

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO.93 OF 2020**

M/s. Minescape Minerals Pvt. Ltd.

... Petitioner

Versus

Mr. Sudhir Murari Sawardekar & Ors.

... Respondents

Shri C.A. Coutinho, Advocate for the Petitioner.

Shri V.R. Tamba, Advocate for the Respondents.

Coram: - DAMA SESHADRI NAIDU, J.**Date: - 9 February 2021****ORAL ORDER:****Facts:**

The petitioner purchased a piece of property from the respondents. Later, he came to know that the respondents had no title to the property. So, he repurchased the property from those whom he believed to be the actual owners.

2. As the petitioner paid the sale consideration, first, to persons without title to the property, he wanted to recover the money. So he filed Special Civil Suit No.3/2011 before Civil Judge, Senior Judge, at Quepem. He has sought a declaration that the Sale Deed the respondents executed is void, and they should return the sale consideration. In that suit, the respondents filed a counterclaim seeking a declaration and other consequential reliefs. To put this counterclaim in perspective, we need to narrate how the title to the property in question flowed.

3. One Murari Vithal Sawardekar was the head of the family, which included his wife and daughter. When his wife died, the succession opened, and the property fell to his daughter's share. But the daughter, too, predeceased him. Then, the property reverted to Murari Sawardekar,

the father and head of the family. The respondents are the other children of Murari Sawardekar.

4. But during his lifetime, Murari Sawardekar gifted the property to one Vithal Sawardekar. It was through a registered Deed of Gift, dated 10.05.1984. So, when Murari Sawardekar died, he had no subsisting interest in the property. That accepted, the question of the respondents' succeeding to that unavailable estate would not arise. At least, this is the petitioner's plea.

5. In the counterclaim, the respondents as the plaintiffs wanted the Gift Deed, dated 10.05.1984, declared void. But they did not add the donee or his legal representatives as parties to the counterclaim. They, in fact, showed only the petitioners as the defendants in that counterclaim. It is even though the petitioner was not a party to the document. In the same year, in 2011, the petitioner filed the written statement and pointed out that the donee's legal representatives are the necessary parties. In their absence, he has contended, the counterclaim must fail for non-joinder of necessary parties.

6. Nine years later, in 2020, the respondents applied to the trial Court, invoking Rule 10 Order 1 of CPC, to implead the original donee's legal representatives as the defendants in the counterclaim. Through the impugned order, dated 01/10/2019, the trial Court allowed that application. Aggrieved, the petitioner, who is the original defendant in the counterclaim, has filed this Writ Petition.

Arguments:

Petitioner:

7. Shri Coutinho, the learned counsel for the petitioner, has drawn my attention to sub-rule 5 of Rule 10 of Order 1, CPC. According to him, a party brought on record in a pending suit should be deemed to have been added as a party from the date he had been served with the summons. Only under exceptional circumstances can a party be brought on record as

if he had been a party from the inception. Here, according to him, the trial Court does not spell out whether the parties were brought on record prospectively or otherwise.

8. Shri Coutinho has also pointed out that the respondents, in their own words, came to know about the Gift Deed in 2011. Therefore, to seek a declaration about that Deed, they had the cause of action then. But they did not choose to implead the donee or, in his absence, his legal representatives. Instead, they sought the relief of declaration against the petitioner, who was not a party to that gift deed. Pointing to section 21 of the Limitation Act, Shri Coutinho asserts that the respondents' claim against the parties now sought to be brought on record stands barred by limitation. To support his contentions, he has relied on *Vasant Permanand Muley v. Aurangabad Municipal Council*¹. Therefore, he has urged this Court to allow the Writ Petition.

Respondents:

9. Shri Venkatesh R. Tamba, the learned counsel for the respondents, has submitted that the petitioner himself pointed out in 2011 that the parties now sought to be brought on record were necessary parties. Merely because they have been brought on record belatedly, the petitioner cannot turn around and assail adversely. According to Shri Tamba, the presence of the donee's legal representatives is necessary for the trial Court to adjudicate the dispute in the suit effectually. That apart, he has drawn my attention to the trial Court's finding on limitation.

10. As the very counterclaim was filed in 2011 when the respondents came to know about the Gift Deed, Shri Tamba stresses, section 21 of the Limitation Act does not apply. Therefore, he wants the Court to dismiss the Writ Petition.

11. Heard Shri C.A. Coutinho, the learned counsel for the petitioner; and Shri V.R. Tamba, the learned counsel for the respondents.

¹ 2009 3 ALL MR 1

Discussion:

12. Indeed, the facts are not disputed. The trial Court has insisted that the respondents are the *dominus litus* and that they can bring on record any party they choose. I am afraid the theory of *dominus litus* stands much attenuated with every passing judicial pronouncement. To some extent, we must accept that the plaintiff may choose his adversary. But that luxury of choice is not universal; besides, he must be prepared to take the consequences of his choice. The suit may, then, suffer for non-joinder of necessary parties. On the contrary, if the plaintiff desires to bring on record an adversary whom he thinks to be necessary, he must do so without delay. For the delay may give rise to, for example, third-party interests or vested rights. The legislative mandate under Rule 10, Order 1, CPC, takes precedence over the common law principle of *dominus litis*.

