
(2014) 01 BOM CK 0112
In the Bombay High Court
Case No : Writ Petition No. 615 of 2013

Antonio Apolinario Menezes

APPELLANT

Vs

Vithola Shamba Shetye and Others

RESPONDENT

Date of Decision : 24-01-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 7 Rule 11(a)
Constitution of India, 1950 — Article 226, 227
Specific Relief Act, 1963 — Section 34, 35

Citation : (2014) 3 ABR 401 : (2014) 6 ALLMR 872 : (2014) 2 BomCR 252 :
(2015) 1 MhLj 677

Hon'ble Judges : William T.W. Baker, J

Bench : Single Bench

Advocate : N. Sardessai and D. Shirodkar, Advocate for the Appellant; U. Tari for Respondents No. 3, 4 and 5, Advocate for the Respondent

Final Decision : Allowed

Judgement

Bakre U.V., J.—Heard Mr. Sardessai, learned Counsel appearing on behalf of the petitioner and Mr. Tari, learned Counsel appearing on behalf of respondents Nos. 3, 4 and 5. Rule. Rule is made returnable and heard forthwith.

2. By this petition filed under Articles 226 and 227 of the Constitution of India, the petitioner has challenged the order dated 28/6/2013 passed by the learned Civil Judge, Senior Division, Bicholim in Civil Miscellaneous Application No. 28/2012/A filed by respondents No. 3, 4 and 5 in Regular Civil Suit No. 3/1979/A.

3. Said Regular Civil Suit No. 3/1979/A has been filed by the petitioner and respondents Nos. 8 to 12 (plaintiffs) against respondents Nos. 1, 6 and 7 (original defendants) for: (a) declaration that the defendants have no right whatsoever to the said property and that the plaintiffs are the owners in possession of the same; (b) for permanent injunction restraining the defendants their agents and representatives from interfering in any manner whatsoever with

the plaintiffs" possession of the suit property; (c) for declaration that the plaintiffs are entitled to receive from the defendants an amount of Rs. 12,419.49/- which is the sum due for unaccounted "dents"; (d) for an order directing to pay to the plaintiffs a sum of Rs. 12,419.49/- along with interest @ 15 % from the date of filing of the suit till the actual payment.

4. For the sake of convenience, the parties shall hereinafter be referred to as arrayed in the suit.

5. It is alleged by the plaintiffs in the said suit that there exists a property known as "Murdi Kator" in village of Piligaon of Bicholim Taluka bearing Survey Nos. 216/1 and 2 of the said village and that the plaintiffs are the owners of the said property by virtue of Deed of Exchange dated 4/2/1974 executed between the petitioners on the one side and Mr. Francisco Pascoal Jose de Menezes and his wife Mrs. Veronica Gonsalves Menezes on the other side. The plaintiffs have further alleged that they had employed the original defendant No. 1 and one Mr. Pandhari Mulgaonkar for the purpose of watch and ward duties and as remuneration, they were entitled to certain percentage of the yield. The said employees were, in turn, liable to maintain account and to make payments to the plaintiffs. On account of the failure of the said original defendants to maintain the accounts and to make payments, the said suit was filed.

6. The original defendants (defendants No. 1, 3 and 4) filed their written statement whereby they alleged to be the deemed owners of the suit property in view of 5th amendment to the Goa, Daman and Diu Agricultural Tenancy Act. The said defendants stated that their father late Shamba Anant Shetye had taken the suit property on lease from one Mr. Parrikar of Mapusa from whom the ancestors of the plaintiffs purchased the said property.

7. In view of the plea of tenancy taken by the said original defendants, an issue of tenancy was accordingly framed and the same was referred to the Mamlatdar for determination.

8. On 13/12/2012, respondents Nos. 3, 4 and 5 filed an application before the trial Court for impleading them as the defendants in the said suit alleging that they are necessary parties to the suit. The said application came to be registered as Civil Miscellaneous Application No. 28/2012/A. By the said application, the respondents Nos. 3 to 5 also prayed for recall of the records and proceedings of Regular Civil Suit No. 3/1979 sent to the Joint Mamlatdar-II, Bicholim, Goa for deciding the issue of tenancy between the plaintiffs and the original defendants and for stay of the proceedings pending before the Joint Mamlatdar-II of Bicholim pertaining to Tenancy Case No. 11/1996.

9. During the pendency of the intervention application filed by respondents No. 3 to 5, the Joint Mamlatdar-II, Bicholim in the said case No. TNC/SR/11/1996/JM-II by judgment and order dated 21/1/2013 held that the issue of tenancy has not been proved and that the original defendants are not tenants in respect of the suit property.

