

**SUMITBAI & OTHERS -VS- PARAS FINANCE CO. & OTHERS, AIR 2007
SC 3166; 2007 AIR SCW 6125; 2007 (11) SCALE 596 – A CRITIQUE**

By

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1. THE FACTS

The Judgment of the Supreme Court dated the 4th October, 2007 in Civil Appeal No. 117 of 2001 hereinafter referred to as SUMITBAI arose out of these facts. M/S PARAS Finance Co. as plaintiff brought a suit for specific performance of a contract of sale of property in dispute consisting of a shop against Kapoor Chand as the defendant. In the agreement to sell the shop Kapoor Chand stated that the property in dispute that is the shop was his self acquired property. During the pendency of the suit Kapoor Chand died and his wife and sons were brought on record as his legal representatives. After they were thus impleaded they filed an application under Order XXII Rule 4(2) read with Order I Rule 10 of the Code of Civil Procedure 1908 (the CPC hereinafter) praying that they should be permitted to file additional Written Statement and also be allowed to take such pleas which are available to them. The Trial Court rejected the application by order dated 06.08.1997. The revision against the Order of rejection of the said application was dismissed by the High Court by order dated 07.01.2000. By the Judgment in SUMIT BAI dated 04.10.2007 the Supreme Court set aside both the above orders and allowed the application of the legal representatives of Kapoor Chand the deceased defendant.

Two additional facts of varying significance need to be mentioned here. The shop in dispute had been shown in the registered sale-deed dated 12.08.1960 as having been purchased by Kapoor Chand and his sons Narainlal, Devilal and Pukhraj. Before the death of Kapoor Chand he himself applied that his sons be impleaded in the Suit. The application was rejected. Narainlal and Devilal applied under Order I Rule 10 CPC to become parties to the Suit. That application was also rejected by the Trial Court. The Orders of rejection of those applications attained finality as they were not challenged in higher courts.

2. THE LAW STATED IN SUMITBAI

In Paragraphs 5, 8 and 15 of SUMITBAI the Supreme Court made some wide general observations on law while allowing the application of the legal representatives to file additional Written Statement without any restriction on pleas available to them. For better appreciation of the nature of the said observations they are quoted as under :

“5. We are of the opinion that a party has a right to take whatever plea he/she wants to take and hence; the view taken by the High Court does not appear to be correct.”

“8 Every party in a case has a right to file a Written Statement. This is in accordance with natural justice. The Civil Procedure Code is really the rules of natural justice which are set out in great and elaborate detail. Its purpose is to enable both parties to get a hearing. The appellants in the present case have already been made parties in the Suit, but it would be strange if they are not allowed to take a defence. In our opinion, Order 22 Rule 4(2) CPC cannot be construed in the manner suggested by learned counsel for the respondent.”

“15. Also, merely because some applications have been rejected earlier it does not mean that the legal representatives of late Kapoor Chand should not be allowed to file an additional Written Statement. In fact, no useful purpose would be served by merely allowing these legal representatives to be impleaded but not allowing them to file an additional Written Statement. In our opinion this will clearly violate natural justice.”

It appears that the label of the application of the legal representatives stating it to be “under Order 22 Rule 4(2) read with Order I Rule 10 CPC” and the resultant mix-up between the aforesaid two provisions coupled with inadequate argument of the counsel for the plaintiff/respondent contributed significantly to the above sweeping observations. It is remarkable that well recognized distinction between provisions of Order 1 Rule 10 and those of Order XXII Rule 4(2) of the CPC have not at all been canvassed for acceptance if necessary by citing authorities of which there is no dearth. Instead the “learned counsel for the respondent relied on a three Judge Bench decision of the court in KASTURI -Vs IYYAM PERUMAL AND OTHERS (2005)6 SCC 733” and thereby prompted the Two Judge Bench in SUMITBAI to distinguish the decision of the Three Judge Bench. Indeed, instead of illucidating the observations quoted above SUMITBAI appears to be concerned more with enunciation of the methods of understanding and using a precedent by

quoting from four Supreme Court decisions and five English cases. Lastly, the sale-deed indicating Kapoor Chand's sons as Co-owners of the shop in dispute also seems to have influenced SUMITBAI considerably. Because of all these SUMITBAI appears to have become an addition to the increasing tribe of Judgments per incuriam. It is time to substantiate the criticism.

