

(2014) 03 DEL CK 0342
In the Delhi High Court
Case No : CS (OS) 320/2006

Dharampal Satyapal Ltd.

APPELLANT

Vs

Sanmati Trading and Investment Ltd. and Others

RESPONDENT

Date of Decision : 18-03-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 6 Rule 17, 151
Limitation Act, 1963 — Section 22
Specific Relief Act, 1963 — Section 19, 19 (b), 19(b)
Transfer of Property Act, 1882 — Section 52

Citation : (2014) 2 ILR (Delhi) 1204

Hon'ble Judges : G.S. Sistani, J

Bench : Single Bench

Advocate : Deepak Dhingra, Advocates for the Appellant; Yakesh Anand, Advocates for the Respondent

Judgement

G.S. Sistani, J.

IA.No.6351/2008

1. Plaintiff has filed the present application under Order 1 Rule 10 read with Section 151 CPC for impleading Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi, as a party to the present suit.

2. The necessary facts to be noticed for disposal of this application are that the plaintiff entered into a Memorandum of Understanding on 17.6.2004 with the defendants for purchase of a residential property bearing No. 3, Friends Colony (West), New Delhi ad measuring 4211 sq. yds. As per the plaint, the sale consideration was fixed at Rs.16.29 crores (Rs.21.0 crores as per the defendants). Plaintiff paid a sum of Rs.11.0 lacs to the defendants, towards the payment of sale consideration. Since the defendants failed to complete the transaction, the present suit for specific performance was filed. After filing of the written statement it was revealed that the suit property was sold on 10.06.2005 to the proposed defendant for a sale consideration of Rs.11.0 crores.

3. Mr. Dhingra, counsel for the plaintiff submits that the necessity of filing the present application has arisen as in paragraph 17 of the preliminary objections it has been revealed by the defendant no.1 that the subject property bearing No. 3, Friends Colony (West), New Delhi, has been sold to one Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi by a registered Sale Deed on 10.6.2005. Mr. Dhingra, submits that the sale in question is mala fide, which is evident from the fact that the documents placed on record show that the sale deed has been executed for an amount far less than that agreed between the plaintiff and the defendants. Counsel further submits that the defendants had been served with a legal notice by the plaintiff seeking specific performance of the agreement dated 17.06.2004 on 6.5.2005, i.e., just a couple of days prior to the alleged sale transaction of the defendants with the proposed defendant. It is thus contended that the sale transaction is collusive, mischievous and is liable to be set aside.

4. Mr. Dhingra, counsel for the plaintiff submits that the proposed defendants [M/s. Veejay Buildwell Pvt. Ltd.] would be a proper and necessary party and their presence would be necessary for proper adjudication of the matter and in case they are not impleaded, any final order which may be passed in the present suit may prejudicially affect the rights of the proposed defendants as well, as they have purchased the suit property, despite a prior agreement to sell in favour of the plaintiff.

5. Mr. Rajesh Banati, counsel appearing for the proposed defendant (M/s. Veejay Buildwell Pvt. Ltd.) has opposed the present application. It is submitted that M/s. Veejay Buildwell Pvt. Ltd. is not a necessary and proper party and they are the bona fide purchasers and have nothing to do with the alleged transaction between the plaintiff and the defendants.

6. Counsel for the proposed defendant further submits that the doctrine of lis pendens would not be applicable in the present case, as the proposed defendant has not purchased the property during the pendency of the present suit. In support of his submission counsel for the proposed defendant has placed reliance on Ram Kumar Tiwari and others Vs. Deenanath and others, and more particularly on paragraph 12, which is reproduced below:

"12. So far as the merits of the matter are concerned, in view of the fact that the applicants did not purchase the property during the pendency of the suit, the observations made by the learned Court below, that the objections filed by the present applicants were hit under the provisions of Section 52 of the Transfer of Property Act or by lis pendens, would become contrary to records. If the learned Court below had applied its mind to the facts of the case and the objections raised by the present applicants, it could read from the objections that they had purchased the property much before the institution of the suit and their vendor, so also they themselves were not joined as parties to the suit. If such was the objection, then application of Section 52 of the Transfer of Property Act was patently illegal. The order passed by the learned executing Court cannot be allowed to stand. Not only it is contrary to law but the same is contrary to the

facts. The order passed by the executing Court deserves to and is accordingly quashed. The parties are directed to appear before the executing Court on 8-5-2001. The executing Court shall grant proper opportunity to the respondent/decree-holder to file fresh objections/reply and shall proceed to decide the application filed by the applicants in accordance with law."

