

Arun Sankpal

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

WRIT PETITION NO. 2097 OF 2023

Sanjay Mahadev Bakare
Age 62 years, Occu: Agriculture
R/at C.T.S. No. 381, Korgaonkar
Compound,
E Ward, Kolhapur 416 001.

..Petitioner

Versus

1. Bebi Shankar Patil,
Age: 65 years Occu: Household
R/at: Mudshingi, Tal-Karveer,
Dist: Kolhapur.

2. Vimal Bhra. Balasaheb Deshmukh
Age: 62 years Occu: Household
R/at: Mudshingi, Tal-Karveer,
Dist: Kolhapur.

3. Deepak Rangrao Patil
Age: 64 years Occu: Business
R/at: 1992, E Eard, Rajarampuri,
8th Lane, Kolhapur.

4. Jyoti Deepak Patil,
Age: 50 years Occu: Agriculture
R/at: 1992, E Eard, Rajarampuri,
8th Lane, Kolhapur.

5. Vilas Rangrao Patil
Age: 67 years Occu: Agriculture,
R/at: 1992, E Eard, Rajarampuri,
8th Lane, Kolhapur.

6. Yashoda Vilas Patil,
Age: 56 years Occu: Agriculture
R/at: 1992, E Eard, Rajarampuri,
8th Lane, Kolhapur.

...Respondents

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Mr. Drupad Sopan Patil, with Rugwed Kinkar and
Namtikumar Pansare, for the Petitioner.

Mr. Shrikrishna Ganbavale, with Shantanu Patil, i/b Kush
Lahankar, for Respondent Nos. 1 and 2.

Mr. Prasad Dhakephalkar, Senior Advocate (through VC), i/b
Shubham Kanade, for Respondent Nos. 3 to 6.

CORAM: N. J. JAMADAR, J.

DATED : 12th MARCH 2025

JUDGMENT:

1. Rule. Rule made returnable forthwith and with the consent of the Counsel for the parties, heard finally.

2. The petitioner - plaintiff takes exception to an Order dated 1st December 2022 passed by the learned Civil Judge, Kolhapur on an Application (Exhibit-157) in Special Civil Suit No. 319 of 2010, whereby the application preferred by the petitioner to implead a subsequent transferee as a party-defendant to the suit and also carry out necessary and consequential amendment in the Plaint came to be rejected.

3. Shorn of superfluities the background facts can be stated as under:

3.1 For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity they are arrayed before the Trial Court.

3.2 Under an Agreement for Sale dated 30th April 2007, defendant nos. 1 and 2 agreed to sale the suit property for a consideration of Rs. 75 lakhs. Under the said Agreement, the defendant nos. 1 and 2 accepted a sum of Rs. 5 lakhs. Further amounts were received towards part consideration. Under the terms of the Agreement, the Sale Deed was to be executed after disposal of First Appeal No. 96 of 2002. The said appeal was disposed by an Order dated 27th November 2009 pursuant to the Consent Terms filed by the parties thereto.

3.3 The plaintiff asserts, the said Consent Terms were obtained by playing fraud upon the Court. During the currency of the Agreement for Sale in favour of the plaintiff, defendant nos. 1 and 2 executed a registered Sale Deed of the suit property in favour of defendant nos. 3 to 6 on 3rd December 2009. Thus the plaintiff was constrained to institute the suit for specific performance of the contract against the original vendors as well as the transferees.

3.4 Post completion of pleadings, issues were settled and the plaintiff led his evidence. When the matter was posted for cross-examination of the defendants' witness, the plaintiff preferred instant application (Exhibit "157") seeking the impleadment of Dinkar Shinde as a party-defendant to the suit and also permit

the plaintiff to carry out amendment in the Plaint, purportedly under the provisions of Order I Rule 10(2) and Order VI Rule 17 read with Section 151 of Code of Civil Procedure 1908 ("the Code").

