

developed for the implementation of PC & PNDT Act. It is important that the manufacturing and importing of potable ultrasound scanning machines must be prohibited and the violators must be severely punished. It is to be noted that Medical Practitioners should respect the sanctity of the code of medical ethics. They should know that it is unethical to promote female foeticide by communicating the sex of the foetus. More importance should be given

to women empowerment. We all put efforts to put gender equality at the top of development agenda and contribute to give opportunities to girl children. It is to be noted that, if we do not let the girl child be born, we will not be able to find brides for our sons, and further, girls are responsible for preserving relationships in the family and society. Therefore, it is the duty of the society to let the girl child be born and nurtured.

**A CRITICAL STUDY
NECESSARY AND PROPER PARTIES – SUITS FOR SPECIFIC
PERFORMANCE ORDER 1 RULE 10 CPC VIS-A-VIS THE PROVISIONS
OF THE POWER OF ATTORNEY ACT**

When the vendor is represented by the Power of Attorney Holder, whether a suit for specific performance can be filed only against the power of attorney holder without impleading the vendor as provided under Order 3 CPC as necessary and proper party? In other words can a Power of Attorney Holder can act or sue and be acted or sued (Yes)

By

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There appears to be some considerable controversy with respect to impleadment of vendor as necessary and proper parties in Suits for Specific Performance when the suit is filed against the Power of Attorney alone represent the vendor. Is it *sine quo non* to implead the vendor also as a necessary and proper party and to the extent of the diligent search made by the writer, there appears to be no direct authority on the subject and in order to set at rest this controversy an honest endeavour is made to propagate the necessary views in a characteristic, forth right fearless strain on this branch of law of day-to-day occurrence dedicated entirely to the service of law and to the legal institutions even under the umbrella of Legal Services Authorities Act.

As a prefatory caveat to appreciate the controversy let us survey the law on the connotation of the expression “Necessary and proper parties” as it appears in Order 1, Rule 10 CPC.

What tests and guidelines are necessary for determination of this moot point fell for consideration in a catena of decisions out of which AIR 1995 SC 724 at 733 is the bedrock of law on the subject, the principals of which are subsequently followed reaffirmed and reiterated in several subsequent decisions.

*AIR 1995 SC 724 at 733 in which AIR 1963
SC 986 is followed*

The law is well settled that a necessary and proper party is one in whose absence

no order can be made effectively and a proper party is one in whose absence an effective order can be made, but whose presence is necessary for complete and final adjudication involved in the question (*Please see AIR 1963 SC 786 and 788*).

Thus there is an essential distinction between the necessary and proper party.

“Necessary parties are parties who ought to have been joined under Order 1 Rule 10 CPC parties necessary to the constitution of the suit without whom no effective Decree at all can be made. Proper parties are parties whose presence is a matter of convenience to enable the Court to adjudicate the matter more effectively and completely. (*Please see 1954 (2) MLJ Andh. 220*)

The study of mine would be incomplete even at the risk of repetition the tests laid down by the Supreme Court are not recapitulated.

AIR 1958 SC 886, AIR 968 Mad. 142,
AIR 1957 Mad. 699
Order 1, Rule 10 (Addition of Parties)
AIR 1958 SC 886

The following tests may be useful guidance in the cases of adding of parties under Order 1 Rule 10.

- (1) If for the adjudication of the real controversy between the parties on record, the presence of a third party is a necessary, then he can be impleaded.
- (2) It is imperative to note that by such impleading of the proper party, all controversies arising in the Suit and all issues arising there under may be finally determined and set at rest, thereby avoiding multiplicity of suits over a subject-matter which could still have been decided.
- (3) The proposed party has a defined subsisting, direct and substantive interest in the litigation which interest is either

legal or equitable and which right is cognizable in law.

- (4) Meticulous care should be taken to avoid the adding of a party, if it is intended merely as a rule to ventilate certain other grievances of one or the other of the parties on record which is neither necessary nor experienced to be considered by the Court in the pending litigation; and
- (5) It should be remembered always that considerable prejudice would be caused to the opposite party when irrelevant matters are allowed to be considered by the Courts by adding a new party whose interest has no nexus to the subject-matter of the suit.

