



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD
APPEAL FROM ORDER NO.7 OF 2024
WITH
CIVIL APPLICATION NO.2963 OF 2024**

1. Dineshkumar Shankarlal Agrawal
Age: 44 years; Occu.: Agril & Business
 2. Rajeshkumar Shankarlal Agrawal
Age: 42 years; Occu.: Agril & Business
 3. Rajesh Champalal Jain
Age: 42 years; Occu.: Agril & Business
 4. Sau. Kiranbai Digambar Lunawat
Age: 56 years; Occu.: Agril & Business

All R/o: Vrundavan Nagar, Nandurbar,
Taluka and District Nandurbar
 5. Pushpendrasing Govardhansing Raghuwanshi
Age: 51 years; Occu.: Business
 6. Sau. Bhartiben Pushpendrasing Raghuwanshi
Age: 44 years; Occu.: Business
Both R/o: Pardeshipura, Nandurbar
Taluka and District Nandurbar
 7. Sanjay Sureshchandra Agrawal
Age: 56 years; Occu.: Business
 8. Manoj Sureshchandra Agrawal
Age: 53 years; Occu.: Business
Both R/o. Ghoda Mill, Near Hat Darwaja Nandurbar
Taluka and District Nandurbar
- ..Appellants
(Orig. Defendant Nos.1 to 8)
- Versus
1. Bhatu Shankar Patel,
Age: 54 years; Occ.: Agriculture,
 2. Smt. Kamalben Shankar Patel,
Age: 734 years, Occ.: Household & Agriculture
 3. Sau. Vimalben Uddavbhai Patel,
Age: 44 years, Occ.: Household & Agriculture

4. Sau. Aashaben Dhanraj Patel,
Age: 52 years: Occ.: Household & Agriculture

All R/o. Patonda,
Taluka and District Nandurbar

5. I.B.P. Company Limited
R/o I.B.P. House,
34/A, Nirmalchandra Road, Calcutta ..Respondents
(Respondent No.1 to 4 Original
Plaintiffs, Respondent No.5 is
original Defendant No.9)

Mr. R. R. Sancheti, Advocate for Appellants.

Mr. M. M. Bhokrikar, Advocate for Respondents.

CORAM : S. G. CHAPALGAONKAR, J.
DATED : 24th MARCH, 2025.

JUDGMENT:-

1. Admit. Heard finally at the stage of admission by consent of parties.
2. The appellants/original defendant nos.1 to 8 impugn order dated 20.01.2024 passed by Principal District Judge, Nandurbar in Regular Civil Appeal No.18/2015, thereby setting aside judgment and decree dated 17.11.2011 passed by Civil Judge, Senior Division, Nandurbar in Special Civil Suit No.17/2001 and remanded suit for trial under Order XLI Rule 23-A of the Code of Civil Procedure (for short 'CPC'). (Hereinafter, parties are referred to by their original status for the sake of convenience and brevity).
3. The respondent nos.1 to 4/plaintiffs filed suit for declaration, specific performance of agreement dated 28.06.1989 executed by

defendant nos.1 to 4 in favour of plaintiffs and one Ushaben (divorced wife of plaintiff no.1). The defendants refuted plaintiffs claim mainly on ground that, suit is bad for non-joinder of necessary party, so also barred by limitation.

4. The Trial Court after evaluation of evidence, dismissed suit accepting case of defendants that Ushaben being party to agreement was necessary party, but not added as party in suit. The aggrieved plaintiffs filed Appeal before District Judge, Nandurbar. The learned District Judge after considering submissions advanced, partly allowed Appeal and remanded matter to Trial Court invoking Order XLI Rule 23-A of CPC. The appellants/original plaintiffs are directed to add Ushaben as defendant in suit by making appropriate application before Trial Court, who is directed to decide suit afresh on the basis of evidence already on record or with further additional evidence as laid by parties. In this background, present Appeal against Order is filed assailing order of remand.