3.5 The substance of the application of the plaintiff was that defendants nos. 3 to 6, the transferees from the vendors-defendant nos. 1 and 2, have pleaded in their Written Statement that the defendant nos. 3 to 6 have, in turn, executed a registered Sale Deed on 5th July 2010 in favour of Dinkar Shinde and thereby sold 26 gunthas land out of the suit property for a consideration of Rs. 4,25,000/- It was, therefore, necessary to implead Dinkar Shinde as a party-defendant to the Suit.

3.6 To substantiate the claim that the said Dinkar Shinde was not a *bona fide* purchaser for value without notice, by way of amendment, averments were sought to be incorporated in the Plaint to the effect that Dinkar was fully aware of the transaction between the plaintiff and defendant nos. 1 and 2 and the said Sale Deed in favour of Dinkar Shinde came to be executed without consideration and by way of illegal gratification for the assistance rendered by Dinkar Shinde in getting the Sale Deed of the suit land executed in favour of defendant nos. 3 to 6 fraudulently. It was, therefore, not

necessary to seek a declaration that the said Sale Deed dated 5th July 2010 was *null and void*. The plaintiff thus simply sought to implead Dinkar Shinde as defendant no.7 and seek the relief of possession and injunction qua the proposed defendant no.7 also.

3.6 The application was resisted by the defendant.

3.7 By the impugned order, the learned Civil Judge, Senior Division, Kolhapur, was persuaded to reject the application observing *inter alia* that the said Sale Deed dated 5th July 2010 in favour of Dinkar Shinde was executed before the institution of the Suit; the principle of *lis pendens* did not come into play; the defendant nos. 3 to 6 had specifically contended that they had sold the 26 gunthas land in favour of Dinkar Shinde on 5th July 2010; the plaintiff was also cross-examined on the said aspect and conceded that he had known the said fact and, yet, the plaintiff did not seek the impleadment of Dinkar Shinde within the stipulated period of limitation. The relief against Dinkar Shinde was clearly barred by law of limitation. Moreover, the plaintiff failed to satisfy the threshold requirement of permitting the amendment post the commencement of the trial.

4. Being aggrieved, the plaintiff has invoked the writ jurisdiction.

5. Mr. Drupad Patil, the learned Counsel for the petitioner, would urge that the learned Civil Judge approached the matter from an incorrect perspective. The primary prayer in the application was the impleadment of Dinkar Shinde, the subsequent transferee of defendant Nos.3 to 6. The prayer for amendment in the plaint was essentially consequential and ancillary. The learned Civil Judge could not have imported the principles which govern the amendment of the plaint post commencement of trial. In the process, according to Mr. Patil, the learned Civil Judge misdirected himself in delving into the merits of the case sought to be pleaded by way of amendment. The learned Civil Judge ought to have kept in view the principles which govern the addition of a party to a Suit for specific performance. Since a subsequent transferee of the vendor or the person who claims through the vendor, is necessary party to have a complete and effectual decree, the Trial Court could not have rejected the application for impleadment, urged Mr. Patil.

6. To buttress these submissions, Mr. Patil placed reliance on the Division Bench judgments of this Court in the cases of *Nitin*

*Gandhi And Anr Vs Dinyar Pheroz Dubhash,*¹ *Shree Kamal Constructions & Ors Vs Kamlakar Jiwan Patil & Ors*² and *Shri Swastik Developers And Ors Vs Saket Kumar Jain.*³

7. Mr. Patil, however, fairly conceded that there is an element of delay in seeking the impleadment of Dinkar Shinde as a party - defendant to the Suit. However, delay by itself, according to Mr. Patil, cannot be a ground to reject the application for impleadment when the party sought to be impleaded is unquestionably a necessary party. The Court could have imposed appropriate conditions and costs, submitted Mr. Patil.

8. In opposition to this, Mr. Prasad Dhakephalkar, the learned Senior Advocate for respondent nos.3 to 6 vehemently opposed the prayers of impleadment and amendment in the plaint.

