

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**INTERIM APPLICATION NO.1830 OF 2021
WITH
CHAMBER SUMMONS NO.997 OF 2019
IN
SUIT NO.354 OF 2017**

Kedarnath Co-op. Housing Society Ltd. & Ors. ...Applicants/Plaintiffs

Versus

R. K. Builders & Ors. & Puri Tower Co-op.

Housing Society Ltd. & Ors. ...Defendants

Mr. Rakesh Kumar a/w. Mr. Akash Giri and Ms. Pragya i/by M/s.
Legal Vision for Applicants/Plaintiffs.

Mr. Sahit Saiyed for Defendant No.1.

Mr. J. G. Damani for Defendant No.5.

Mr. Chandrakant N. Chavan for Defendant No.10.

Ms. Yamuna Parekh i/by Mr. Sunil Sonawane for Defendant
(MCGM).

CORAM : R. I. CHAGLA, J.

DATED : 25th AUGUST, 2022.

P.C.

1. Heard learned counsel for the parties.
2. By this Interim Application, the Applicants/Plaintiffs are seeking permission to amend the plaint by transposing existing

Plaintiff Nos.5 as Defendant in the captioned Suit and other pending Applications such as Notice of Motion, Chamber Summons and Interim Applications. The Applicants/Plaintiffs have also sought permission for carrying out consequential amendments.

3. The Applicants who are the Original Plaintiffs had filed the Suit No.354 of 2017, wherein by prayer clause (a) of the plaint a decree and order was sought directing Defendant Nos.1 to 3, jointly and/or severally, their heirs, assigns, successors and person/s claiming through them to get the suit property, sub-divided in accordance with the Development Control Regulation Act, 1991 and in proportion of the FSI consumed in construction of the respective buildings of Plaintiff Nos.1 to 5 and Defendant No.9 to enable these Defendants to convey the respective buildings and the sub-divided plots to the said Plaintiffs with all common amenities.

4. It can be seen from the prayers in the plaint that the Plaintiff Nos.1 to 5 and Defendant No.9 are the owners of their respective existing buildings. Plaintiff No.5 being the owner of Building No.6. Further, the suit plot of land is being sought to be sub-divided in the respective share of the Plaintiffs as well as Defendant No.9.

5. The Applicants/Plaintiffs had taken out Notice of Motion for ad-interim and interim relief as well as Interim Application/Chamber Summons for amendments. During the pendency of these proceedings, Plaintiff No.5 had shown unwillingness to continue as Plaintiff and had addressed email dated 22nd July 2021, to the Advocates for the Plaintiffs requesting them not to represent the Plaintiff No.5 any further. On 23rd July 2021, the matter was listed before this Court for filing Consent Terms. On that date, Plaintiff No.5 was separately represented by Advocate Mr. Desai, who had communicated that Plaintiff No.5 desires to be separately represented and Plaintiff No.5 is not agreeable to the proposed Consent Terms which had been signed and executed by proposed Plaintiff No.6, described as the Apex Federation Society on behalf of the Plaintiffs Co-operative Housing Societies for conveyance of the suit property.

6. In para 1 and 2 of the said order, it is recorded as under:-

“1. The Consent Terms are signed only by the 6th Plaintiff, described as an apex cooperative federation society. Plaintiff Nos.1 to 5 are cooperative housing societies. It is not shown to me how Plaintiff Nos.1 to 5 can be bound by the signature of the 6th Plaintiff on

these Consent Terms. In fact, as of today, the 6th Plaintiff has not even been joined to the Suit.

2. In any case, Mr. Desai appears for the 5th Plaintiff. Obviously, he cannot separately represent the 5th Plaintiff – all Plaintiffs have to be represented by a common advocate. But he states that the 5th Plaintiff is not agreeable to these Consent Terms. The 5th Plaintiff seeks to be transposed as a Defendant. It does not wish to continue as a fellow Plaintiff with Plaintiff Nos.1 to 4.”

7. This Court had also recorded that since Plaintiff No.5 is not agreeable to be bound by the Consent Terms, then there is no question of accepting the Consent Terms as they stand. The Consent Terms had purported to pass title from Second Defendant, another public trust, ostensibly to Plaintiff Nos.1 to 5. This Court had therefore not accepted in Consent Terms and granted parties liberty to file Applications as they think fit.

8. After the order was passed, Plaintiff No.6-Federation had addressed letter dated 26th July 2021, by which the order of this Court and Consent Terms were forwarded to the Plaintiff No.5. In response Plaintiff No.5 had raised various grievances and which were thereafter answered by the Federation.

9. The Applicants/Plaintiffs have stated that in the entire lay out of the Suit plot of land there are 5 buildings and 6 societies, out of which Plaintiff Nos.1 to 4 have 201 units (62% in entire layout) and existing Plaintiff No.5 has total 67 units (21% in entire layout), the remaining are with Defendant No.9 who has 54 units (17% in entire layout). The Defendant No.5 had previously expressed intention to join the Federation. There is a dispute between Plaintiff No.5 who is not in line with the other Plaintiffs as well as dispute with the Federation. Accordingly, the Applicants/Plaintiffs have stated that it is impossible to continue the Suit without transposing Plaintiff No.5 as Defendant in the Suit. The present Interim Application has been taken out accordingly.

