



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

42 WRIT PETITION NO. 8697 OF 2023

MUKUND BALVIRSING THAKUR THROUG GPA ANIRUDH MUKUND
THAKUR
VERSUS
CHITRAREKHA BALMUKUND CHAUDHARI THROUGH HER POWER OF
ATTORNEY MEENAKSHI BALMUKUND CHAUDHARI

Mr. V. B. Patil, Advocate for the petitioner
Mr. T. K. Sant, Advocate for respondent no.1.
Mr. S. B. Yawalkar, Advocate for respondent no.2.

CORAM : R. M. JOSHI, J.

DATE : 18th NOVEMBER, 2024

PER COURT :-

1. This petition takes exception to the order dated 4th October, 2022 passed below Exhibit 75 in Spl. Civil Suit No. 71/2013 whereby application filed by the petitioner/ third party to join as party defendant under Order 1 Rule 10 of the Code of Civil Procedure stood rejected.

2. The original plaintiff filed suit for declaration and other reliefs which reads thus:

"a) The suit of the plaintiff may kindly be decreed with costs.

b) It be declared that the decree in Spl. C.S. No. 131/2009 is obtained by fraud.

c) The decree in Spl. C.S. No. 131/2009 may kindly be set aside.

d) The sale deed executed on the basis of decree in Spl.C.S. No. 131/2009 dt. 5/10/2012 may kindly be

declared to be null and void and not binding on the plaintiff and it may kindly be set aside.

e) The Defendant No.1 may kindly be restrained by an order of temporary as well as perpetual injunction from alienating the suit property in any manner.

f) Any other order in the interest of justice that may be deemed fit may kindly be passed.”

3. The petitioner claims that he filed suit bearing R.C.S. No. 110/2011. This suit came to be dismissed in default. An application being M.C.A. No.184/2022 filed for restoration thereof is pending before the Competent Court. It is alleged by the petitioner that intentionally the petitioner is not added as party respondent to the Spl. C.S. No. 71/2013 as well as Spl.C.S. No. 131/2009.

4. Learned counsel for the petitioner submits that owing to the averments in the plaint it can be said that the petitioner has interested in the subject property i.e. plot No.30 situated at Mauje Pimprala, Jalgaon. He has also drawn attention of the Court to the averments made in the plaint by the plaintiff with regard to the acquisition of rights, title and interest in the said property on the basis of sale deed of Rukhminibai. Thus, it is his submission that the petitioner is necessary and proper party to the said suit. Apart from this it is his submission that the Principal District Judge, Jalgaon has passed order in Misc.C.A. No. 4/2023 whereby R.C.S. No. 110/2011, Spl. C. S. No. 71/2013 as well as

restoration application bearing No. M.C.A. No. 184/2022 are transferred before one Court.

5. Learned counsel for the original plaintiff/respondent supported the impugned order.

6. Since the application is filed under Order 1 Rule 10 of C.P.C. unless it is shown that person who has applied for joining as a party either necessary or proper party, the applicant cannot be entertained. In this regard reference can be made to the judgment of Hon'ble Supreme Court in case of ***Mumbai International Airport Pvt. Ltd. vs. Regency Convention Centre and Hotels Pvt. Ltd. and Ors.*** MANU/SC/0427/2010.

"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 MANU/SC/0502/1980 : 1981 (1) SCC 80 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 in so far 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."

7. In the light of the law laid down by Hon'ble Supreme Court, this Court will have to see as whether the petitioner is necessary or proper party to the suit bearing Spl. Civil Suit No. 71/2013. This suit is

filed for declaration that the decree obtained in Spl. C.S. No. 131/2009 is by fraud and consequent sale deed executed on the basis of the said decree is not binding upon the plaintiff. Admittedly, the petitioner herein was not party to the Spl. C.S. No. 131/2009 nor is party to the sale deed executed on the basis of decree passed therein. Thus, the presence of petitioner in this suit is not necessary.

8. The contention of the leaned counsel for the petitioner about the petitioner having right / interest in plot no. 30 is concerned, separate suit was filed by the petitioner which came to be dismissed for want of prosecution. An application for restoration of the said suit is pending. If the said suit is restored, it is open for the petitioner to pursue his remedy. Apart from this there is no dispute about the fact that the plaintiff herein at filed counter claim and as such said issue is involved in the counter claim wherein the petitioner is a party defendant. Thus, no prejudice will cause to the petitioner if his application under Order 1 Rule 10 is rejected. In exercise of writ jurisdiction, for want of perversity in the impugned order, no interference is caused. Hence, petition is dismissed.

(R. M. JOSHI, J.)

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