7. Counsel for the proposed defendant has also placed reliance on *Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma*, and more particularly headnote "c" and paragraph 8, which are reproduced below:

"(C) Transfer of Property Act (1882), S.52 - Applicability -- Suit seeking specific performance of agreement - Execution and registration of sale deed with respect to property involved in suit on same day when suit was filed - Transfer pendente lite could not be presumed.

The burden is on the party relying on the effect of S.52 and pleading *lis pendens* to prove that his suit was instituted before the execution of the deed of transfer which he is impeaching. In the instant case execution and registration of sale deed and the presentation of the plaint were on the same day. So also, sale deed was registered only at 2:30 p.m. That does not mean that execution and presentation for registration were at that time. It must have been executed and presented for registration much earlier. Then only after the formalities and in the usual course it could have come up before the Sub Registrar at 2.30. There is no evidence regarding the time at which sale deed was executed. "Transferred or otherwise dealt with" the property appearing in S. 52, T.P. Act is not the admission of execution before the Sub.-Registrar or the registration by him. That is execution and transfer of possession and title as the case may be."

8. The contention that Ext. A6 is hit by the rule of *lis pendens* embodied in S. 52 of the Transfer of Property Act does not appear to be correct. It is true that execution and registration of Ext. A6 and the presentation of the plaint were on the same day. So also, Ext. A6 shows that it was registered only at 2.30 p.m. That does not mean that execution and presentation for registration were at that time. It must have been executed and presented for registration much earlier. Then only after the formalities and in the usual course it could have come up before the Sub Registrar at 2.30. There is no evidence regarding time at which Ext. A6 was executed.

"Transferred or otherwise dealt with" the property appearing in S. 52, T.P. Act is not the admission of execution before the Sub. Registrar or the registration by him. That is execution and transfer of possession and title as the case may be. The burden is on the party relying on the effect of S. 52 and pleading *lis pendens* to prove that his suit was instituted before the execution of the deed of transfer which he is impeaching (*Hafiuddin v. Brijmohan* (1913) 21 Ind Cas 602 followed in *Mathan Philip Vs. Ithak*, .

8. Mr. Rajesh Benati, counsel for the proposed defendant has also placed reliance on a decision of a Division Bench of this Court *Mohan Overseas P. Ltd. Vs. Goyal*

Tin and General Industries , and more particularly on paragraph 12, which is reproduced below:

"The doctrine of lis pendens fortifies and strengthens this interpretation of the law which is to be found in Section 52 of the TP Act. It contemplates that during the pendency in any Court of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the suit property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made thereto except under the authority of the Court and on such terms as it may impose. The impact of the doctrine of lis pendens has been analysed by the Supreme Court very recently in Guruswamy Nadar Vs. P. Lakshmi Ammal (D) through LRs. and Others, ; the field of operation and interaction of Section 19 of the SR Act and Section 52 of the TP Act have been discussed. Section 19 deals with the availability of the relief of specific performance against a person claiming subsequent title to the property; this relief being unavailable in instances where the subsequent purchaser has paid valuable consideration for the purchase without having any notice or knowledge of the earlier or original contract. Section 52 of the TP Act, it has already been seen, stipulates broadly that where a suit has already been filed in respect of a property it cannot be transferred or dealt with to the detriment of the Plaintiff. Thus, let us conceptualize a case where on 1st April, 2009 A enters into an agreement to sell a house with B, and on the refusal or failure by A to complete the deal, B is constrained to initiate an action for specific performance against A on 1st May, 2009. Any endeavour of A to transfer the suit property after the latter date shall not defeat the rights of Plaintiff B, this being the doctrine of lis pendens. However, if A had sold for value the said property to C in the month of April, 2009 itself, then if C had no knowledge or notice of the agreement between A and B, A would not be able to enforce the relief of specific performance against C, as per Section 19 of the Specific Relief Act. Notice or knowledge should be actual; but it can also be constructively assumed as where the second purchaser fails even to ascertain who is in possession (See R. K. Mohammed Ubaidullah and Others Vs. Hajee C. Abdul Wahab (D) By Lrs. and Others, . The two provisions, thus, operate in different fields albeit these may be located contiguous or close to each other. In Nadar the Defendant Lakshmi had contracted to sell her house for Rupees 30,000/- on 4.7.1974 but the entire price was not paid as per contract by 31.7.1974. Lakshmi thereafter sold the house to Nadar for Rupees 40,000/- on 5.5.1975, the dealings being bona fide, that is, NADAR who had been put in possession had no notice of the previous agreement. The Apex Court held that since the second transaction of sale took place after the filing of the suit on 3.5.1975 predicated on the earlier sale agreement, the doctrine of lis pendens would take effect. In Nadar two points came to the fore - (a) that the pendency of a suit for specific performance will invariably act as a clog on property transactions and in unsustainable cases will therefore tantamount to an abuse of the legal process; (b) despite the operation of lis pendens, in a genuine