AIR 2005 SC 2813
(Kasturi v. Iyyamma Perumal)

The 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.

AIR 1958 AP 195

Only in exceptional cases, where the Courts finds that the addition of new defendant is absolutely necessary to enable it to adjudicate effectively and completely the matter in controversy between the parties, will it add a person as defendant.

Thus it is submitted a person may be added as party to a Suit in two cases only.

- (1) When he ought to have been joined and is not joined.
- (2) When he is necessary party (or) without his presence the question in the case cannot be decided completely.

A person may not be added as defendant merely because he would be incidentally affected by the judgment.

A necessary party is one without whose presence the question in the suit cannot be completely and effectively adjudicated upon. If he is neither necessary party nor a proper party, the Court has no jurisdiction to add him as a party.

What is “direct interest” *Lindley*, J., has explained it in *Mosco v. Marshaden*, (1892) Ch. 487, which is referred and followed in 1991 (2) CCC 601 at 603 Kerala as a direct interest in the issues between the plaintiff and defendants, only a person who is so interested, can be impleaded as a defendants. Lord *Green M.R.* has further explained the nature of his interest *In Re LG., Ferdinindustrie A.G. Agreement*, 1943 (2) AL ER 525, where he stated that in order that a party may be added as defendant in the suit, he should have legal interest in the subject-matter of litigation – Legal interest not as distinguished from as equitable interest but the interest which the law recognises.

AIR 1954 SC 210

Non joinder of proper parties is not fatal.

In the case of *Vidhur Impex's* case (AIR 2012 SC 2925 = (2012) 85 CC the Supreme Court again had the opportunity to consider all the earlier judgments, which is a suit for specific performance. Taking note all the earlier decisions, the Court laid down the broad principles governing the disposal of applications for impleadment Paragraphs 36 is worth to be quoted hereunder

2012 (8) SCC 384 – AIR 2012 SC 2925

The decision *i.e.*, 1995 (3) SCC 147 is followed reaffirmed and reiterated in 2012 (8) SCC 384 = AIR 2012 SC 2925 and the relevant material as referred in Para 36 at Page 13 is as follows :

1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant whose presence before the Court is necessary for effective and complete adjudication of the issues involved in this suit;
2. A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective Decree cannot be passed by the Court;
3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a Decree is to be made;
4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff;
5. In a suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

Be these general principles as it may

Now adverting to the suits for specific performance let us read and reread the provisions of Order 1 Rule 10 CPC which would clearly show, that the necessary parties in a suit for specific performance, in a contract for sale are parties to the contract, or if they are dead, their legal representatives and also a person who has purchased the contract property from the vendor who executed the contract.

In other words the original owners who executed the contract and subsequent purchasers alone are necessary and proper parties.

In *Kusturi v. Iyyamma Perumal and others*, 2005 (3) ALD 83 (SC) = AIR 2005 SC 2813, the Supreme Court held that the second part of the Order 1, Rule 10(2) CPC would clearly show that the necessary parties in a Suit for specific performance of the contract for sale are the parties to the contract or if they are dead, their legal representatives and also a person who purchased the contracted property from the vendor. This bedrock of law is subsequently followed and reiterated and reaffirmed in 2007 (1) ALD 846.

Thus in other words, under the caption of “parties to the contract” mean and only mean vendors who have executed the sale agreement and also the subsequent purchasers.

Thus, in view of the well settled principles of law, the word “vendor” includes his power of attorney also.

*AIR 2002 SC 1061, JJ Pvt. Ltd., M.R. Murali
Followed in 2007 (2) CCC 80 at 85 and also
2007 (1) ALD 830, 846*

Parties to the contract alone are necessary and proper parties and as a necessary corollary a person who is not a party to the contract is not necessary and proper party to the suit for specific performance which requires determination of the rights and liabilities of the parties.

Whether the parties who have not executed the agreement of sale are necessary and proper parties.

In 1995 (3) SCC 147 *Anil Kumar Singh v. Shivanth Misra* followed in 2012 (2) ALD 109 at 111 it was held, that since the applicant who sought for his addition is not a party to the agreement of sale it cannot be said that in his absence the dispute as to specific performance cannot be decided. In this case,

at Paragraph 9, the Supreme Court while deciding whether a person is a necessary or not in a suit for specific performance of a contract for sale made the following observations.