10. The plaintiffs filed an application before the trial Court for deletion of plaintiffs No. 1-a to 1(d), 2, 3, 4 and 6 (respondents No. 8(a) to 8(d), 9 to 12) alleging that they have executed Deed of Transfer and Relinquishment in respect of the said property in favour of the plaintiff No. 5 (petitioner) and have no interest in the same. The said application is pending before the trial Court.

11. On 25/3/2013, the plaintiffs filed their reply opposing the impleadment application filed by respondents Nos. 3 to 5.

12. By impugned order dated 28/6/2013, the said application filed by respondents Nos. 3 to 5 came to be allowed and respondents Nos. 3 to 5 have been added as the defendants in the said suit. The learned trial Court observed that it is the case of intervening parties that they are the sons of late Shri Vasant Shamba Shetye, who was the legal representative of late Shamba Anant Shetye to whom, according to the plaintiffs as well as the original defendants, the said properties were originally leased out in the year 1924 or thereabout by the erstwhile owners of the said properties. The trial Court found that the plaintiffs have nowhere stated that the said intervening parties are not the legal representatives of said Anant Shamba Shetye, who expired somewhere in the year 1998 during the pendency of the proceedings. The trial Court held that it was incumbent upon the plaintiffs, for just and proper adjudication of the main controversy between the parties, to implead all the said intervening parties as necessary parties. It was held that the plaintiffs have omitted to implead the said legal representatives of the said Vasant Shetye as the defendants, thereby preventing them from proving their case on merits. The learned trial Court further observed that though the issue of tenancy has been decided in negative by the Mamlatdar against the original defendants, the said issue remains to be completely and sufficiently adjudicated in the absence of above legal representatives of late Vasant Shetye, who did not get an opportunity to take part in the proceedings and produce necessary evidence in support of their case, not having been made parties in the suit and consequently, before the Mamlatdar. The trial Court, therefore, observed that an opportunity has to be given to the intervening parties to take part in the suit and to prove their case on merits and that no prejudice would be caused to the plaintiffs as it is on account of the plaintiffs themselves that the matter is getting delayed to come to a final conclusion. Consequently, the application of respondents Nos. 3 to 5 came to be allowed and respondents Nos. 3 to 5 themselves were directed to carry out the amendment to the cause title with the help of office of the Court. The plaintiff No. 5 is aggrieved by the above order.

13. Mr. Sardessai, learned Counsel appearing on behalf of the plaintiff No. 5 invited my attention to the plaint and showed that the plaintiffs have nowhere pleaded that the suit property was leased out to anyone and more particularly to Shri Shamba Anant Shetye at any time. He submitted that the plaintiffs have not pleaded of any lease in favour of anyone and it is their case that the original defendant No. 1 and one Pandhari Mulgaonkar were employed to do watch and

ward duties. He, therefore, submitted that respondents Nos. 3 to 5 had misled the learned trial Court by stating in their application that the original defendants as also the plaintiffs have categorically averred that the said properties were originally leased out by the plaintiffs to Shri Shamba Anant Shetye somewhere in the year 1924. Mr. Sardessai, learned Counsel appearing on behalf of the plaintiff No. 5 further submitted that the plaintiffs are "dominus litis" and since they had absolutely no cause of action against respondents Nos. 3 to 5, they had not added them as parties. He contended that the declaration is always in personam and not in rem. In the present suit, the declaration has been sought vis-a-vis the original defendants against whom the plaintiffs have cause of action. He further pointed out that the suit is of the year 1979 and at the fag end of trial, respondents Nos. 3 to 5 sought for their impleadment in the suit. He pointed out from paragraph 14 of the application for impleadment that in September, 2007, the said respondents had knowledge about the present suit and also about the issue of tenancy which was referred to the Mamlatdar, since they had filed an application for intervention before the Joint Mamlatdar on 24/9/2007. He pointed out that the application for impleadment before the trial Court was filed on 13/12/2012 which is hit by inordinate delay and laches. He pointed out that the issue of tenancy as against the original defendants has been already decided in the negative by the learned Joint Mamlatdar and, therefore, the question of sending the same issue, in respect of respondents Nos. 3 to 5, who claim tenancy, to the Joint Mamlatdar does not arise. He submitted that if such things are allowed, then, anyone would come at any stage so as to delay the proceedings and deprive the plaintiffs of the fruits of the decree. He further submitted that respondents Nos. 3 to 5 will not be affected by the decree if passed in the suit against the original defendants and they have their remedy to file independent proceedings. He pointed out that in the written statement filed by the original defendants, they have nowhere stated that respondents Nos. 3 to 5 are also tenants along with them or that the suit is bad for non-joinder of the said respondents Nos. 3 to 5. He, therefore, urged that the impugned order allowing the impleadment application is perverse and liable to be quashed and set aside.