case, the Defendant should be enjoined from creating third party rights in the interest of an innocent third party."

9. Counsel for the proposed defendant has also placed reliance on *Shri Meer Singh Vs. Shri Amar Singh*, .

10. Another argument raised by counsel for the proposed defendant is that section 19(b) of the Specific Relief Act would be applicable and the proposed defendant being a bona fide purchaser, who purchased the property in good faith and without any notice of the original MOU executed between the plaintiff and the defendants, would not be a proper and necessary party, therefore, no relief can be granted in favour of the plaintiff.

11. Per contra, counsel for the plaintiff in support of his submission that the proposed defendant is a necessary party, has relied upon a decision of the Apex Court in the case of *Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others*, . Reliance has also been placed on a decision rendered by a Division Bench of this Court in the case of *Samarjit Singh Chattha Vs. Fashion Flare and Others* : and more particularly on paragraph 7 thereof, which is reproduced below:

"7. We may notice that the learned single Judge has analyzed the controversy in detail. On the factual matrix the learned single Judge has noted the crucial fact of sale of property to the appellant by the original plaintiff even prior to the last date for performance of the obligations inter se the original plaintiff and the original defendants. The learned single Judge has rightly drawn support from the observations made in paragraph 7 of the judgement in *Kasturi Vs. Iyyamperumal & Ors.* Case (supra) to the following effect:

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)

It has, thus, been categorically held that where a person had purchased a contracted property from a vendor, he/she can be impleaded as a party as the purchaser is a necessary party being affected if he has purchased with notice of

the contract, the exception being a person who claims adversely to the claim of the vendor where such party would not be a necessary party. The latter is not so in the facts of the present case. It is, once again, emphasized in paragraph 11 of the said judgement that the question to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract."

12. I have heard counsel for the parties and considered their rival submissions. The following dates, which are admitted by the parties would have a necessary bearing on the final decision to this application, hence, the same are being noticed. Pursuant to an oral communication defendants had agreed to sell the suit property to the plaintiff for a sale consideration of Rs.16.29 crores. An amount of Rs.11.0 lacs was paid by the plaintiff to the defendant, which was acknowledged in the Memorandum of Understanding signed between the parties on 17.6.2004. On 6.2.2005, the plaintiff got issued a public notice inviting objections from the public at large with respect to the sale transaction. A legal notice was also issued to the defendant for completing the sale transaction on 6.5.2005; and thereafter the present suit was instituted on 21.1.2006. In the meanwhile the suit property was sold by the defendant to the proposed defendants in terms of a sale deed dated 10.6.2005.

13. The short submission of counsel for the plaintiff is that the final order which may be passed in the present suit is likely to have a bearing on the rights of the proposed defendant, and thus, the proposed defendant is a proper and necessary party.

14. The submission of Mr. Benati, counsel for the proposed defendant is that in view of section 19(b) of the Specific Relief Act, the proposed defendant is not a proper and necessary party, moreover since the property was not sold during the pendency of the suit, doctrine of lis pendens would also not apply to the proposed defendant. It is also the case of the proposed defendant that they are bona fide purchasers and they had no knowledge or notice with regard to an earlier Memorandum of Understanding between the plaintiff and the defendants.

15. At the outset, it may be noticed that it is not the case of the plaintiff that the doctrine of lis pendens would be applicable as admittedly the property has been sold prior to the filing of the suit, thus in my view the judgments relied upon by counsel for the proposed defendant Ram Kumar Tiwari and others Vs. Deenanath and others, and Narayana Pillai Chandrasekharan Nair Vs. Kunju Amma Thankamma, , would not be applicable, as both the aforesaid decisions pertain to the proceedings arising out of the execution and moreover relate to the doctrine of lis pendens.

