

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

WRIT PETITION NO.4250 OF 2018

1. Kalpesh Babulal Jain ...Petitioners
R/at. 201, Priyadarshani Building,
S.P. Road, 13, Kamathipura, Mumbai-400008

2. Rajkumar Khimchand Jain
R/at. Flat No.101, 10th Floor,
Siddhesh Jyoti Apartment, F Wing,
Baklaram Street, Grant Raod,
Mumbai – 400 007.

Versus

1. Sheikh Abdul Kased ...Respondents
R/at. Room No.406, 6th Floor,
110/112, Dhanji Street, S. N. K. Plaza,
Mumbai – 400 004.

2. Shaikh Santona Abdul Kased
R/at. Room No.406, 6th Floor,
110/112, Dhanji Street, S. N. K. Plaza,
Mumbai – 400 004.

3. Mr.Kishormal Bhabutmal
office at Shop No.3, Ground Floor,
34, Bori Chawl No.3, Kamathipura,
13th Lane, Mumbai – 400 008.

Mr.R.D. Soni i/b. Mr.Sachin B. Chowdhari for the petitioners.
Ms.Priya Rombade i/b. Mr.Deven Dwarkadas for respondent no.1.

CORAM : DAMA SESHADRI NAIDU, J.

DATE : 21st JUNE 2019.

JUDGMENT :

1. The petitioners claim to be the co-owners of the property which is the subject of R.A.E. & R. Suit No.1016 of 2016 in the Small Causes Court, at Bombay.

2. To begin with, the 1st and the 2nd respondents sued the 3rd respondent on the grounds that they are exclusive owners, that the 3rd respondent is the tenant, and that he should vacate the leased property and hand it over to them. Pending that suit, there arose a title dispute between the petitioners on the one hand and the respondents 1 and 2 on the other, for the petitioners claimed 3/4th right in the property. And it has led to another S. C. Suit No.443 of 2015, filed by the respondents 1 and 2. In that suit, they secured an interim order restraining the petitioners in this writ petition from acting on the sale deed based on which they are claiming their right.

3. Against that interim order, the petitioners filed three Applications before this Court. By a common order, this Court recorded the consent terms of the parties, and one of the terms reads:

“7. The Appellants Respondents Nos.1 and 2 may institute future eviction proceedings against any tenant or occupant, but only with prior leave of this Court. *In any event, the Appellants will be joined as parties to any*

eviction action filed by Respondents Nos.1 and 2, and vice versa.”

(italics supplied)

4. On the strength of this arrangement, the petitioners wanted to come on record in RAE & R Suit No.1016 of 2016 as the respondents. For they also claim to be the co-owners of the property. But the respondent Nos.1 and 2, as the original plaintiffs, resisted the petitioners' application for impleadment. And the trial Court eventually rejected that application, through the impugned order, dated 30th November 2017.

5. Though the petitioners claimed to be the co-owners, the trial Court has, as I see, felt that the petitioners could establish no relationship with the tenants. On the other hand, it has also felt that the title was under a cloud. So it rejected the application. Aggrieved, the petitioners have come to this Court.

6. Heard, Mr. Soni, the learned counsel for the petitioners, and Ms. Rombade for the respondent No.1.

7. Evidently, the petitioners applied under Order 1 Rule 10; they have pleaded about the consent terms and also placed them on record. Despite that, the trial Court has disregarded that aspect—the aspect of

consent terms—and, instead, decided the matter against the petitioners.

8. I reckon, had the trial Court perused the consent terms—which not only bind the respondent Nos.1 and 2 but also estop them from acting otherwise—the trial Court would have concluded otherwise. Thus, there is a patent error committed by the trial Court. Indeed, the consent term No.7 abundantly clarifies that the petitioners may join as parties to any eviction proceedings. And if the petitioners were to file any eviction proceedings, the respondent Nos.1 and 2, too, would have the same privilege.

9. Of course, the Counsel for respondent Nos.1 and 2 does contend that the petitioners intend to collude with the 3rd respondent-tenant and, thus, defeat the rights of the respondents Nos.1 and 2. Before they could attempt that, he asserts, they should, first, establish their title in the other pending case.