“Since the respondents is not a party to the agreement for sale it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party.”

and laid down the broad principles in Paragraph 4.

Paragraph 4 : Order 1, Rule 3 is not applicable to the suit for specific performance because admittedly, the respondent was not a party to the contract. Rule 3 Order 1 provide that “3 who may be joined as defendants ? All persons may be joined in one suit as defendants where (A) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative, and (B) if separate Suits were brought against such persons, any common question of law or fact would arise.

Paragraph 7 : By operation of the above quoted rule through the Court may have power to strike out the name of a party improperly joined or add a party either on application or without application of either party, but the condition precedent is that the Court must be satisfied that the presence of the party to be added, would be necessary in order to enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit. To bring a person as party, defendant is not a substantive right but one of procedure and the Court has discretion in its proper exercise. The object of the rule is to bring on record all the persons who are parties to the dispute relating to the subject-matter so that the dispute may be determined in

their presence at the same time without any protraction, inconvenience and to avoid multiplicity of proceedings.

Paragraph 8 : The question is whether the person who has got his interest in the property declared by an independent Decree but not a party to the agreement of sale, is a necessary and proper party to effectually and completely adjudicate upon and settle all the questions involved in the Suit. “The question before the Court in a Suit for specific performance is whether the vendor had executed the document and whether the conditions prescribed in the provisions of the Specific Relief Act have been complied with for granting the relief of Specific Performance.

Order 9 sub-rule (2) of Rule 10 of Order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the Suit. Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore he is not a necessary party.

This decision is followed in 2012 (2) ALD 109 at 111 and also in 2013 (3) ALD 111 at page 121 SC.

Thus, the well considered view, extending the principles delineated in several authorities, referred to above to the factual matrix, covered by the article, would lead to adjudicatory paralysis, that when the vendor is not a party to the agreement of sale, the vendor is not a necessary party nor a proper party and when the Power of Attorney Holder alone is a party to the agreement who alone executed the agreement the Power of Attorney Holder alone is necessary and proper party and the suit against him or by him alone is maintainable.

Before the study is taken up in the ramifications of details under the provisions of Power of Attorney Act also, let us consider the scope of Order 3 CPC, which no doubt permits institution of proceedings by a Power of Attorney Holder and against the Power of Attorney Holder.

The Supreme Court while addressing the Scope of Power of Attorney Holder to give evidence and the concomitant restrictions with respect to depose evidence in relation to the acts performed by the principal, the Supreme Court held in *Janaki v. Industrial Bank*, 2005 (3) ALD 43 (SC), held as follows:

“13 Order III Rules 1 and 2 CPC empowers the holder of the Power of Attorney Holder to act on behalf of the principal. In our view the word “Act” employed in Order III(1)(2) CPC confines only in respect of “Act” done by the Power of Attorney Holder in exercise of the power granted by the instrument. The term “Act” would not be included deposing in place and instead of the principal. In other words, if the Power of Attorney Holder has rendered some “Acts” in pursuance the Power of Attorney he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined”.

2013 SAR (Civil) 503 SC

In quick succession the Supreme Court has once again laid down this Court and concept of Order 3 Rules 1 and 2. Order 3 Rules 1 and 2 CPC empowered the Power of Attorney Holder to act on behalf of the principal the word “Act” employed therein is confined only to the acts done by the Power of Attorney Holder in exercise of

the power granted to him by virtual of the instrument. The term "Acts" would not include depositing in place and instead of the principal.

It is therefore clear explicit and admits no argument the Power of Attorney Holder can act and be acted on the strength of the power granted to him under the instrument and as a concomitance thereof a suit lies by him or against him and he is alone the necessary and proper party and there is no inhibition for the maintainability of the suit for the omission to implead the principal, vendor, owner as the necessary and proper party.

Power of Attorney Act

Now adverting the matter from the provisions of the Power of Attorney Act, 1882, Section 2 : Execution under Power of Attorney Act.