5. Mr. Sancheti, learned Advocate appearing for appellants vehemently submits that appellants/original defendant nos.1 to 8 had raised specific objection in written statement as to non-joinder of Ushaben Patel as party to suit. Consequently, issue was framed by Trial Court. The plaintiffs failed to add Ushaben as party during pendency of suit. Eventually, suit came to be dismissed as

not maintainable for want of necessary party. In this background, Appellate Court could not have permitted plaintiffs to fill up lacuna and remanded matter for re-trial by granting opportunity to add Ushaben as defendant. Mr. Sancheti would further submit that during pendency of Appeal, Ushaben had filed an application seeking her impleadment as party to suit. The plaintiffs had given their no objection. However, said application was contested by appellants/defendants. Eventually, Appellate Court rejected said application vide order dated 10.07.2023. In that view of matter, there was no scope for Appellate Court to invoke jurisdiction under Order I Rule 10(2) of CPC and permit plaintiffs to add Ushaben as party. He submits that order passed below Exhibits 30 and 36, dated 10.07.2023, operates as *res judicata* within the same proceeding, and Appellate Court could not have passed converse order permitting impleadment of Ushaben, ignoring order dated 10.07.2023. In support of such contentions, Mr. Sancheti relies upon observations of Supreme Court of India in case of ***S. Ramchandra Rao Vs. S. Nagabhushana Rao and Ors. (Civil Appeal Nos.7691-7694 of 2022*** decided on ***19.10.2022***). Similarly, he relies upon judgment of this Court in case of ***Purushottam Shivdas Chaudhari Vs. Narayan Shivdas Chaudhari***¹.

6. Per contra, Mr. Bhokrikar, learned Advocate appearing for respondents supports impugned order contending that all relevant

¹ 2017 (2) Mh.L.J. 694.

aspects have been considered by Appellate Court and discretion as available under Order I Rule 10(2) of CPC has been judiciously exercised so as to adjudicate dispute between parties.

7. Having considered submissions advanced, two important aspects of matter arises for consideration before this Court, which are as follows:

(i) Whether Appellate Court could have exercised discretion under Order I Rule 10(2) of CPC, thereby directing appellants to add Ushaben Bhatu Patel as defendant?

(ii) Whether orders passed below Exhibits 30 and 36, whereby Appellate Court had rejected earlier application made by Ushaben Bhatu Patel seeking her impleadment in suit would operate as *res judicata* within the proceeding?

8. So far as first aspect as to exercise of discretion under Order I Rule 10(2) of CPC is concerned, it would be apposite to refer relevant provision of Order I Rule 10(2) of CPC:

“10. Suit in name of wrong plaintiff:- 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.

(3) *No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.*

(4) *Where defendant added, plaint to be amended—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.*

(5) *Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”*

9. The Appellate Court has relied upon observations of Supreme Court of India in case of ***Mumbai International Airport Pvt. Ltd. Vs. Regency Convention Centre and Hotels Pvt. Ltd. and Ors.***², particularly paragraph nos.14 and 22, which reads thus:

“14. 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.

22. Let us consider the scope and ambit of Order I 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”

10. In light of aforesaid observations of Supreme Court of India, it is evident that Court is empowered to direct addition or deletion of any party at any stage of proceeding. The discretion available to Court has to be exercised according to reason and fair play guided by law and it must not be arbitrary, vague and fanciful, but legal and regular. The addition of such party shall always be subject to provision of Indian Limitation Act. It is not out of place to mention here that judicial discretion available to Court has to be used considering overall conspectus of matter. The discretion must be aimed to achieve ends of substantial justice. The care has to be taken that if any right is accrued in favour of party on account of lapses or negligence of either parties, benefit accrued shall not be taken away.

11. In present case, Ushaben is one of the prospective purchaser alongwith plaintiffs in subject agreement to sale. In suit, explanation is tendered for not impleading her as party that she has divorced with plaintiff no.1-Bhatu and her rights are already merged with plaintiff no.1. With such bonafide belief, her non-impleadment is justified in plaint. Apparently, omission to add Ushaben was under conception that right to seek specific performance would not be eclipsed by her absence in peculiar facts of the case. However, Trial Court as well as Appellate Court arrived at conclusion that presence of Ushaben is necessary to finally adjudicate real matter in dispute between parties. In that view of matter, exercise of discretion under Order I Rule 10(2) of CPC is held to be essential and that has been judiciously exercised by Appellate Court.

