

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

WRIT PETITION NO. 475 OF 2020

Abdul Rahman Imamuddin Ansari

Age : 57 Years, Occu.: Business,

R/at : Room No. 336, Behind Dawar Bakery,

NSS Road, Mumbai – 400 086.

.... Petitioner

Versus

1. Venezia Realtors,
Partnership Firm duly registered under
the provision of Indian Partnership Act,
1932, having address at 101, Commerce
House, 140, Nagindas Master Road,
Mumbai – 400 001.
2. Sarovar Homes Pvt. Ltd.
A private Limited Company Incorporated
under the Companies Act, 1956, having
its office at 297/299, Chartted House, 2nd
Floor, Room No. 205, 206, Marine
Lines, Mumbai – 400 002 and
510, Akruti Arcade, J. P. Road, Andheri
(W), Mumbai – 400 058.

.... Respondents

**WITH
WRIT PETITION NO. 536 OF 2020**

1. Sabir Wali Patel
Age : 49 Years, Occu.: Tailor,
2. Samir Husain Sabir Patel
Age : 21 Years, Occu.: Service,
3. Arbaz Sabir Patel
Age : 29 Years, Occu.: Student,

.... Petitioners

All R/at : Umar Khan Chawl, Room No.6,
Andheri (East), Mumbai – 400 060.

Versus

1. Venezia Realtors,
Partnership Firm duly registered under the
provision of Indian Partnership Act, 1932,
having address at 101, Commerce House,
140, Nagindas Master Road, Mumbai –
400 001.
2. Sarovar Homes Pvt. Ltd.
A private Limited Company Incorporated
under the Companies Act, 1956, having its
office at 297/299, Chartted House, 2nd
Floor, Room No. 205, 206, Marine Lines,
Mumbai – 400 002 and
510, Akruti Arcade, J. P. Road, Andheri
(W), Mumbai – 400 058.

.... Respondents

Mr. Sajid Shamim a/w Mr. Jishan Ansari i/b Shamim & Company, for
the Petitioners.

Mr. Deepak Lulia, for the Respondent No.1.

CORAM : MANJUSHA DESHPANDE, J.

RESERVED ON : 2nd FEBRUARY, 2024

PRONOUNCED ON : 27th MARCH, 2024.

JUDGMENT

1. Rule. Rule made returnable forthwith, the matter is taken
up at the admission stage for final disposal, with the consent of the
parties.

2. These two Writ Petitions are identical, in nature. Both the Petitioners are tenants who had filed proceedings before the Small Causes Court at Mumbai. The date of filing of proceedings, and the date of passing of Orders is one and the same. All the proceedings and the party Respondents are also same, even the date and contents of Order are also same. Therefore, both the Writ Petitions are being decided by way of this Common Order.

3. The Petitioners, in both Writ Petitions are the original Plaintiffs, they are challenging the Order dated 22nd August, 2019, passed by the 1st Additional Principal Judge, City Civil & Sessions Court, Dindoshi, Mumbai, in Chamber Summons No. 59 of 2018 and Chamber Summons No. 60 of 2018 respectively. While deciding the present matters, for the sake of convenience, the proceedings in the Short Cause Suit No. 3303 of 2016 have been referred, but same has to be read in Short Cause Suit No. 3304 of 2016 as well.

4. The Respondent No. 1 – Applicant had filed Chamber Summons Nos. 59 of 2018 and 60 of 2018, for adding it as Defendant No.2, in the Short Cause Suit Nos. 3303 of 2016 and 3304 of 2016.

The Petitioners i.e. original Plaintiffs opposed the said applications however the learned Judge, City Civil and Sessions Court, by his Order dated 22nd August, 2019, has been pleased to allow the Chamber Summons in terms of prayer clause (a) and directed the Plaintiffs to join the Applicant as Defendant No.2 in the Short Cause Suit Nos. 3303 of 2016 and 3304 of 2016 respectively. Being aggrieved by the said Order, the Petitioners i.e. original Plaintiffs, have approached this Court, challenging the said Order.

5. The case of the Petitioners, who are the original Plaintiffs is that, the Plaintiffs were the occupants of tenanted premises at Marol, Andheri. The Respondent No.2 – original Defendant has purchased the suit property from the earlier landlord. The Defendant was trying to evict the tenants from the suit premises forcibly therefore, Plaintiff had filed R.A.D. suit No. 106 of 2010 before the Small Causes Court at Mumbai. The suit was filed for declaration that, Defendant do not have any right to dispossess the Plaintiff from the tenanted premises and to declare that Defendant had no right to demolish the tenanted premises with several other reliefs.