3. THE SUPREME COURT ON ORDER XXII RULE 4(2) BEFORE SUMITBAI

Under the provisions of Order XXII Rule 4 when the sole defendant dies and the right to sue survives as in SUMITBAI "the Court, on an application made in that behalf shall cause the legal representatives of the deceased defendant to be made a party and shall proceed with the suit." In SUMITBAI the legal representatives of deceased defendant Kapoor Chand became parties in accordance with the above prescription of law. Rule 4(2) speaks of the rights of such parties in the following words – "Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant." The language of the provision hardly needs any construction and the application of the legal representatives of Late Kapoor Chand praying for allowing unrestricted pleas in their Written Statement deserved rejection on the language of this rule itself. Be that as it may the Supreme Court itself has spoken on Rule 4(2) at least three times before SUMITBAI. The decisions are J.C. CHATERJEE & OTHERS Vs SHRI SRI KISHAN TANDON AND ANOTHER, AIR 1972 S.C. 2526 dated the 10th of August 1972, BAL KISHAN Vs OM PRAKASH AND ANOTHER, AIR 1986 S.C. 1952 dated the 26th of August 1986 and VIDYAWATI Vs MAN MOHAN AND OTHERS, AIR 1995 S.C. 1653 dated the 1st of May 1995. These decisions form a trilogy in that the second decision relies on the first and the third decision relies on the first and the second decision. It will be sufficient to have a closer look at VIDYAWATI (Supra), the third decision., In the suit there when as in SUMITBAI the legal representatives sought to file additional Written Statement claiming title to and interest in the suit property under a Will the petition was dismissed by the Trial Court. It was held that if a legal representative wants to raise any individual point which the deceased party could not have raised, he must get himself impleaded in his personal capacity or he must challenge the decree in a separate suit. The High Court upheld the order of the Trial Court. The Supreme Court added its imprimatur to the enunciation of the law as above in these words :-

"It is true that when the petitioner was impleaded as a party-defendant all right under Order 22 Rule 4 and defence available to the deceased defendant become available to her. In addition, if the petitioner had any independent right, title and interest in the property she had to get herself impleaded in the Suit as a party defendant in which event she could set up her own

independent right, title and interest or resist the claim made by the plaintiff or challenge the decree that may be passed in the suit. This is the view the court below has taken rightly.”

VIDYAWATI (Supra) quotes extracts from para 11 and para 3 respectively of J.C. CHATERJEE (Supra) and BALIKISHAN (Supra). All the three Judgments also highlight the difference in legal consequences of impleadment under Order I Rule 10 and that under Order XXII Rule 4 which SUMITBAI failed to notice. VIDYAWATI (Supra) is factually almost on all fours with SUMITBAI except for the fact that unlike in SUMITBAI there was no unsuccessful approach under Order I Rule 10 in VIDYAWATI (Supra) and SUMITBAI unlike VIDYAWATI (Supra) a regular Civil Suit on title and possession is governed by the prescriptions of a Special Statute that is the provision of the Specific Relief Act, 1963. However the law stated in SUMITBAI is clearly in conflict with the law declared in VIDYAWATI (Supra). Incidentally it may be mentioned that way back on the 22nd July 1936 a Full Bench of the Allahabad High Court said much the same thing as regards the provisions of Order XXII Rule 4(2) in RAM UGRAH OJAH AND ANOTHER Vs GANESH SINGH, AIR 1940 Allahabad 99 (FB).

The legal theory behind the provisions of Order XXII Rule 4(2) can best be exposed by the following from paragraph 120 of Chapter 13 at page 443 of SALMOND ON JURISPRUDENCE, 12TH Edition :

“The rights which a dead man thus leaves behind him vest in his representative. They pass to some person whom the dead man, or the law on his behalf, has appointed to represent him in the world of the living. This representative bears the person of the deceased, and therefore has vested in him all the inheritable rights, and has imposed upon him all the inheritable liabilities of the deceased. Inheritance is in some sort a legal and fictitious continuation of the personality of the dead man; the representative is in some sort identified by the law with him whom he represents. The rights which the dead man can no longer own or exercise in propria persona, and the obligations which he can no longer in propria persona fulfill, he owns, exercises, and fulfils in the person of a living substitute. To this extent, and in this fashion, it may be said that the legal personality of a man survives his natural personality, until, his obligations being duly performed, and his property duly disposed of, his representation among the living is no longer called for.”

Thus the observations as regards the provision of Order XXII Rule 4(2) CPC contained in para 8 of SUMITBAI cannot be supported on legal theory, on the terms of the statute and on binding precedents within Article 141 of the Constitution detailed above.