9. Mr. Dhakephalkar would urge that the petitioner has, by resorting to clever drafting of the draft text of the proposed amendment in the plaint, has sought to overcome the interdict contained in the proviso to Order VI Rule 17 of the Code. Incontrovertibly, the suit is at an advanced stage. As the plaintiff cannot now seek an amendment in the plaint without

1 2015(2) MhLJ 850.

2 2013 SCC OnLine Bom 2000.

3 2014 (2) MhLJ 968.

showing due diligence, amendment is sought to be made in the plaint in an indirect manner disguised as an application for impleadment of a party. The predominant purpose is not the impleadment of Dinkar Shinde but to incorporate substantial amendment in the Plaint.

10. Mr. Dhakephalkar further submitted that the defendant Nos.3 to 6 had disclosed in the Written Statement, filed on 7th October 2010 itself, that they had conveyed 26 gunthas of land under a Sale Deed dated 5th July, 2010 in favour of Dinkar Shinde. The plaintiff, thus, can hardly dispute the knowledge about the said transaction. No steps were taken by the plaintiff to implead the said subsequent transferee. To overcome the bar of limitation qua the said instrument dated 5th July, 2010, the plaintiff has asserted that it is not necessary to seek declaration qua the said instrument. The plaintiff cannot be permitted to defeat the statutory provisions and the bar of limitation by such clever drafting and omission to seek the prayer for declaration. As the relief qua the said instrument dated 5th July, 2010 is *ex facie* barred by law of limitation, the amendment cannot be permitted.

11. To bolster up the aforesaid submissions, Mr. Dhakephalkar placed reliance on the decision of the Supreme

Court in the cases of *Hardesh Ores (P) Ltd Vs Hede And Company*⁴ and *Life Insurance Corporation of India Vs Sanjeev Builders Private Limited & Anr.*⁵

12. Mr. Shrikrishna Ganbavale, the learned Counsel for respondent Nos.1 and 2, supplemented the submissions of Mr. Dhakephalkar.

13. I have given careful consideration to the rival submissions canvassed across the bar. With the assistance of the learned Counsel for the parties, I have also perused the original pleadings, application for amendment in the Plaint, the reply thereto and the material on record.

14. To start with few uncontroverted facts. Defendant nos. 1 and 2 executed an Agreement for Sale in favour of the plaintiff on 30th April, 2007. The parties had agreed that the Sale Deed would be executed within one month of the disposal of the First Appeal, in respect of the suit property, then pending before this Court. Indisputably after the disposal of the said First Appeal pursuant to the Consent Terms dated 27th November, 2009, the defendant Nos.1 and 2 executed a conveyance of the suit property in favour of defendant Nos.3 to 6. The fact that

4 (2007) 5 SCC 614.

5 2022 SCC OnLine SC 1128.

defendant Nos.3 to 6 had, in turn, executed a registered Sale Deed of 26 gunthas land out of the suit property in favour of Dinkar Shinde on 5th July, 2010, was specifically pleaded in the Written Statement of the defendant Nos.3 to 6, filed on 7th October, 2010.

15. In the backdrop of the aforesaid facts, the issue is required to be appreciated from two perspectives; namely, the prayer for impleadment of a party governed by the provisions of Order I Rule 10(2) of the Code and the prayer for amendment in the plaint governed by Order VI Rule 17 of the Code, being alive to the fact that, in practical application, these two aspects may not be evaluated in watertight compartments. In a case of the present nature, it is quite possible that these two prayers may be so inextricably intermingled that an independent consideration on each of the aspects without influencing the outcome of the other may not be possible.