6. The said dispute ultimately came to be settled between the parties and an Agreement came to be entered between them. It was agreed that the Defendant shall make available permanent alternative accommodation with rent for transit accommodation, and for providing new premises of 210 Sq. Ft. carpet area in the proposed building, which was to be constructed, and hand it over on ownership basis to the Plaintiff. The said agreement was duly executed by both the parties and consent terms were entered into between the parties as per the agreement dated 12th August, 2010. An undertaking was executed by the Defendant that, he would comply with the conditions of Agreement for permanent alternate accommodation. The consent terms were entered on 5th August, 2010. The Defendant had agreed and undertaken to complete the construction within 24 months from the date on which Plaintiff hands over the vacant possession to the Defendant. Accordingly, the vacant possession of the suit premises was handed over on 10th August, 2010. However, the said undertaking was not complied with, even after the period of 24 months were over. The Defendant had thereby committed contempt of the Court, by intentionally committing breach of the undertaking given to the Court.

The Petitioner, therefore, filed Short Cause Suit before the City Civil Court, Dindoshi.

7. As per the agreement dated 12th August, 2010, the Defendant had undertaken to provide permanent alternate accommodation and pay rent for transit accommodation at the rate of Rs.8,500/- per month for 24 months. There was also a condition in the said Agreement that, if the project gets delayed beyond 24 months, the Defendant would pay 10% additional rent every year. Since there was delay of four years, the construction of the building was not complete, so also the Defendant had stopped paying the transit accommodation charges, hence the Plaintiff has filed the Short Cause Suit. The Plaintiff has prayed for payment of arrears of rent from 1st February, 2013 to 31st July, 2016, totalling to Rs. 3,89,620/-. In spite of follow ups with the Defendant, the Defendant was giving vague and evasive reply and did not complete the project. The Plaintiff was therefore constrained to file the Small Cause Suit.

8. The Plaintiffs issued notice dated 2nd May, 2014 to the

Defendant seeking compliance of the undertaking given before the Small Cause Court. Even the postdated cheques issued by the Defendant were dishonoured for which separate proceedings under Section 138 of the Negotiable Instruments Act, have been initiated by the Petitioner. Though the Defendant approached the Plaintiff and orally assured that he will pay the arrears and offered to settle the matter, however, he was unable to keep his word and also was unable to complete the project. In the meanwhile, the Plaintiff came to know that, the Defendant had transferred the development rights to a third party, in respect of the suit property. The said conduct of the Defendant was contrary to the undertaking given by the Defendant before the Small Causes Court. In Clause No. 19 of the Agreement, it was specifically undertaken by the owner/developer, who is Defendant in the suit, that he will not sell his development rights to any third party and will himself complete the project of re-development. The said agreement was entered on 12th August, 2010.

When the present Short Cause Suit was listed before the learned Judge of the City Civil Court, Dindoshi, on 27th January, 2017, the Defendant had sought time to file reply. The Advocate for the

Plaintiff had prayed that Defendant be restrained from creating any third party interest over the suit property. In response to which the Defendant Counsel had made a statement that, the Defendant shall not create any third party interest, till the filing of the reply. The said statement was taken on record and treated as an undertaking to the Court, which was to continue till the filing of reply. The learned Advocate for the Petitioner has placed on record the copy of Roznama of the City Civil Court at **Exh-'A'**.

9. Thereafter, the Respondent No.1 herein has filed Chamber Summons, seeking directions that, the Plaintiff be directed to join the Applicant as Defendant No.2, in the Short Cause Suit. The Respondent No.1/Applicant had entered into a registered Development Agreement with the defendant in the suit. Pursuant to which, the defendant had executed irrevocable Power of Attorney, in favour of the Respondent No.1/Applicant, on the basis of which he is developing the property. The said Development Agreement was entered between the defendant and the Respondent No.1/Applicant on 22nd December, 2012. It is the contention of the Petitioner that, knowing it fully well, that he has

already entered into a Development Agreement on 22nd December, 2012, the defendant has made a false statement before the City Civil Court on 27th January, 2017. The Defendant has made a solemn statement that he will not create any third party rights over the suit property, till filing of reply. The Applicant in his Application has stated that, on 22nd October, 2017, the Director of defendant company informed the Applicant/Respondent No.1, about filing of suit by the Plaintiff against the Defendant and the copies of the proceedings were handed over to the Applicant. According to the Applicant he has entered into shoes of the Defendant, on the basis of the registered Development Agreement and the irrevocable Power of Attorney, executed in his favour by the Defendant. Therefore, he is a necessary and proper party to the Short Cause Suit. According to him, he has been put in possession of the suit property and construction of the new building has already commenced. The R.C.C frame work of the new building had come up to the level of the third floor, when the said application for Chamber Summons was filed. According to him, he had invested a huge amount to construct the new building on the suit premises. The Applicant had prayed that if any adverse order is passed

in the Short Cause Suit, it would affect his rights, therefore he is a necessary party to the present suit.

