreme Court, in the case of **Mumbai International Airport Pvt. Ltd.** (supra). The question whether, the party seeking impleadment, has shown any semblance of title, would evidently depend upon facts and circumstances of each case.

11. Coming to the present case, the learned Trial Court has found that the case made out by the respondent no. 1 was that the spouses of respondent nos. 2 to 5 (original defendants) are not necessary parties, as they were not governed by regime of communion of assets. The learned Trial Court has further found that there is an issue of non-joinder of necessary parties, raised by the defendants in the suit, which is a triable issue and the defendant no. 1, Ms. Susan D'Souza, can very well produce documents to show that her heirs were necessary parties and their marriage was governed by the regime of communion of assets. The learned Trial Court has further found that the petitioners have not produced any document on record to show that their father Mr. Oliveiro D'Souza was of Goan origin or was governed by the local laws as applicable in Goa. The learned Trial Court, on the contrary, has found that Mr. Oliveiro D'Souza is shown to be a resident of Mumbai and his death certificate also shows him to be a permanent resident of

Mumbai. Lastly, the learned Trial Court found that the copy of the decree for dissolution of marriage of Ms. Susan D'Souza and Mr. Oliveira D'Souza was not produced to show whether, their marriage was governed by regime of separation of assets or communion of assets or to show by which law the marriage was governed. In such circumstances, the learned Trial Court found that the applicants are not necessary parties to the suit and impleading them will only enlarge the scope of the suit and can change the nature of the suit, which cannot be permitted.

12. It can thus be *prima facie* seen at this stage that Mr. Oliveira D'Souza is not shown to be of Goan origin and on the contrary, the death certificate shows that he was resident of Mumbai. The marriage was performed at Mumbai and was dissolved by a decree of divorce granted by Family Court at Mumbai. There is no material to show that the marriage, even if governed by local law, was governed by the regime of communion of assets. A copy of the decree of divorce is not produced. On consideration of all these grounds, I find that the view taken by the learned Trial Court is a plausible view, based on the material produced on record and need not be interfered with, in the supervisory jurisdiction of this Court, under Article 227 of the Constitution of India. In any event, it is for the

respondent no. 1, who runs the risk of proceeding with the suit, in the event, the suit is found to be bad for non-joinder of necessary party. It is evident that any decree/order passed in favour of the respondent no. 1/plaintiff in the suit will not be binding on the petitioners.

Subject to this, the petition is dismissed, with no order as to costs.

C. V. BHADANG, J.

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