12. It is true that, Trial Court after recording findings against all issues in favour of plaintiffs, dismissed suit merely for the reasons of non-impleadment of Ushaben as party. Although there was an objection in written statement and an eventual issue, the plaintiffs, under a misconception in peculiar facts of the case, did not implead her as party. The Appellate Court, therefore, felt it necessary to implead her as party and issue such directions at appellate stage.

13. So far as contentions that in view of orders passed below Exhibits 30 and 36 Appellate Court could not have ordered

impleadment of Ushabai as party, it can be observed that orders below Exhibits 30 and 36 had been passed on application moved by Ushaben seeking her impleadment as party during pendency of Appeal. The Court decided that application from perspective of Ushaben observing that she had neither filed an independent proceeding for specific performance based on the subject agreement to sale nor had she sought impleadment before Trial Court in this suit. It can be observed that order on her application is procedural one, passed considering stage of the proceeding and individual right of Ushaben to invoke procedural clause under Code of Civil Procedure before a decision is made. It does not relate to the substantive rights of parties.

14. Mr. Sancheti relying upon observations of Supreme Court of India in case of ***S. Ramchandra Rao*** (supra) submits that doctrine of *res judicata* attracted not only in separate subsequent proceeding, but also at subsequent stage of same proceeding. Earlier decision even erroneous, remains binding on parties to same litigation concerning the same issue. There cannot be dispute to the preposition of law. However, in facts of presence case, Appellate Court while finally deciding Appeal thought it fit to direct impleadment of Ushaben as defendant so that controversy between parties can be resolved in peculiar facts and circumstances. The Appellate Court found that non-impleadment

of Ushaben by plaintiffs at the time of institution of suit or during the trial was bonafide mistake. Further, because of matrimonial discord i.e. divorce between plaintiff no.1 and Ushaben, she was not joined by plaintiffs in prosecuting suit for specific performance of agreement.

15. In case of ***Arjun Singh Vs. Mohindra Kumar and Others***³, two propositions as to the application of *res judicata* have been generally approved:

(i) *that an issue of fact or law decided even in an interlocutory proceeding could operate as res judicata in a later proceeding.*

(ii) *that in order to attract the principle of res judicata the order or decision first rendered and which is pleaded as res judicata need not be capable of being appealed against.*

It is further clarified that,

“whether principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, scope of the enquiry which the adjectival law provides for the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and relevant factors to be considered before the principle is held applicable.”

16. Applying aforesaid principles of law in facts of present case, it can be observed that issue as to the impleadment of Ushaben has been previously decided on her application filed at Exhibits 30 and 36 at interlocutory stage. The whole conspectus of matter was not considered nor it was expected to be considered while deciding

³ AIR 1964 SC 993.

entitlement of Ushaben to get herself impleaded as party in proceeding at appellate stage. However, while deciding appeal when Appellate Court arrived at conclusion that impleadment of Ushaben was necessary, looking to the nature of dispute, Appellate Court exercised jurisdiction vested under Order I Rule 10(2) of CPC. Therefore, in present case applying principles of law espoused by Supreme Court of India, it is difficult to hold that principle of *res judicata* can be invoked to bar consideration of question of impleadment of Ushaben while finally deciding appeal in light of decision rendered on Exhibits 30 and 36.

17. Mr. Sancheti further submits that permitting addition of Ushaben as defendant would prejudice right accrued in favour of defendants by operation of law of limitation. An addition of party as defendant cannot relate back to date of institution of suit in view of Order I Rule 10(5) of CPC. There cannot be dispute on such preposition, but in this case directions are given to add Ushaben as defendant. Therefore, all issues emerging from her addition as defendant are open for consideration by Trial Court. However, on such Court order impugned cannot be faulted. In result, there is no merit in Appeal from Order.

18. Consequently, Appeal from Order stands dismissed.

19. In view of dismissal of Appeal from Order, pending Civil Application stands disposed of.

(S. G. CHAPALGAONKAR)
JUDGE

Devendra/March-2025