



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 8298 OF 2024

- 1] Anuradha w/o Nagnath Gavkonde @ Penurkar,
Age : 54 years, Occu : Household,
R/o. Kalipeth, Basmath, Tq. Basmath,
Dist. Hingoli.
- 2] Umesh s/o. Nagnath Penurkar @ Gavkonde,
Age: 31 years, Occu : Service.
- 3] Yogesh s/o. Nagnath Penurkar @ Gavkonde,
Age : 29 years, Occu : Service
- 4] Sheetal d/o. Nagnath Gavkonde @ Penurkar,
Age : 27 years, Occu : Service,

All R/o. Kalipeth, Basmath, Tq. Basmath,
Dist. Hingoli, at present Pune.

- 5] Akash s/o. Nagnath Penurkar @ Gavkonde,
Age : 31 Years, Occu : Service.

R/o. Kalipeth, Basmath, Tq. Basmath,
Dist. Hingoli at present Mumbai.

.. PETITIONERS

VERSUS

- 1] Sau. Vanita w/o. Ashokaro Dande,
Age : 54 Years, Occu : Business,
R/o. Kalipeth, Basmat, Tq. Basmat,
Dist. Hingoli.
- 2] Nangnath s/o. Sangappa Penurkar,
Age 70 years, Occu. Retired,
R/o. Kalipeth, Basmath, Tq. Basmat,
Dist. Hingoli.

.. RESPONDENTS

...
Mr.Suyaskumar S. Jangada, Advocate for the petitioner
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CORAM : ARUN R. PEDNEKER, J.
DATE : 26.08.2024

ORDER :

1] By the present petition, the petitioners are challenging the impugned order dated 14.03.2024 passed by the Civil Judge Senior Division, Basmath below Exh.45 in RCS No.202/2018 whereby the Court was pleased to dismiss the application under order 1 Rule 10 of the Civil Procedure Code seeking impleadment as defendants in the suit.

Brief facts leading to filing the present petition are summarized as under :

2] Respondent no.1 – plaintiff filed Regular Civil Suit No.202/2018 for specific performance of contract in respect of the suit property bearing Municipal House No. Old-A/42 [New A/63] situated at Kalipeth, Basmath, District Hingoli, contending that on the basis of the

agreement dated 13.12.2012, the defendant no.1 agreed to sell the suit property for consideration of Rs.3,50,000/- and earnest amount of Rs.1,50,000/- was paid by the plaintiff. It is further contended in the plaint that since defendant no.1 has refused to execute the sale deed even after legal notice dated 08.12.2017, Regular Civil Suit No.202 of 2018 is filed seeking specific performance of contract. Pursuant to the suit summons, the defendant no.1 filed written statement and contested the claim.

3] The plaintiff adduced evidence and has closed her evidence by filing evidence closed pursis on 03.01.2022. From 03.01.2022, the matter was adjourned for the evidence of defendant and the defendant has not adduced his evidence, as such, his right to adduce evidence was forfeited on 18.10.2022. The petitioners filed an application under Order 1 Rule 10 and Section 151 of the Civil Procedure Code below Exh.45. It is the contention of the petitioners in Exh.45 that the suit property is partitioned between the parties and upon partition, the names of the

petitioners were effected in the suit property and valuable rights vested in the suit property and the petitioners are necessary party to the suit. The said application is resisted by the plaintiff – respondent no.1, contending that after defendant no.1 has lost his right to lead the evidence, the present application is filed to delay the suit and to protract the trial. It is further contended that it is self acquired property of the defendant no.1 and the defendant no.1 is alive. As such, the present petitioners are not necessary party to the suit. Thereafter, by order dated 14.03.2024, the Civil Judge Senior Division, Basmath has rejected the application below Exh.45.

4] Considering the submission of the parties, at the outset law on the scope and ambit of order 1 Rule 10 of the Civil Procedure Code has been discussed in the case of ***Mumbai International Airport Pvt. Ltd. v. Regency Convention Centre & Hotels Pvt. Ltd. & Ors.*** reported in ***AIR 2010 SC 3109***, the Hon'ble Supreme Court at para nos, 8 and 12 in this regard has observed as under :

8. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order 1 Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

"Court may strike out or add parties.

(2) 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.

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party.

A 'necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a 'necessary party' is not impleaded, the suit itself is liable to be dismissed. A 'proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.

12. Let us consider the scope and ambit of Order 1 of Rule 10(2), CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo moto or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice. This Court in *Ramji Dayawala & Sons (P) Ltd. v. Invest Import* : 1981 (1) SCC 80 : (AIR 1981 SC 2085), reiterated the classic definition of 'discretion' by Lord Mansfield in *R. v. Wilkes* 1770 (98) ER 327 that 'discretion' when applied to courts of justice, means sound discretion

guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. We may now give some illustrations regarding exercise of discretion under the said Sub-Rule.

12.1 If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order 1. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party.

12.2 If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party. But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant-in-possession, then the tenant will be a necessary party insofar as the prayer for actual possession.

12.3 If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

12.4 If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonafides etc., the court will normally implead him, if he is found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court

finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if 'D' claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of 'P' representing that he is the co-owner with half share, and 'P' files a suit for specific performance of the said agreement of sale in respect of the undivided half share, the court may permit the other co-owner who contends that 'D' has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the vendor-defendant to be decided in an independent proceeding by the other co-owner, or the plaintiff; alternatively the court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject matter of the suit for specific performance, and that it will decide in the suit, only the issues relating to specific performance, that is whether the defendant executed the agreement/contract and whether such contract should be specifically enforced. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party.

5] Considering the submissions and the law discussed in the case of *Mumbai International Airport Pvt. Ltd. [supra]*, the facts of the case are required to be noted that the present suit relates to the specific performance of the contract to sell the suit property in which the plaintiff has claimed that the suit property is owned by the sole defendant and the documents of the suit property were verified by the plaintiff before entering into agreement of sale. The suit is for specific performance of contract, which is based on the agreement to sell, therefore, the present petitioners, who claim ownership of the suit property, are not necessary party to the suit as they are not party to the agreement. The suit property is transferred during the pendency of proceedings before the civil court to the family members. The plaintiff is a *dominus litis* and the plaintiff can choose the defendant, he cannot be forced to add parties, which are not necessary parties to the suit. The trial Court at para no.7 has observed as under :

07. Further, on perusal of record it is noticed that, the applicant Nos. 1 to 5 have filed on record certain documents below list Exh.50. On going through those documents it is noticed that, the suit property was mutated in

the name of applicant Nos.1 to 5 based upon proceedings, dated 08.09.2022. It appears that, during the pendency of suit the applicant Nos. 1 to 5 have got mutated the suit property in the name of applicant Nos.1 to 5. At the relevant time matter was fixed for evidence of defendant and defendant was not adducing his evidence. From the conduct of defendant and applicant Nos.1 to 5 it appears that, intention of applicant Nos. 1 to 5 was not bonafied and during the pendency of suit they have transferred the suit property in their name. It appears that, the applicant Nos. 1 to 5 have purposefully got transferred the suit property in their name in order to create the complications in the suit and to protract the trial.

6] Considering the fact situation as noticed by the trial Court, it is not necessary to implead the applicant nos. 1 to 5 in the suit. The applicant nos. 1 to 5 are family members of the defendant no.1. The application for impleadment of the petitioners as party in the suit is rightly rejected by the trial Court. Hence, the present Writ petition is dismissed.

**[ARUN R. PEDNEKER]
JUDGE**

DDC