

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
BENCH AT AURANGABAD

**46 WRIT PETITION NO.326 OF 2022**

SUBHASH RAMRAO JADHAV AND OTHERS  
VERSUS  
AYUBODDIN MOHD. HAMIDUDDIN ALIAS HAFIZODDIN AND  
OTHERS

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Mr. Ajinkya A. Joshi h/f. Mr.S.V. Natu, Advocate for the Petitioners.  
Mr. G.D. Kale, Advocate for the Respondent No.1.  
Mrs. A.N. Ansari, Advocate for the Respondent No.2.

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**CORAM : SHARMILA U. DESHMUKH, J.**  
**DATED : JANUARY 23, 2023.**

**PER COURT :**

1. Petition challenges the impleadment of the respondent Nos.1 and 2 in RCS No.265 of 2021, instituted by the Respondent No.3 herein, against the petitioners seeking to restrain the petitioners from interfering and obstructing the peaceful possession and enjoyment of the Respondent No.3 over the suit property described in the plaint.

2. Heard learned counsel appearing for the parties.

3. Learned counsel appearing for the petitioners, who are the original defendants in RCS No.265 of 2021 submits in the suit for injunction simpliciter the respondent Nos.1 and 2 are neither necessary party nor proper party in a suit, which only seeks

restraining order as against the petitioners. He would further submit that the respondent Nos.1 and 2 are concerned with RCS No.1007 of 1989, in which the Respondent Nos.1 and 2 are claiming a right in the suit property and the said RCS No.1007 of 1989 is pending. He has invited attention of this Court to the necessary averments in the plaint and in particular paragraph 14 of the plaint, in which it is averred by the Respondent No.3 that Respondent no.3 is always ready and willing to perform his obligation under the agreement of sale and to pay remaining consideration. He has also invited attention of this Court to the paragraphs 16 and 17 of the plaint, in which the averments are made that the defendant and their agent and family members are without any reasonable cause obstructing the possession of the respondent No.3 over the suit property. As against the background of the averments in the plaint, he would claim that even if the suit is to be construed as suit for specific performance, it is only parties to the agreement who are necessary and proper party and respondent nos.1 and 2, who are claiming title adverse to that of the petitioner cannot be said to be a proper party. He would further submit that in RCS No.1007 of 1989, the respondent No.3 herein had submitted an application for being impleaded as party, which has been vehemently opposed by the respondent Nos.1 and 2 which opposition has been upheld by the trial Court in said RCS No.1007 of 1989.

4. Learned counsel for the petitioners relied upon the decisions in the following cases:

- (i) *Kasturi vs. Iyyamperumal and Others*, reported in (2005) SCC 733;
- (ii) *Harisha s/o. Ramdeo Baheti (Dr.) & Others vs. Municipal Corporation of Amravati & Another*, reported in 1987 (3) Bom.C.R.19;
- (iii) *Waman Nago Choudhari & Ors. Vs. Mahadu Nago and Brothers & Ors.*, reported in 2011 (4) Bom.C.R.632;
- (iv) *Khushi Ram vs. Lal Man & Ors.*, in CR No.1085 of 1981 decided on 28.7.82.

5. *Per contra*, the learned Counsels for the Respondent Nos 1 and 2 supported the impugned order and would urge that the Respondent Nos 1 and 2 have an interest in the suit property as is evident from the RCS NO 1007 of 1989 and the outcome of the RCS No 265 of 2021 will affect their interest in the suit property.

6. I have considered the rival submissions of the parties.

7. An application for impeachment of the parties has to be considered on the touchstone of the Order 1 Rule 10. A necessary party is a party in whose absence the decree cannot be passed effectively and proper party is a party, whose presence is necessary to adjudicate the dispute.

8. In the present case, RCS No.265 of 2021 has been instituted by the Respondent No.3, seeking an order of perpetual

injunction restraining the petitioners from causing any sort of interference and obstruction in the peaceful possession and enjoyment of the respondent no.3 over the suit property. It is the case of the Respondent No.3 that in the year 2015, the respondent no.3 was intending to purchase as well as petitioner intending to sell some portion owned by them as mentioned in paragraph 1 of the plaint, and as such, entered into an agreement of sale under which part payment was made by the respondent no.3.

9. It is the case of the respondent No.3 that as per the terms of purchase, the respondent no.3 obtained possession of the suit property for school structure and have invested huge amount and constructed some rooms. Based on these facts, the respondent no.3 states that respondent no.3 is ready and willing to perform his part of his agreement of sale and ready to pay the remaining consideration and as such, the obstruction by the petitioners is unwarranted. The case of the petitioners in the written statement and in the counter claim is that there is no such agreement of sale and the respondent no.3 was only permitted to use part of the premises admeasuring 30000 sqr.feet. which is open space and there is no construction of the rooms. It is further his case that no possession has been handed over under the counter claim, the relief of injunction has been sought as against the respondent no.3.

10. Considering the averments made in a plaint as well as in the written statement under the counter claim, it is clear that the

suit is simplicitor for injunction based on possession. In the said suit, the decree if any, will be only decree for injunction, which will bind the parties to the suit and will not be binding upon the respondent nos.1 and 2, who are agitating their rights in an independent suit RCS No.1007 of 1989. In RCS No.265 of 2021, the cause of action is alleged as against the petitioners and is peculiar to the petitioners and there is no relief which is sought as against the respondent Nos.1 and 2. In such fact and situation, the issue which will have to be considered is whether the respondent nos.1 and 2 will be affected by the outcome of the proceedings.

11. In my opinion, considering the limited relief which has been sought i.e. a relief for injunction, the decree if any will bind only the petitioners or the respondent No.3, in event the counter claim is allowed and as the judgment is in personam, the respondent nos.1 and 2 will not be bound by the decree and as such, cannot be said to be affected by the outcome of RCS No.265 of 2021. The trial Court while allowing the application of the Respondent Nos.1 and 2 have failed to consider the scope of Order 1 Rule 10 of the Code of Civil Procedure, and has been swayed by the identity of the parties and the subject matter. The impugned order shows that there is no discussion as to whether the respondent nos.1 and 2 are necessary or proper party to the suit and without a speaking order, the Trial Court has permitted the application on the ground that the petitioners are parties to the suit

which is filed by the respondent Nos.1 and 2 and it is in respect of the said survey no.74.

12. Although the impugned order shows that on perusal of the record, the application filed by the Respondent Nos.1 and 2 did not annex any document, much less the copy of RCS No.1007 of 1989 and as such, it cannot be said that there is any discussion about the claim of ownership of the Respondent nos.1 and 2 in respect of survey No.74, which is the suit property in RCS No.1007 of 1989.

13. For the reasons stated above, the Petition succeeds and the impugned orders dated 31<sup>st</sup> August, 2021 and 14<sup>th</sup> October 2021 passed by learned 2<sup>nd</sup> Jt. Civil Civil, Junior Division, Nanded below application Exh.41 and Exh.68, respectively in RCS No.265 of 2021 are hereby quashed and set aside.

( SHARMILA U. DESHMUKH, J. )