16. First, the aspect of impleadment of Dinkar Shinde, the subsequent transferee, as a party defendant to the suit. In the matter of addition or deletion of a party, it is well nigh settled that, it is not a matter of initial jurisdiction but that of judicial discretion to be exercised keeping in view all the relevant considerations. The factors that the plaintiff is a *dominus litis*

and in a suit for specific performance, the impleadment of a subsequent transferee is, generally, considered necessary, especially, when the plaintiff seeks to implead such transferee, are required to be kept in view. In view of the provisions contained in Section 19 of the Specific Relief Act, 1963, specific performance of a contract may be enforced against any other person claiming under a party to the contract, by a title arising subsequently to the contract, except a transferee for value, who has paid his money in good faith and without notice of the original contract. It is equally well settled that to convey complete title to the plaintiff, in the event of grant of decree of specific performance of the contract, the transferee is made to join in the execution of the instrument alongwith the vendor. From this standpoint, ordinarily, where the plaintiff moves for impleadment of a subsequent transferee such prayer is considered favourably in the absence of the factors which otherwise render such impleadment unjustifiable.

17. In the case of *Durga Prasad vs. Deep Chand*⁶ the Supreme Court underscored the necessity of impleading the transferee of the vendor in a suit for specific performance of the contract to sell immovable property, in the following words:

6 AIR 1954 SC 75.

“42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in *Kafiladdin v. Samiraddin AIR 1931 Cal 67(C)*, and appears to be the English practice. See Fry on Specific Performance, 6th edition, page 90, Paragraph 207 ; also *Potter v. Sanders (1846) 67 ER 1057 (D)*. We direct accordingly.

(emphasis supplied)

18. In the case of *Dwarka Prasad Singh vs. Harikant Prasad Singh*⁷ after following the decision in the case of *Durga Prasad* (supra) while resolving the controversy with regard to the question whether in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party or not, another Three-Judge Bench of the Supreme Court enunciated the law as under:

“..... This Court has, however, held in *Lala Durga Prasad & Another v. Lala Deep Chand & Others ([1954] S.C.R. 360)* that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. This was the course followed by the Calcutta High Court in the above case and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in favour of the plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title- which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff. In a recent decision of this Court in *R. C. Chandiok & Another v. Chunni Lal Sabharwal & Others ([1971] 2 SCR 573)* while passing a decree for specific performance of a contract a

7 (1973) 1 SCC 179.

direction was made that the decree should be in the same form as in Lala Durga Prasad's case. It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the subsequent purchaser has also to join so as to pass on the title which resides in him to the plaintiff."

19. In the case of *Kasturi vs. Iyyamperumal*⁸, the question arose before the Supreme Court when a third party sought impleadment in a suit for specific performance of the contract. The Supreme Court drew a distinction between a subsequent purchaser, who claimed through the vendor, and a person, who claimed adversely to the claim of the vendor. The observations of the Supreme Court in paragraph 7 are instructive and hence extracted below.

"7. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the CPC would clearly show that the necessary parties in a suit for specific performance of a contract for sale are the parties to the contract or if they are dead their legal representatives as also a person who had purchased the contracted property from the vendor. In equity as well as in law, the contract constitutes rights and also regulates the liabilities of the parties. A purchaser is a necessary party as he would be affected if he had purchased with notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are - (1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings (2) no effective decree can be passed in the absence of such party.

(emphasis supplied)

8 (2005) 6 SCC733.

20. The aforesaid authoritative pronouncements of the Supreme Court make it beyond cavil that the transferee of the vendor is a necessary party to suit for specific performance of the contract for sale of immovable property. The necessity of impleadment of the transferee arises from the point of view of making conveyance of title in favour of the plaintiff complete and prefect and also from the point that such a decree may impair the rights of the transferee and, therefore, his presence is necessary for a complete and effectual adjudication of the dispute.

21. Mr. Patil, the learned Counsel for the petitioner, would urge that at the stage of impleading the transferee as a party defendant, the merits of the claim of the transferee being a *bona fide* purchaser for value need not be delved into. As a second limb of this submission, Mr. Patil would urge that, the trial court could not have drawn inferences against the plaintiff on account of non-impleadment of the transferee in this case immediately after the said fact was pleaded by defendant Nos.3 to 6, in their written statement.