10. The learned Judge of the City Civil Court, Dindoshi, Mumbai, has been pleased to decide the Chamber Summons No. 59 of 2018 and 60 of 2018, by Order dated 22nd August, 2019. After taking into consideration the rival submissions, the learned Judge has been pleased to hold that, the Applicant has now stepped into shoes of the Defendant by entering into agreement with the Defendant. On the basis of the Agreement, he is developing the suit property. Considering that presently he is developing the suit property and has also filed photographs of the stage of construction of the suit property, the learned Judge thought it appropriate to allow the application and to join the Applicant in the Small Cause Suit as a party Defendant. According to the learned Judge, even if the Applicant is joined as party, it would not create a new case and the Plaintiff will have every opportunity to go for his claim, in the suit against Applicant, therefore he has allowed the said application.

11. I have heard the respective parties. In the present writ petition the affidavit-in-reply has been filed on behalf of the Respondent No.2 i.e. the original Defendant. It is submitted in his affidavit that, the Respondent No.2 has now terminated the Development Agreement entered into with the Respondent No.1. He has annexed the copy of termination letter dated 29th December, 2021, in respect of the Development Agreement. The said termination of Development Agreement is subsequent to the Order passed by the learned Judge of the City Civil Court i.e. after 22nd August, 2019. The Respondent No.1 has also filed its Affidavit-in-Reply. The Respondent No.1 has stated in his affidavit that, the Respondent No.2 had executed registered Development Agreement dated 22nd December, 2012 alongwith registered irrevocable Power of Attorney dated 27th December, 2012 in the favour of Respondent No.1, for the development of the suit property. According to him, the Respondent No.2 has filed a collusive suit in the City Civil Court. The Petitioner and the Respondent No.2 are in collusion and they are trying to play fraud upon the City Civil Court. According to him, the Respondent No.2 has played fraud on the Court by making a statement that he will

not create any third party right or transfer the development right over the suit property till filing of the reply. The said statement was in fact a false statement and the Respondent No.2 has played a fraud because even prior to giving of undertaking before the Court, the Respondent No.2 had already transferred the Development Rights and irrevocable Power of Attorney in the year 2012 itself. Therefore, according to him, the conduct of the Respondent No.2, makes it more necessary to add the Respondent No.1 as a party to the suit, because it would affect his rights in the said property. According to him, the learned Judge of the City Civil Court has rightly allowed the application of the Respondent No.1. It is his contention that there are other proceedings pending between the Respondent Nos.1 and 2 regarding the suit property. That, the Respondent No.2 has committed breach of undertaking given before the City Civil Court in S. C. Suit No. 1356 of 2018, therefore the Respondent No.2 is liable for committing contempt of Court.

12. Learned Advocate for the Petitioner has opposed the said application before the City Civil Court for impleading the Respondent

No.2 as Defendant in the suit, mainly on the ground that the said Respondent No.2 has stepped into shoes of the Respondent No.1, which is contrary to the undertaking given before the Small Causes Court in R.A.D. Suit No. 106 of 2010. The learned Advocate for the Petitioner has placed on record a compilation of the documents. The Agreement dated 12th August, 2010 also forms part of the said compilation. The clause No.19 of the said Agreement categorically mentions that, the owner/developer will not sell his development rights to the third party and the developer will himself complete the project of re-development. So far as the said clause is concerned, the Petitioner has already initiated contempt proceedings before the appropriate Court for violation of the terms of the said agreement. As regards the application for Chamber Summons is concerned, it has been filed in the proceedings before the City Civil Court, wherein the Plaintiff/Petitioner had filed proceedings for execution of the Consent Terms, entered before the Small Causes Court. It is evident that the Petitioner is interested in getting the possession of the suit premises and also the arrears of transit rent, which was agreed upon by the developer to be paid, till the Petitioner has been granted possession of

the re-developed suit premises.

13. The power of the Court to add parties is provided in Order I Rule 10(1) and 10(2) of the Code of Civil Procedure 1908, (“C.P.C.”) which reads thus :

10. Suit in name of wrong plaintiff.

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted thought a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties. - 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.