4. IMPLEADMENT.

The entire law of impleadment of parties in a pending Suit or other proceedings can be read in Section 146, Order I Rule 10, Order XXII Rule 3 and 4 and Order XXII Rule 10 of the CPC. It is trite to say that when a special provision governs a matter the general provisions would yield. This principle is expressed in the maxims "Generalia Specialibus non derogant" and "Generalibus Specialia derogant". The field of operation of the provisions of Order 1 Rule 10 and that of the provisions of Order XXII Rule 4 C.P.C. thus are distinct and well demarcated. That indications to that effect are available in the trilogy ending with VIDYAWATI (Supra) has already been noted in paragraph 3 of this Writing. That apart this legal position has been precisely and vividly laid down by a Full Bench of the Allahabad High Court in Smt. Mahendra Kaur V. Hafiz Khalil, 1983 All. L.J. 1305." There the Full Bench said thus :-

"The right conferred by O.1 R.10, C.P.C. enables the court to add a person as a party. O.1. R.10 has a specific and limited purpose which is different from one contemplated by Rr.4 and 9 of O.XXII of the Civil P.C. The two provisions deal with different eventualities and contingencies. As already held above, it is one thing to file an application to implead certain persons as party to the suit in place of a deceased party under O.XXII, R.4. C.P.C. and it is entirely different to apply under O.1. R.10, C.P.C. to add a new party. The main difference is that the rights of the parties in one case would be altogether different from those of the party in the other case. A legal representative has the same status and rights as that of the deceased, whereas the rights and obligations of a person impleaded under O.1., R.10 C.P.C. would not be circumscribed and that he would be entitled to take any plea which he is advised to do."

Allahabad Law Journal is not available to the Writer and as such the full report of the Judgment of the Full Bench could not be perused. The extract quoted above has been taken from the Division Bench Judgment of the Kerala High Court in STATE OF KERALA Vs MADHAVAKURUP RAM CHANDRAN PILLAI, AIR 1999 Kerala 359, para 6 and 7 whereof contain a resounding reiteration of the same statement of law besides the quotation from the Full Bench. Patna High Court has also

highlighted the difference between application of the provisions of Order I Rule 10 and that of Order XXII Rule 4 in **RAMASHRAY MAHTO Vs AMIRI MAHTO (2005) AIHC 4362** and **MINATI DUTTA AND OTHERS Vs SUSHIL CHAUDHARY, AIR 2006 Patna 62**. The above statement of law can also be read in **MULLA'S Code of Civil Procedure, 17th Edition 2007, Vol.II, page 118 at Synopsis 5 under Order I Rule 10**. It is unfortunate that all the above principles of law relevant to the case went by default in **SUMITBAI** and the Supreme Court had been persuaded to deal with a downright case of impleadment under Order XXII Rule 4 as a case under Order 1 Rule 10 C.P.C. Probably the confusing mix up has occurred because of the misplaced reliance on **KASTURI (Supra)** by the learned counsel for the respondent in **SUMITBAI**. **KASTURI (Supra)** is being analyzed hereunder.

5. KASTURI -Vs- IYYAMPERUMAL AND OTHERS, AIR 2005 S.C. 2813, (2005)6 SCC 733.

KASTURI (Supra) is a Three Judge unanimous decision of the Supreme Court dealing with concurrent orders of the Trial Court and the High Court allowing an application under Order I Rule 10 C.P.C. of nine persons, admittedly not parties to the contract of sale setting up independent title and possession over the contracted property, to get themselves added as defendants in a Suit for specific performance of a contract for sale of the contracted property. The question falling for decision there has been framed by the Three Judge Bench itself in the following terms :-

“Whether in a suit for specific performance of contract for sale of a property instituted by a purchaser against the vendor, a stranger or a third party to the contract, claiming to have an independent title and possession over the contracted property, is entitled to be added as a party-defendant in the said suit.”

After noticing a few facts giving rise to the question the Supreme Court immediately answered the question by holding that the High Court as well as the Trial Court acted illegally in allowing the application of the nine strangers for their addition as defendants in the Suit. In support of the said answer the Supreme Court proceeded to record reasons. The reasons may be considered under three broad frame. In paragraph 6,7,16,17 and 20 of the Judgment (SCC Report) the question was dealt with from the stand point of the law under Order 1 Rule 10 CPC. Two tests required to be satisfied for determining the question who is a necessary party have been laid down thus :- (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. It was further held that from a plain reading of the expression used in sub-Rule (2) Order 1 Rule 10 CPC “all the questions involved in the suit” it is abundantly clear that the legislature clearly meant that the controversies raised as between the parties to the litigation must be gone into only, that is to say, controversies with regard to the right which is set up and the relief claimed on one side and denied on the other and not the controversies between the plaintiffs and the defendants inter se or questions between the parties to the suit and a third party. It was laid down that no different cause of action involving collateral matters can be allowed to be inserted by impleadment under Order 1 Rule 10 CPC. A suit for specific performance of a contract cannot be allowed to be turned into full fledged suit on title and possession by impleading a stranger to the contract claiming adversely to the vendor.