22. In the case of *Nitin Gandhi* (supra) a Division Bench of this Court held that at the stage of considering the Chamber Summons seeking leave to implead/amend, the Court is really

not concerned with the veracity or otherwise of the statements made in the proposed text of the amendment. Therefore, at that stage, pleadings to the effect that the subsequent purchaser is not a *bona fide* purchaser would suffice. There is no requirement of producing any material or evidence for establishing that the subsequent purchaser is not a *bona fide* purchaser, at the stage when leave for impleadment/consequential amendments is being applied for.

23. In the case of *M/s Shree Kamal Construction* (supra) another Division Bench of this Court enunciated that it was impossible to conceive as to how the impleadment of those persons, who claimed title under the vendors of the appellants would not be necessary. This judgment was followed in the case of *Shri Swastik Developers* (supra).

24. There can be no duality of opinion on the point that at the stage of the consideration as to whether a party is entitled to carry out the amendment, or for that matter implead a party as a defendant, the merits of the amendment and the case qua the proposed defendant are not required to be delved into. In particular, on the aspect of the transferee being a *bona fide* purchaser for value without notice, in view of the text of Section 19(b) of the Specific Relief Act, generally, the onus of proof of

good faith is on the transferee who takes the plea that he is a *bona fide* purchaser for value without notice of the original contract. However, these propositions may not advance the cause of the submission on behalf of the petitioner to the extent desired by Mr. Patil.

25. In the facts of the case, as narrated above, the crucial question is of the inaction on the part of the plaintiff in seeking the impleadment of the transferee of defendant Nos.3 to 6, despite undeniable notice in the month of October, 2010. What accentuates the situation is, the carriage of the suit upto the stage of recording of evidence of the defendants without seeking the impleadment of the transferee.

26. If the plaintiff was to seek a declaration that the sale deed executed by defendant Nos.3 to 6 in favour of the transferee does not bind him, clearly the bar of limitation would be attracted. The plaintiff, therefore, does not seek any declaratory relief qua the said instrument. On the contrary, in the proposed text of amendment, the plaintiff has made averments to the effect that since the transferee had known about the original contract between the plaintiff and defendant Nos.1 and 2 and the sale deed in favour of the transferee by defendant Nos.3 to 6 was without consideration and by way of illegal gratification,

there was no need to seek declaration qua the said sale deed dated 5th July, 2010. The aforesaid stand of the plaintiff brings in question the permissibility of the amendment in the plaint, in contradistinction to the impleadment simpliciter of the transferee as a party defendant to the suit. Can the omission to seek the declaratory relief qua the said instrument be said to be innocuous? Can the plaintiff be permitted to now make the averments in the plaint to assail the said sale deed, short of seeking declaration? are the questions which are required to be considered keeping in view the stage of the suit and the interdict contained in the proviso to Order VI Rule 17 of the Code.

27. It is trite, if the proviso to Order VI Rule 17 is attracted, the satisfaction of the Court that, in spite of due diligence the party seeking the amendment could not have raised the matter before the commencement of the trial is a jurisdictional fact. (*Vidyabai and others vs. Padmalatha and another*⁹)

28. In the facts of the case, the plaintiff conceivably cannot offer any explanation, much less a justifiable one, to satisfy the jurisdictional fact. In the application for the amendment also, the plaintiff has not made a serious endeavour to offer such justification. Instead, the plaintiff has laid emphasis on the

9 (2009) 2 Supreme Court Cases 409.

necessity of the amendment from the perspective of a complete and effectual adjudication of the dispute.

29. Undoubtedly all the amendments which are necessary for determination of the real question in the controversy between the parties are required to be allowed. The impleadment of the transferee and the averments regarding the instrument in favour of the transferee are germane for the determination of the questions in controversy. However, the fact that the relief qua the said instrument and, by the same token, against the transferee, is barred by law of limitation cannot be lost sight of.

