

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

**WRIT PETITION NO.5041 OF 2022
WITH
WRIT PETITION NO.5075 OF 2022**

M/s. Dolphin Developer

..Petitioner

Versus

Mr. Tharakan David Joseph

Since deceased through legal heirs

Mr. Desmond Tharakan Joseph and Ors.

..Respondents

Mr. Rajendra B. Mokashi a/w Aditya R. Mokashi & D. S. Padwal, for
the Petitioner in both Petitions.

Mr. Rajesh Singh a/w Pradhuman Chavhan, for the Respondent
Nos.1a to 1c in both Petitions.

Mr. Ashok C. Giri, for the Respondent No.2 in both Petitions.

CORAM : NITIN W. SAMBRE, J.

DATE : 25th APRIL, 2022

PC.

1. The issue involved in both these petitions is common viz.
as regards impleadment of a party to the suit in the capacity of
defendant and as such, both these petitions are heard and decided
together.

2. In Writ Petition No.5075 of 2022 legality of the order
dated 2nd March, 2022 passed in Chamber Summons No.1349 of
2021, is questioned whereby the Trial Court i.e. City Civil Court,
Dindoshi allowed the Chamber Summons in terms of prayer clause
(a) and (b). The prayer clause (a) and (b) of the Chamber

Summons reads thus :-

- “(a) That the Plaintiff be directed to add the Applicant as the Defendant No.2 to the Plaint as well as other pending Applications/s, Notice of Motion as per the Schedule annexed hereto;
- (b) That the Plaintiff be directed to carry out such other and further consequential amendment, as may be necessary;
- (c) That the cost of this Chamber Summons may be provided for;
- (d) For such other and further reliefs as the nature and circumstances of the case may require.”

3. The prayer (a) permits the applicant to the said Chamber Summons to be added as defendant No.2 and the prayer (b) pertains to directions to the plaintiff/petitioner to carry out consequential amendment.

4. As far as Writ Petition No.5041 of 2022 is concerned, same is arising out of Short Cause Suit No.1391 of 2013 on the file of Bombay City Civil Court at Dindoshi, wherein vide order dated 2nd March, 2022, Chamber Summons No.1348 of 2021 for impleadment of defendant No.2 came to be allowed.

5. The submissions are, the proposed defendant No.2 stood retired from the partnership firm by deed of retirement which was executed on 27th October, 2021. According to him, after the

respondent No.2 i.e. defendant No.2 stood retired from the partnership firm, the petitioner/plaintiff has undertaken to indemnify the interest of the said party post his retirement.

6. Clause 4 of the said retirement-deed reads thus:-

“4. The Continuing Partners agree to pay all the debts and liabilities of the said firm and to indemnify and keep indemnified the Retiring Partner against all such debts and liabilities and all loss, costs, charges and expenses that the Retiring Partner may incur or suffer on account thereof.”

7. As such the contentions are, for deciding the claim in the suit, which is for recovery of damages, the respondent No.2 is neither necessary nor appropriate party under the provisions of Order I Rule 10 of the CPC.

8. Apart from above, my attention is also invited to the consent terms dated 17th November, 2021 in S. C. Suit No.2239 of 2021. It is claimed that even in the said consent terms based on which the compromise decree is drawn in accordance with provisions of Order XXIII Rule 3 of the CPC, the petitioner had already undertaken to indemnify the defendant No.2. That being so, it is claimed that the order impugned is not sustainable.

9. Respondents jointly opposed the prayer for showing indulgence in the petition by upsetting the order impugned,

whereby impleadment of respondent No.2 is granted. The contentions are, the suit claim is based on such transactions, which had taken place prior to the execution of the deed of retirement dated 27th October, 2021. It is further claimed that the facts in the suit are twisted so as to draw undue monetary advantage. The defendant No.2 is necessary or appropriate party so as to bring to the notice of the Trial Court the truth. It is further claimed that if respondent No.2 is added as defendant No.2, no prejudice is likely to be caused to the petitioner/plaintiff in the said suit. That being so, it is claimed that the petition is liable to be rejected. The additional submissions are, there are certain violations which are necessary to be brought on record as regards development control regulations.

10. I have appreciated said submissions.

11. The suit in question in which the impleadment is sought being SC Suit No.2672 of 2013 is for the relief of recovery of the amount of Rs.84,80,000/- and Rs.40,000/- towards financial liability. In other Suit being No.2239 of 2021, similar relief of recovery of amount is prayed.

12. Along with the said reliefs, certain other reliefs are moved in the plaint. As far as the pleadings in the plaint are concerned, nowhere any relief is claimed against the said defendant No.2. Apart from above, the Court is required to be sensitive to the

fact that already defendant No.2 has executed a retirement-deed thereby retiring from the plaintiff's partnership firm on 27th October, 2021. The interest of the proposed defendant No.2 is already secured by virtue of clause 4 of the said retirement deed as the petitioner has undertaken even before this Court also to keep the defendant No.2 indemnified in relation to any liability arising out of the business transaction of partnership firm. Thus, even if it is accepted that defendant No.2 intend to take out proceeding thereby seeking cancellation of the deed of retirement, such act on the part of the respondent/defendant No.2 will be hardly any significance in the matter of exercising powers under Order I Rule 10 of the CPC, particularly, having regard to the nature of claim in the suit. This Court is required to be sensitive to the right of the defendant No.2 qua claim made in the suit. In case, if claim of the defendant No.2 is allowed qua his alleging forced retirement from the partnership firm, he shall always have a remedy suing the petitioner/plaintiff for financial claim and other issues. However, that by itself will not prompt him to exercise power under Order I Rule 10 of the CPC directing his impleadment to be appropriate or necessary party in the suit in question.

13. The proposed defendant i.e. defendant No.2's claim as a partner is required to be considered under Section 32 of the Partnership Act, 1932. It is an accepted case from both the sides that there is a retirement of defendant No.2 pursuant to the provisions of Section 32(1)(b) of the said Act i.e. in accordance with

an express agreement by the partners i.e. plaintiff and the proposed defendant No.2. Even if such retirement is claimed to be under challenge, the fact remains that as a consequence of alleged retirement, the retired partner stood discharged from liability, as the petitioner has already undertaken as referred above to indemnify defendant No.2 of all the liabilities arising out of the business of the partnership firm.

14. There is one more facet to the matter, viz. it is always open for the parties to the suit to examine the proposed defendant No.2 as witness, which prayer, if so moved shall be dealt with in accordance with law. That being so, in my opinion, the defendant No.2 does not appear to be an appropriate party to the suit in question. As such, the orders impugned dated 2nd March, 2022 passed in Chamber Summons Nos.1348 of 2021 and 1349 of 2021 are hereby quashed and set aside. Both the Chamber Summonses stand rejected. Both the petitions stand allowed.

15. However, this will not preclude the party from summoning the defendant No.2 as witness to the suit proceeding. If such prayer is made, same is directed to be dealt with in accordance with law without being influenced by the findings recorded herein-above.

16. Since hearing of the suit is expedited by the Apex Court and the counsel for the respondent/plaintiff intend to question the

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validity of the present order, the effect and operation of this order shall remain stayed for a period of two weeks from today.

17. Both these petitions stand disposed of in above terms.

[NITIN W. SAMBRE, J.]