14. The learned Counsel appearing on behalf of the plaintiff No. 5 has relied upon the following judgments:

- (i) Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others, .
- (ii) SNP Shipping Services Pvt. Ltd. and others Vs. World Tanker Carrier Corporation and another, .
- (iii) State of Kerala Vs. Sridevi and Others, .
- (iv) Kasturi Vs. Iyyamperumal and Others, .

15. Per contra, Mr. Tari, learned Counsel appearing on behalf of respondents Nos. 3 to 5 submitted that the original defendants namely, Vithoba, Anant (deleted),

Shrikant and Umakant are the paternal uncles of respondents Nos. 3 to 5 and that the suit is for declaration that the said defendants had no right to the suit property and that the plaintiffs are the owners in possession of the same. He further submitted that the original defendants, in their written statement, alleged that the suit property was leased to Shamba Anant Shetye by one Parrikar. He further submitted that accordingly, one of the issues framed by the trial Court is whether the defendants prove that they are the tenants of the suit property. According to the learned Counsel, on account of this issue of tenancy, respondents Nos. 3 to 5, who are the legal representatives of Vasant Shetye, who in turn, was one of the sons of late Shamba Anant Shetye, are necessary parties to the suit for proper decision. He submitted that out of the legal representatives of deceased Shamba Shetye only the father of respondents Nos. 3 to 5 was excluded by the plaintiffs, who died somewhere in the year 1998 during the pendency of the suit. He further submitted that respondents Nos. 3 to 5 sought intervention in the suit vide application dated 13/12/2012 before the trial Court whereas the order was passed by the Joint Mamlatdar-II rejecting the application for intervention on the same day i.e. on 13/12/2012. Therefore, according to the learned Counsel, there is no delay in filing the application before the trial Court. He further submitted that once the issue of tenancy was framed, it was for the plaintiffs themselves to join respondents Nos. 3 to 5 as parties. He, therefore, urged that there is no substance in the present petition as the impugned order, in no way can, be termed as perverse.

16. I have gone through the material produced on record by the plaintiff No. 5. I have considered the submissions made by the learned Counsel for the parties. I have also considered the judgments relied upon.

17. Rule 10(2) of Order I of C.P.C. provides that 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 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 rule therefore gives discretion to the Court, inter alia, to add parties. This discretion ought to be exercised in a reasonable manner, with caution and on judicial principles. It is well settled that the object of the rule is not to change the scope or character of the suit by adding new parties and to enable them to litigate their own independent claims but simply to hold them to avoid unnecessary litigation which might otherwise become necessary. The power under Rule 10(2) of Order I of C.P.C. is restricted to two cases: one when a party ought to have been joined but not joined and is a necessary party and the other when without the presence of such party the question involved in the case cannot be completely decided.

18. It is noticed that in the application for intervention/impleadment, filed by

respondents Nos. 3 to 5, which is duly verified by respondent No. 3, they falsely stated that the plaintiffs have categorically averred that the suit properties were originally leased out by the plaintiffs to Shri Shamba Anant Shetye somewhere in the year 1924. In the plaint, the plaintiffs have nowhere pleaded that the suit property was leased at any time to anyone. The name of the said Shamba Anant Shetye nowhere figures in the plaint. The name of Vasant Shetye, who is allegedly the father of respondents Nos. 3 to 5 also does not figure in the plaint. A perusal of the contents of the entire plaint reveals that the plaintiffs have averred that they administer and manage the suit property with the help of the supervisor Mr. Pobres Xavier and for this purpose, they have employed original defendant No. 1 and Pandhari Mulgaonkar to do the watch and ward duties in the properties. The learned trial Court in the impugned order has mentioned that it is the case of the intervening parties that they are the sons of late Shri Vasant Shamba Shetye, who was the legal representative of late Shamba Anant Shetye to whom, according to the plaintiffs as well as the defendants, the suit properties were originally leased in the year 1924. It can be understood that the mind of the trial Judge was influenced on account of the said fact which led the trial Court to allow the application for impleadment. It is true that persons who are regarded as proper parties to a litigation are normally allowed to be added as parties but this principle is subject to one exception i.e. that such a course should not prejudicially affect the rights of the opposite party.