30. One of the parameters on which a prayer for amendment in the pleadings is to be tested, is bar of limitation. In the case of *Life Insurance Corporation* (supra), after adverting to the previous pronouncements, the Supreme Court enunciated that one of the cardinal principles of law in allowing and rejecting the application for amendment of the pleadings is that the Courts generally, as a rule, decline to allow amendment if a fresh suit on the amended claim would be barred by limitation on the date of filing of the application. But that would be a factor to be taken into account in the exercise of the discretion as to whether the amendment should be ordered, and does not

affect the power of the Court to order it, if that is required in the interest of justice.

31. In the said case, the Supreme Court also referred to the decision in the case of *Ragu Thilak D. John vs S. Rayappan & Others*¹⁰, wherein it was enunciated that whether the amendment was barred by time or not, was a disputed question of fact and, therefore, that prayer for amendment could not be rejected and in that circumstances the issue of limitation can be made an issue in the suit itself.

32. The decision in the case of *Ragu Thilak* (supra) may not, however, be construed to give a carte blanche to the plaintiff to seek amendment in the plaint when the relief would be *ex facie* barred by limitation, without necessitating an adjudication. The cases where the issue of limitation appears to be a mixed question of law and fact, which would be the case in a vast majority of cases, stand on different footing. In a case like the one at hand, where, incontrovertibly, the factum of transfer of a portion of the suit property by defendant Nos.3 to 6 to the transferee, was made known to the plaintiff in the written statement itself more than a decade prior to the filing of the

10 (2001) 2 SCC 472.

application for amendment, the principle in *Ragu Thilak* (supra) may not apply.

33. This propels me to the submission of Mr. Dhakephalkar premised on clever drafting of the proposed text of amendment. Had the reliefs been sought qua the instrument executed by defendant Nos.3 to 6 in favour of the transferee, the plaintiff would have been required to surmount the impediment of bar of limitation. To wriggle out of the said situation, the plaintiff has cleverly chosen not to seek such reliefs, urged Mr. Dhakephalkar. Thus the trial Court rightly tore into the facade and looked at the real purpose of the amendment and rejected the application, urged Mr. Dhakephalkar.

34. In the case of *Hardesh Ores Pvt. Ltd.* (supra) wherein the plaintiffs had not prayed for the declaration, which they ought to have prayed, the Supreme Court observed as under:

“39. The appellants ought to have prayed for a declaration that their agreement stood renewed automatically on exercise of option for renewal and only on that basis they could have sought an injunction restraining the respondents from interfering with their possession and operation. Having not done so, they cannot be permitted to camouflage the real issue and claim an order of injunction without establishing the subsistence of a valid agreement. In the instant suit as well they could have sought a declaration that the agreement stood renewed automatically but such a claim would have been barred by limitation since more than 3 years had elapsed after a categoric denial of their right claiming renewal or automatic renewal by the respondents- defendants.”

(emphasis supplied)

35. The aforesaid pronouncement, governs the facts of the case at hand. The proposed text of the amendment, if considered in a correct perspective, is but a camouflage to seek relief qua the Sale Deed dated 5th July, 2010 and an endeavour to overcome the bar of limitation. In the absence of any justification for seeking amendment, post commencement of the trial, the interdict contained in the proviso to Order VI Rule 17 also comes into play.

36. In the totality of the circumstances, in my considered view, in the facts of the case at hand, the issues of impleadment of the transferee and the averments in the proposed text of amendment, are inextricably intermingled. Resultantly, the plaintiff cannot be permitted to amend the plaint substantially disguised as an application for impleadment of a necessary party to the suit, post commencement of the trial.

37. The upshot of the aforesaid consideration is that the learned Civil Judge cannot be said to have committed any error in rejecting composite application for impleadment of a party and amendment in the plaint. Thus, no interference is warranted in the impugned order.

38. Hence the following order:

: O R D E R :

- (i)** Petition stands dismissed.
- (ii)** Rule discharged.

No costs.

[N. J. JAMADAR, J.]