Next frame of reasoning flowed from the stand point of the Special Statute that is the Specific Relief Act. The ingredients of specific performance of a contract and the provisions of Section 19 of the Specific Relief Act detailing the persons against whom Specific relief can be obtained were considered. It was held that the strangers-third party did not fulfill any of the categories described in Section 19 of the Specific Relief Act.

In the third frame of reasoning English decisions *TASKER V. SMALL*, (1834)40 ER 848 and *HOGHTON -Vs- MONEY* (1866)2 Ch. 164. *AMON -Vs- RAPHAEL TUCK & SONS LTD.* (1956)1 ALL E.R. 273 were considered. Of particular significance is the last of these English cases which was utilized to support the holding that the intervener must be directly and legally interested in the answers to the controversies involved in the Suit for specific performance. Rejecting the argument for impleadment on the ground that the question of possession is common even to the nine strangers the Supreme Court held that if whoever asserts his independent possession of the contracted property has to be added in the suit, then this process may continue without a final decision of the suit. The Three Judge Bench then considered *ANIL KUMAR SINGH -Vs- SHIVNATH MISHRA*, (1995)3 SCC 147 and *VIJAY PRATAP -Vs- SAMBHU SARAN SINHA*, (1996)10 SCC 53 holding similarly on the question of impleadment of strangers to the contract in a suit for specific performance.

Throughout the entire Judgment in *KASTURI* (Supra) the provisions of Order XXII Rule 4 whereunder the heirs of Kapoor Chand were impleaded in *SUMITBAI* or Rule 4(2) whereunder the heirs sought to file Additional Written Statement were not even indirectly referred to in *KASTURI* (Supra). Thus *KASTURI* (Supra) cannot do any duty in *SUMITBAI* and should not have been cited at all. It is unfortunate that because of this citation, probably casual citation, the Two Judge Bench in *SUMITBAI* was persuaded to hold that *KASTURI* (Supra) is distinguishable without recording any supporting facts or reasons. What has been stated

regarding KASTURI (Supra) a three Judge decision by the Two Judge Bench at para 9 of SUMITBAI does not have the support of facts in KASTURI (Supra). KASTURI was also a case involving claim of independent title to and possession over contracted property and yet the impleadment of nine strangers by the Courts below was set aside. Thus the only distinguishable features in KASTURI (Supra) vis-à-vis SUMITBAI are that while KASTURI (Supra) is a case dealing with Order 1 Rule 10 SUMITBAI is a case governed by Order XXII Rule 4(2) and in KASTURI (Supra) concurrent impleadment of strangers to the contract claiming independent title to the contracted property has been set aside by the Supreme Court in SUMITBAI concurrent rejection of prayer for additional Written Statement without restriction on pleas has been set aside. Lastly KASTURI (Supra) has even dealt with the question of multiplicity of proceeding in para 19 and 20 of the Judgment. Thus what has been stated in para 14 of SUMITBAI with regard to KASTURI (Supra) and multiplicity of proceedings would be per incuriam. KASTURI (Supra) being of a Bench of larger strength SUMITBAI of a Bench of smaller strength has to follow the same. If the Two Judge Bench still thought KASTURI (Supra) does not lay down correct law reference to a still larger Bench of Five Judges was the only course open.

In one of the passages in **THE DOCTRINE OF PRECEDENT** (*Part seven, The Discipline of Law by Lord Denning*) occurs the following :

“But even so, there were ways and means of getting round a previous decision that was wrong. The conventional means was by “distinguishing” it, that is, finding some distinction on the facts or on the law- may be a minor distinction. But still it would serve the turn”.

This was said with reference to rigid application of the Doctrine of precedent in England. In SUMITBAI, KASTURI (Supra) has been stated to be distinguishable without noticing and detailing any distinction on facts or on law applied.

6. THE CONCLUSION

Thus for the reasons narrated above SUMITBAI qualifies as a judgment per incuriam. SUMITBAI (I) failed to take notice of three previous Two Judge decisions on Order XXII Rule 4(2)C.P.C, (II) it failed to follow the law laid down by the Three Judge Bench on Order I. Rule 10 CPC and lastly, (III) SUMITBAI failed to notice the prescriptions of the provisions of Section 12, 15, 19 and 20 of the Specific Relief Act, 1963 in holding impleadment under Order 1 Rule 10 CPC of strangers to the contract in a Suit for specific performance of contract of Sale of property to be legal, a holding which was not at all necessary because impleadment in SUMITBAI was under Order XXII Rule 4 CPC.