19. Since the plaintiffs have pleaded in the plaint that defendants Nos. 1 and 2 permanently were employed for doing the watch and ward duties and were permitted to reside in the suit property and as remuneration, they were given 5% of the yield of the coconuts and that other defendants are the brothers of the defendant No. 1, who helped defendant No. 1 to interfere with the suit property and that the defendants have no right to the suit property, it can be understood that the plaintiffs' cause of action was only as against the original defendants. In the written statement filed by the said original defendants, they specifically averred that the suit is bad for non-joinder of necessary plaintiffs as Shri Francisco Pascoal Jose Da Menezes and Mrs. Veronica Gonsalves Menezes have not been impleaded though they are necessary parties. The original defendants nowhere in the written statement alleged that respondents Nos. 3 to 5 are necessary parties, being the heirs of Vasant Shetye and that the suit is bad for their non-joinder. Thus, effective decree can be passed in the suit in the absence of the respondents Nos. 3, 4 and 5. Where an application is filed under Rule 10(2) of Order I, for impleading the applicants in the suit and the Court comes to a conclusion that it is not a bona fide one and filed for their own cause of action, the application should not be allowed. In the present case, it is true that the original defendants have alleged in their written statement that their father late Shamba Anant Shetye had taken on lease the suit property from one Parrikar from whom, the ancestors of the plaintiffs purchased the same. It has been further pleaded that Shri Shamba Anant Shetye remained in continuous uninterrupted possession of the suit property as its lessee and after his death in

the year 1965, the defendants continued as lessees of the suit property. But, the original defendants have not pleaded that Vasant Shetye also continued along with them as lessee of the suit property. They nowhere pleaded that respondents Nos. 3 to 5 are the sons of late Vasant Shetye who, in turn, was the son of late Shamba Anant Shetye and, therefore, they are also the tenants in respect of the suit property. They have not pleaded that the suit is bad for non-joinder of necessary parties, i.e. the heirs of late Vasant Shetye. In such circumstances, the suit of the plaintiffs will not fail on the ground of non-joinder of the respondents Nos. 3 to 5.

20. Respondents Nos. 3 to 5, in their application, however, alleged that it is categorically averred by the original defendants that the said properties were tenanted/leased by erstwhile owners to Shri Shamba Anant Shetye who remained in possession of the same till his death somewhere in 1965. The said respondents further stated that all the legal representatives thereafter continued as owners in possession of the suit properties as lawful tenants, which included their father Shri Vasant Shamba Shetye who died in the year 1976. The above is not the case of the original defendants. The respondents Nos. 3 to 5 claim to be the children of Vasant Shamba Shetye and that Vasant Shamba Shetye was the son of Shamba Anant Shetye and, therefore, they also being the tenants, are necessary parties to the suit. It is not the case of the respondents Nos. 3 to 5 that the original defendants agree to the position as stated by them in the application for impleadment.

21. In view of the pleadings of the plaintiffs and the original defendants, it can be certainly said that respondents Nos. 3 to 5 have independent claim as against the plaintiffs. Since the plaintiffs are "dominus litis", they ought not to have been forced to join respondents Nos. 3 to 5 as defendants, since the plaintiffs have no cause of action against them at all. The remedy to respondents Nos. 3 to 5 may lie in filing independent proceedings.

22. In the case of Ramesh Hirachand Kundanmal (supra), the Apex Court has observed thus:

The object of Rule 10(2) of Order I is not to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objective. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action and the question to be settled therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. A clear

distinction has been drawn between suits relating to property and those in which the subject matter of litigation is a declaration as regards status or legal character. In the former category, the rule of present interest as distinguished from the commercial interest is required to be shown before a person may be added as a party. It is, therefore, necessary that person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally, that is, by curtailing his legal rights. The rule does not contemplate joining as a defendant a person whose only object is to prosecute his own cause of action.

23. In the case of *Kasturi* (supra), the Apex Court has held thus:

The question of jurisdiction of the Court to invoke Order I, Rule 10 of the C.P.C. to add a party who is not made a party in the suit by the plaintiff shall not arise unless a party proposed to be added has direct and legal interest in the controversy involved in the suit. A person is legally interested in the answers to the controversies only if he can satisfy the Court that it may lead to a result that will affect him legally. A bare reading of Order I, Rule 10(2) C.P.C. 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 or without notice of the contract, but a person who claims adversely to the claim of a vendor is, however, not a necessary party. 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.