10. The learned counsel appearing for the Applicants/Plaintiffs has relied upon Order 1 Rule 10 of the Code of Civil Procedure, 1908, in particular Order 1 Rule 10 (2) which provides for the Court to strike out or add parties at any stage of the proceedings, either upon 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,

stuck out, and the name of that 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 questions involved in the Suit, be added. He has submitted that Plaintiff No.5 is having a share in the entire layout of which sub-division has been sought and therefore is a necessary party. He has relied upon the decision of the Supreme Court in ***Saila Bala Dassi Vs. Nirmala Sundari Dassi & Others***, Civil Appeal No.350 of 1957 decided on 14th February 1958 and in ***State of Assam Vs. Basanta Burman & Ors.***, Misc. Case No.45 of 1984 in F.A. No.5 of 1984 decided on 5th April 1984, where the Supreme Court has construed Order 1 Rule 10 and held that the Court can add parties or transpose Plaintiff as Defendant or Defendant as Plaintiff for effectually and completely adjudicating the disputes. He has submitted that the present case is such a case where Plaintiff No.5 themselves have expressed their desire not to continue as Plaintiff and infact they have made a statement before this Court recorded in the order dated 23rd July 2021, that they may be transposed as Defendant.

11. Mr. Damani, learned counsel appearing for Plaintiff No.5 has vehemently opposed the Application and has stated that a Co-Plaintiff cannot be transposed as Defendant. He has relied upon the decision of *Madras High Court in C. Dhandayutham Vs. M. Natarajan & Ors. in CRP No.4067 of 1983 dated 17th April 1984*. He has submitted that the Court had held that it is only the Defendant who can be transposed as the Plaintiff and not the other way around. He has submitted that Plaintiff No.5 does not intend to be a part of the litigation and that there are no prayers which can be claimed against Plaintiff No.5 and hence Plaintiff No.5 should not be joined as Defendant. He has submitted that in any event, Plaintiff No.5 cannot be bound by the proposed 6th Plaintiff which is the Apex Co-operative Federation Society and that the Consent Terms have been held by this Court to be not acceptable, if the 5th Plaintiff is not agreeable to the settlement. He has submitted that Plaintiff No.5 be dropped from these proceedings.

12. Having considered the rival submissions, in my view, considering the prayers in the plaint which is for sub-division of the suit property which includes the share of Plaintiff No.5 being owner of Building No.6 on the suit property, the relief sought for in the

present Suit cannot be considered in the absence of Plaintiff No.5. Further, it is necessary to note that the then Advocate appearing for Plaintiff No.5 had himself sought for the 5th Plaintiff to be transposed as Defendant. This has been recorded in the aforementioned extracted para 2 of the order dated 23rd July 2021.

13. Under Order 1 Rule 10 of the Code of Civil Procedure, 1908, it is clear that the Court may add parties and this may be upon an Application made by either party or by the Court itself and this applies to the Plaintiff as well as the Defendant by adding of names of persons who ought to have been joined either as Plaintiffs or Defendants where the presence of these parties before this Court may be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the Suit.

14. It is required to be noted that Plaintiff No.5 has a dispute with the proposed Plaintiff No.6-Federation and claimed to be not bound by the decision taken by the proposed Plaintiff No.6-Federation on behalf of the Plaintiffs to settle their disputes. Plaintiff No.5 has total 67 units (21% in the entire layout of suit property). Thus, any order of sub-division of the suit property would

necessarily be required to be passed in presence of Plaintiff No.5, considering that Plaintiff No.5 has a share in the suit property.

15. The decision relied upon by Mr. Damani in ***Madras High Court in C. Dhandayutham Vs. M. Natarajan & Ors. (supra)*** is not applicable considering that case concerned Application for abandonment or withdrawal of the Suit under Order 23 Rule 1A of the Code of Civil Procedure, 1908. Upon reading of that provision it was considered that if the Defendant applies to be transposed as Plaintiff, the Court is to consider whether the Applicants seeking transpossession has a substantial question to be decided against the other Defendants should be weighed in deciding the application for abandonment of Suit and withdrawal under Order 23 Rule 1A of the Code of Civil Procedure, 1908. In that context, it was held that the provision shows that it is only the Defendant who can transpose himself as Plaintiff.

16. The decision relied upon by Mr. Damani is accordingly not applicable in the facts of the present case. It is settled law as can be seen from the aforementioned decisions of the Supreme Court relied upon by the learned counsel for the Applicants/Plaintiffs that under Order 1 Rule 10 of the Code of Civil Procedure, 1908, the

Court can transpose the Plaintiff as Defendant for effectual and complete adjudicating of the disputes. Thus, there is merit in the Interim Application. Accordingly, the relief sought for in the Interim Application requires to be granted. Hence, the following order is passed:-

- (i). The Applicants/Plaintiffs are permitted to amend the plaint by transposing the existing Plaintiff No.5 as Defendant in the captioned Suit as well as other pending Applications such as Notice of Motion, Chamber Summons and the Interim Application.
- (ii). The Applicants/Plaintiffs shall carry out the amendments within a period of two weeks from the date of uploading of this order. Consequential amendments are permitted to be carried out in the Plaint and other proceedings filed in the captioned Suit. Re-verification is dispensed with.
- (iii). The Interim Application is disposed of in the above terms.
- (iv). After the order was passed, Mr. Damani applies for stay

of this order. In view of the findings in the order, the application for stay stands rejected.

(R. I. CHAGLA, J.)