14. In a decision in *Civil Appeal No. 4900 of 2010 in Mumbai International Airport Pvt. Ltd. V/s Regency Convention Centre & Hotels Pvt. Ltd. And Ors., dated 6th July, 2010*, the Hon'ble Supreme Court, has considered the scope and ambit of Order I of Rule 10(2) for the CPC regarding striking out or adding parties. The Hon'ble Supreme Court had discussed the scope of the Rule 10(2), by giving illustrations. It has been observed that if a non-party makes an application seeking impleadment as a proper party and the Court finds him to be a proper party he may be directed to be added as defendant, but if the Court finds that his addition will alter the nature of suit or introduce new cause of action, it may dismiss the application, even if he is a proper party, if it does not want to widen the scope of the specific performance of the suit. It is the Court's discretion either to allow or reject Application, depending on the facts of each case, no person has a right to insist that he should be impleaded as party,

merely because he is a proper party. It is further clarified that the observation in *Kasturi V/s. Iyyamperumal And Ors., reported in (2005) 6 SCC 733* are made with reference to the facts of the case. It is held in the said case that, in suit for Specific Performance only parties to the contract or a person having direct and legal interest in the controversy involved in the suit, can invoke Order I Rule 10(2) of the CPC. The tests to determine who is a necessary party are (i) there must be a right to some relief against such party in respect of controversy involved in proceeding, (ii) no effective decree can be passed in absence of such party.

15. The Respondent No.1/Applicant claims to have acquired rights by way of the transfer of Development Rights, from Respondent No.2, and has accordingly constructed the building after acquiring necessary permissions. However, he is not a party to the Agreement and the consent terms executed before the Small Cause Court. He is a stranger to the Agreement so also the consent terms entered before the Court. The plaintiff is seeking execution of the said consent terms. The claim of the Respondent No.1 is based on the transfer of Development

Right executed by the Respondent No.2 in his favour, whereas the petitioner's right are based on the Agreement dated 12th August, 2010, and the consent terms entered before the Small Causes court. Therefore, both the Agreements, between the parties are limited to the extent of parties to the contract. Any third party is a stranger to the Agreement therefore he is not a necessary party to the contract.

16. The Petitioner/Plaintiff is seeking performance of the contract entered by the Respondent No.2. Hence, the question would be whether the Petitioner can be compelled to implead a person in the suit for execution of the Agreement, wherein no relief is claimed against him.

17. The learned Counsel for the Petitioner has placed reliance on the Judgment of the Hon'ble Supreme Court in *Gurmit Singh Bhatia V/s Kiran Kant Robinson And Ors., reported in AIR 2019 SC 3577*. In similar facts where a subsequent purchaser of a suit property had filed Application for impleadment of party to the suit on the ground that he had direct interest in the suit property, when the matter

reached the Hon'ble Supreme Court, while determining the question whether Plaintiff can be compelled to add a party against whom no relief is claimed, the Hon'ble Supreme Court has observed that, the Applicant cannot be impleaded as Defendant in a suit for specific performance of contract between original Plaintiff and original Defendant, against the wish of Plaintiff.

18. In the present matter, the Petitioner has not claimed any relief against the Respondent No.1. The relief is limited to the extent of the clauses of agreement between the Petitioner and Respondent No.2. Considering the restricted relief claimed by the Petitioner, if the impleadment is allowed it would amount to enlargement of the scope of the suit.

19. The right of the Respondent No.1 is based on a independent Agreement between the Respondent No.1 and the Respondent No.2 *interse*. Respondents are already litigating in respect of the said agreement. The Petitioner is aware about the same, inspite of that he has opted not to add the said party as a defendant to the suit.

20. There can be no doubt that, the Plaintiff is *dominus litis* of his own suit. It is his choice against whom he can claim relief. If a litigant chooses not to claim any relief against a particular party, and does not add him as a party, it is his choice and he cannot be compelled to add him as a party respondent. The non impleadment of person as Defendants is at the risk of Plaintiff.

21. In the present matter the Respondent No.1 is not a party to the agreement; no relief is claimed against him; and Plaintiff does not wish to implead him. Therefore, the Plaintiff cannot be forced to add the Respondent No.1 as a party defendant. Furthermore, if the Respondent is added, the whole nature and scope of the suit would be altered. Taking into consideration all the above factors cumulatively, the Orders passed by the learned Judge of the City Civil Court, Mumbai, deserves to be quashed and set aside.

22. Hence, I proceed to pass the following Order :

ORDER

- (i) Orders dated 22nd August, 2019, passed by the 1st Additional Principal Judge, City Civil & Sessions Court, Dindoshi, Mumbai, in Chamber Summons No. 59 of 2018 in Short Cause Suit No. 3303 of 2016 and Chamber Summons No. 60 of 2018 in Short Cause Suit No. 3304 of 2016, are quashed and set aside.
- (ii) Rule is made absolute in the above terms.
- (iii) No order as to costs.

MANJUSHA DESHPANDE, J.

After the pronouncement of the Judgment, the Respondent No.1 has made an oral request for stay of the present Judgment and Order for a period of twelve weeks. Learned Advocate for the Petitioner is objecting to the same. I am not inclined to consider the request. Motion rejected.

MANJUSHA DESHPANDE, J.