The donee of a Power of Attorney may, if he thinks fit, execute or do any instrument or thing in and with his own name and signature and his own seal, where sealing is required by authority of the donor of the power and every instrument and thing so executed and done shall be as effectual in law as it had been executed or done by the donee of the power in the name, and with the signature and seal of the donor thereof.

Section 1(A) of the Power of Attorney Act defines Power of Attorney which is an inclusive definition as any instrument empowering a specific power to act for and in the name of the persons executing it. Section 2(211) of the Indian Stamp Act 1999 also defines Power of Attorney which is again an inclusive definition and borrows the very same expression from Section 1(a) Power of Attorney Act. Thus it is the declaration of Power to Act for and in the name of the executor. In fact Rule 2, Order 3 of CPC and Rule 32 of Civil Rules of Practice in their procedural ambit contemplated appearance application and Act. The expression "Act" is sufficiently and it is only to enable the Power of Attorney

Holder to surrogate by stepping in to the shoes of the principals apt, connotations are provided in Section 85 Evidence Act envisages presumptions of execution and authentication of document when it is authenticated by Notary Public or any Court Judge or Magistrate *etc.*

In view of the said presumptions even the initial proof of such documents are dispensed with. A power of attorney surrogates a party in all aspects including giving evidence, subject to certain restrictions of personal knowledge.

Two in one

For all practical purposes, the owners and the Power of Holder are two in one so far as to their liability to execute the sale deeds concerned as a follow up action of executing the agreement to sell. They are not distinct persons having separate and distinct legal rights.

Effect of Section :

AIR 1999 SC 1385

This section empowers the Donee of Attorney to do anything "in and with his own name and signature" by the authority of the donor of the power. Once such authority is granted, the Act recognises that everything done by the Donee shall be as effectual in law as if it has been done by the Donee of Power in the name and with the signature of the Donor. (*Please see AIR 1999 SC 1385*)

Powers and limitations of GPA holder covered by Order 3(1), (2) CPC

Order 3(1) provides that "any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader appearing or acting, as the case may be, on his behalf."

In other words, if a party does not act personally he may act through his recognised agent and a person holding a power of attorney on behalf of a party is his recognised agent within the measuring of Order 3 Rule 2 of the Code.

Order 3 Rule 2 of CPC

2. Recognised Agents

The recognised agents are parties by whom such appearance, applications and Acts may be made or done are

(a) Persons holding Power of Attorney authorising them to make and do such appearance, applications and acts on behalf of such parties :

Now adverting Section 2 of the Power of Attorney Act once again even at the risk of the repetition a Donee of Power of Attorney is entitled to act and sign on behalf of the Donor and such act is as effectual as if it had been done by the Donor of the Power himself. Under the provisions it is, therefore, clear that an attorney is entitled to act on behalf of the Donor of power, that he is the recognised agent of the party under the Code. He can make appearance or can file suit in the Court.

Except where otherwise expressly provided by any law for the time being in force

It may, however, be noticed that provisions of Order 3 Rules 1 and 2, which permit appearance, application or acting in any Court are subject to any other law for the time being in force. Therefore, where there is an express provision of law, then

that provision will prevail. There are other modes of appearance, application or acting expressly prescribed by the Code for particular cases, ex : Order 33, Rule 3 and Order 44 Rule 1 of the Code, which by reason of the words “except where otherwise provided by any law for the time being in force” are taken out of the general rule to the extent prescribed there under.

It is therefore suggested as result of consuming considerable industry as delineated supra, the Registered General Power of Attorney Holder does not come with the above exceptions and as a consequent thereof it is suggested for the various reasons suggested supra the owners who have not executed the registered agreement are not necessary and proper parties and the Court can effectively dispose of the Suits even without the presence of the owners as they have no direct interest in the subject-matter of the litigation whether it raises question relating to movable or immovable property.

Bestowing thoughtful considerations and keeping in view the aforesaid legal principles and after comprehensive review of all the authorities, the envitable conclusion of revolutions of thought provoking a Power of Attorney Holder can act and sue and be acted and sued on behalf of the owners-vendors-principals in the suit for specific performance and the Power of Attorney Holder alone is the necessary and proper party and vendor-owner-principal is neither necessary nor proper party.

Any sophisticated contra view is worth well come.