10. I am afraid such a plea is farfetched. Rules 1 & 2 of Order I are permissive in content and liberal in their scope. In fact, Rule 1 permits all persons to be joined in one suit as plaintiffs if (a) any right to relief arising out of the same act or transaction is alleged to exist in those persons, “whether jointly, severally, or in the alternative.” And (b)

if those persons brought separate suits, there should arise any common question of law or fact. Indeed, this provision is not mandatory; it is enabling. For the expression “severally”, as this Court has held in *Paikanna v. Laxminarayana*¹, what is required is the involvement of a common question of law and fact, and not identify of interest or cause of action.

11. Rule 2 of Order I, on the other hand, ordains who may be joined as defendants. According to that provision, all persons may be joined in one suit as defendants if (a) any right to relief arising out of the same act or transaction is alleged to exist against those persons, whether jointly, severally, or in the alternative. And (b) if separate suits were brought against them, there should arise any common question of law or fact.

12. As we shall see, the underlying object of either provision—Rule 1 or Rule 3—is to avoid multiplicity of suits and needless expenditure. For this reason, the provision has received a liberal construction.

13. Now let us examine Order1, Rule 10. Its long cause title, misleadingly, reads: “Suit in Name of Wrong Plaintiff”. But it travels

¹ AIR 1979 Bom 298

beyond that and covers the defendants, too. For our purpose, Subrule (2) assumes importance. Let us examine it.

Order I, Rule 10(2):

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(2) Court may strike out or add parties--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.

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(4) Where defendant added, plaint to be amended.--Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

...

14. The purpose of Order 1, Rule 10 is salutary. Let us analyze Subrule (2). The court may strike off the name of a person—either plaintiff or defendant. To exercise that power, the court must conclude that plaintiff or defendant has been improperly joined.

15. Conversely, the court may also add the name of any person—as a plaintiff or as a defendant. To exercise this power, the court

needs to conclude that the party now sought to be added ought to have been joined as a party to the proceedings at the inception. But this facility of adding a party, be it plaintiff or defendant, depends on these factors: (a) that the presence of the person sought to be added may enable the court to settle all questions—effectually and completely; (b) that the addition of the party can be at any stage of the proceedings, including appellate stage; (c) that the addition can be on the court's own volition or on a party's application; and (d) that the court may impose terms, such as costs if the inclusion is at the behest of a party to the proceedings.

16. As we may see, the expression employed in Subrule (2) is “[whose] presence before the Court *may be* necessary in order to enable the Court”. The provision has not mandated that the person's presence on record “must be necessary.” And this has given rise to the dichotomy of parties to be added: necessary party and proper party. In this statutory backdrop, the theory of *dominus litis*, at times, must yield. A plaintiff cannot insist that as the originator of the suit proceedings, he is the master of the suit and has unbridled right and power to choose his adversaries and carry on the proceedings as his fancy dictates. If the court—that is, the de facto *dominus litis*, even in the adversarial system

—reckons that a party's presence either as a plaintiff or as a defendant is either necessary or even proper, it can order that person's inclusion to the array of parties.

17. Here, the petitioners claim co-ownership in the property—and by 3/4th, at that. They assert that they have purchased that right through a registered sale deed executed by some of the erstwhile joint owners. And that sale deed has already been in issue in some other suit instituted by none other than the respondents 1 & 2. The icing on the cake is that in connected proceedings to the other suit, both the parties have agreed—before this Court—that one will ensure the presence of the other in any proceeding instituted by either of them against a third party. This Court has recorded those consent terms, as I have already extracted.

18. Viewed from any perspective, the impugned order, dt.30th November 2017, suffers from incurable legal infirmities. I reckon the petitioners' presence is necessary to the eviction-suit proceedings the respondents 1 & 2 have initiated.

19. True, the respondents, as the plaintiffs in the suit seeking the tenant's eviction, apprehend that the petitioners, after coming on record, may collude with the tenant and affect their interests adversely.

I am afraid an apprehension is no ground to shut out a party from exercising his right— his right to participate in judicial proceedings by bringing himself on record and by taking a legally permissible plea or defence in those proceedings.

Under these circumstances, I set aside the order, dated 30th November 2017, and allow the writ petition. As a result, the petitioners' Application below Exh.-31 in R.A.E.&.R. Suit No.1016 of 2016 before the trial Court stands allowed.

Writ Petition is, accordingly, disposed of.

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[DAMA SESHADRI NAIDU, J.]