13. Here, the respondents filed a counterclaim, which in fact is an independent suit. It survives on its own whatever should happen to the suit brought by the adversary—that is, the main suit, in which the counterclaim is filed. In that counterclaim, the respondents sought a declaration regarding a particular registered document. Admittedly, the petitioner is not a party to that document. The trial Court has reasoned that since counterclaim was filed in 2011, the limitation ceased to run from then onwards.

14. I am afraid the trial Court has erred in concluding that the moment the respondents filed a counterclaim, the limitation froze. Merely because a person files a suit, it does not arrest the run of limitation. To arrest the limitation, the suitor must have sued the necessary party. The flow of limitation is person-specific, not issue-specific, not even subject matter specific. Here, the petitioner is a stranger to the Gift Deed. The legal representatives of the donee alone must answer the respondents' claim. In that event, the counterclaim takes effect only from the date the donee's legal representatives have been brought on record.

15. First, the respondents have not assigned any reason why they could not bring on record the necessary parties though close to a decade ago it had been brought to their notice that the counterclaim might fail in the absence of those parties. Their application under Rule 10 Order 1 is laconic and divulges no reason. So, I see no exceptional circumstances to apply the doctrine of relation back as provided under section 21 of the Limitation Act, read with Rule 10 or Order 1 CPC. To appreciate the issue, let us examine the statutory position. Rule 10 of Order 1, CPC, to the extent relevant, reads:

10. Suit in name of wrong plaintiff.—(1) ...

(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.

...

(5) Subject to the provisions of [section 21 of the Indian Limitation Act, 1963] the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

16. Now let us examine what section 21 of the Limitation Act declares. According to this provision in a pending suit, if a new plaintiff or defendant is substituted or added, the suit for or against him is deemed to have been instituted only from the day he has been brought on record. But the proviso to section 21 provides for relation back. That is, if the party who brings on record the other party, either as a plaintiff or as a defendant, can demonstrate before the court “the omission to include a new plaintiff or defendant was due to a mistake made in good faith”, the court may direct that the newly added party must be treated as if he had been on record from the beginning. Thus, what is important is the court’s satisfaction that the party’s failure to implead at the earliest the newly added party was *bona fide*. The provision, to the extent relevant, reads thus:

[“21. Effect of substituting or adding new plaintiff or defendant.”](#)—(1) Where after the institution of a suit, a new plaintiff or defendant is substituted or added, *the suit shall, as regards him, be deemed to have been instituted when he was so made a party:*

Provided that where the court is satisfied that the omission to include a new plaintiff or defendant was due to *a mistake made in good faith* it may direct that the suit as regards such plaintiff or defendant shall be deemed to have been instituted on any earlier date.

(2) Nothing in sub-section (1) shall apply to a case where a party is added or substituted owing to assignment or devolution of any interest during the pendency of a suit or where a plaintiff is made a defendant or a defendant is made a plaintiff.

(italics supplied)

17. Interpreting the above provision, the Supreme Court in *Ramalingam Chettiar v. P. K. Pattabiraman*², has held that unless the court expressly directs otherwise by a separate and further order under the proviso, the suit would be deemed to have been instituted against the newly added defendant on the date of his impleadment, not any earlier date.

18. In *Vasant Permanand Muley*, relied on by the petitioner, this Court, per P. R. Borkar J, has held that one of the salutary objects of law of limitation is to prevent the plaintiff from raking up old dispute in respect of which other party would not be able to adduce clear cogent evidence. Despite objection by defendants on the ground of non-joinder, whenever the period of limitation was allowed to expire, it would be too late for the plaintiff to join such necessary parties to the suit. And the only course is to dismiss the very suit. Distinguishing between a proper and a necessary party, it has also held that if the party is only a proper party, the suit as regards the other parties would not be barred because the suit, which had already been instituted, was legal and proper. Of course, to apply that proposition here, it is premature. I better leave it for the trial Court to appreciate the question of limitation once the parties, now brought on record, enter their appearance.

²(2001) 4 SCC 96

19. Here, in 2011 the petitioner pointed out the respondents' omission to bring on record the necessary party. The respondents, however, remained quiet until 2020. They hardly demonstrated, not even pleaded, any reason to invoke the proviso to section 21 of the Limitation Act. Of course, the trial Court, too, has not spelt out that the impleadment was retroactive. It is only prospective.

Result:

20. Therefore, it serves the ends of justice if I hold that the parties now impleaded have actually been brought on record in terms of sub-rule (5) of Rule 10 of Order 1, CPC. And, by that reckoning, the issue of limitation is left open for all the parties to urge before the trial Court during the trial.

Thus, the writ petition stands disposed of.

DAMA SESHADRI NAIDU, J.

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NITI K
HALDANKAR

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