24. In the case of *SNP Shipping Services Private Limited and others* (supra), the Apex Court has held thus:

16. There is yet another reason why the plaintiffs cannot be permitted to continue with this suit. The plaintiffs are seeking the relief of declaration of being an Indian Company, in view of the findings of the New Orleans Court that SNP is "alter ego" of the Merali family. The plaintiffs apprehend that this would be interpreted by the Indian Authorities to mean that Meralis are the beneficial owners of SNP. Therefore SNP would be carrying on business in contravention of the Foreign Exchange Regulation Act, 1947, The Income Tax Act, 1961 and the Securities and Exchange Board of India Act, 1992. SNP would be liable to criminal action. In my view this argument of Mr. Sundaram needs only to be stated to be rejected. Sections 34 and 35 of the Specific Relief Act provide as under:

34. Discretion of Court as to declaration of status or right:-Any person entitled to any legal character, or to any right as to any property, may institute a suit

against any person denying or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no Court shall make any declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation-A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee.

35. Effect of declaration.-A declaration made under this Chapter is binding only on the parties to the suit, persons claiming through them respectively, and where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration such parties would be trustees.

By virtue of section 35 of the Specific Relief Act a declaration given u/s 34 is binding only between the parties. It is declaration in personam and not in rem. Thus the Indian Authorities would not be bound by the declaration. It would be of no effect, and thus futile. This apart, even if it is declared that SNP is an Indian Company, legally owned by Indians, it would not automatically mean that it is not an "alter ego" of the Merali family. Thus the declaration would be an empty formality. Courts refrain from passing meaningless orders. Thus this submission of Mr. Sundaram has also to be rejected. In any event, cause of action for seeking such a declaration can, conceivably, only arise on the WTCC filing a suit in this Court to enforce the judgment of the New Orleans Court. The plaintiffs are aware of this legal position as they have reserved their right to "challenge the decree as and when the defendants seek its implementation/execution/recovery". Additionally, therefore the plaint has to be rejected as disclosing no cause of action, under Order 7, Rule 11(a).

25. Order I, Rule 10 of C.P.C. empowers the Court to add necessary and proper parties at any stage of the proceedings in order to enable it to adjudicate the dispute between the parties effectively and completely and rules of limitation do not fetter the power of the Court to add the party under above rule at any time. But still the discretion will not be exercised in favour of the applicants who apply to be added as parties, where the application is made at a late stage. More particularly, when the plaintiffs, who are "dominus litis" are opposed to such addition, the addition should not normally be done. In the present case, the suit was filed in the year 1979, which is still pending for the last more than 34 years. At least on 24/9/2007, the respondents No. 3 to 5 knew that the said suit is pending and the tenancy issue was referred to Mamlatdar. But they waited till 13/12/2012 i.e. for more than 5 years to file the application to add them as parties to the suit. On 13/12/2007, the intervention application of the respondents No. 3 to 5 filed before the Joint Mamlatdar-II was dismissed. The present position is that by order dated 21/1/2013, the joint Mamlatdar has answered the tenancy issue referred to him by the trial Court, as not proved. In

such circumstances, grave prejudice is bound to be caused to the plaintiffs by addition of respondents Nos. 3 to 5, who also claim to be tenants on the ground that they are the male legal representatives of late Vasant Shetye who was the son of Shamba Shetye. Same issue, which has already decided by him, will have to be again referred to the Mamlatdar and there would be a trial de novo before him. This is certainly not the object of Rule 10(2) of Order I of C.P.C. Since neither the plaintiffs nor the original defendants have alleged about the necessity of the respondents Nos. 3 to 5 for adjudication of the controversy, their interests cannot be said to be jeopardized.

26. As has been held in the case of SNP Shipping Services Pvt. Ltd. and ors. (supra), by virtue of section 35 of the Specific relief Act, a declaration given u/s 34 is binding only between the parties to the suit. It is a declaration in personam and not in rem. Thus, no prejudice would be caused to the respondents Nos. 3 to 5, in case they are not added as parties to the suit.

27. The impugned order, in my considered view, is arbitrary and not an exercise of sound judicious discretion. The same deserves to be quashed and set aside.

28. In the result, the petition is allowed.

(a) The impugned order dated 28/6/2013 is quashed and set aside.

(b) The application of the respondents Nos. 3 to 5 for impleading them as parties to Regular Civil Suit No. 3/1979 is rejected.

(c) The names of the respondents Nos. 3 to 5 shall be expunged from the cause title of the said suit.

(d) Rule is made absolute in the aforesaid terms.

The petition is disposed of accordingly, with no order as to costs.