16. Reliance on Section 19 (b) of the Specific Relief Act by counsel for the proposed defendant is also misplaced as Section 19(b) of the Act lays down two exceptions to the enforcement of specific performance against a person claiming title under a subsequent contract i.e. (i) against a person or transferee who has

paid consideration in good faith and (ii) without notice of the original contract. As far as the submission of Mr. Benati, counsel for the proposed defendant pertaining to being covered under the exceptions laid down in section 19(b) of the Specific Relief Act is concerned, in my view this submission is premature for two reasons: firstly, at this stage it cannot be established beyond reasonable doubt that the payment was made by the proposed defendant in good faith as it is the case of the plaintiff that the property was sold in a mala fide manner to the proposed defendant and it was undervalued, as the MOU entered between the plaintiff and the defendants was for Rs.16.29 crores, whereas the property was sold to the proposed defendant at merely Rs.11.0 crores; and secondly the question as to whether the purchaser had knowledge of the previous agreement or not, is a question of evidence, which cannot be decided at this stage. Therefore, both the conditions/exceptions under section 19 (b) that protect a subsequent purchaser from enforcement of specific performance against him are not prima facie made out at this stage. The effect of impleadment is something which is to be considered by the Court at the stage of final hearing of the suit.

17. The judgment of Meer Singh (Supra) relied upon by counsel for the proposed defendant pertains to a matter where an application under Order 1 Rule 10 CPC was filed by two persons, who claimed that the suit property was a coparcenary property. Although the Single Judge came to the conclusion that being strangers to the transaction, they were not proper and necessary party, reliance was placed by the learned Single Judge on the case of Kasturi Vs. Iyyamperumal and Others, , more specifically on para 13 of the decision, wherein incidentally the Supreme Court has distinguished and highlighted in bold that a purchaser is a necessary party, as he would be affected if he had purchased with or without notice of a contract, but a person who claims adversely to the claim of the vendor is, however, not a necessary party.

18. The distinction made by the Supreme Court in the aforesaid decision was that a person, who claims adversely to the claim of the vendor, is not a necessary party. In the instant case the proposed defendant is a subsequent purchaser who is not claiming title adverse to the seller and therefore is a necessary party irrespective of whether he purchased the property with or without notice of the prior agreement as he would be affected by the final outcome of the present case between the plaintiff and the defendants.

19. In Thomson Press (India) Ltd. (Supra), the Apex Court has observed as under:

"30. In the light of the settled principles of law on the doctrine of lis pendens, we have to examine the provisions of Order 1 Rule 10 of the Code of Civil Procedure. Order 1 Rule 10 empowers the court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit.

31. Order 1 Rule 10 CPC reads as under:

"10. Suit in name of wrong plaintiff.-(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) Court may strike out or add parties.-The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

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

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

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

From the bare reading of the aforesaid provision, it is manifest that sub-rule (2) of Rule 10 gives a wider discretion to the court to meet every case or defect of a party and to proceed with a person who is either a necessary party or a proper party whose presence in the court is essential for effective determination of the issues involved in the suit.

32. Considering the aforesaid provisions, this Court in *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay and Others*, held as under: (SCC p. 531, para 14)

"14. It cannot be said that the main object of the rule is 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. It is, therefore, necessary that the 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. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in *Amon v. Raphael Tuck & Sons Ltd.* [(1956) 1 QB 357 : (1956) 2 WLR 372 : (1956) 1 All ER 273], wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Mieg et Compagnie SA v. Bank of England* [(1950) 2 All ER 605], that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject-matter of the action if those rights could be established, Devlin, J. has stated: (*Amon* case [(1956) 1 QB 357 : (1956) 2 WLR 372 : (1956) 1 All ER 273], QB p. 371) "... the test is:

"May the order for which the plaintiff is asking directly affect the intervenor in the enjoyment of his legal rights?"

20. Applying the law laid down by the Apex Court in the case of *Thomson Press (India) Ltd.* (*Supra*) to the facts of the present case, it may be noticed that it is the case of the plaintiff that the property was sold by the defendant in a clandestine manner, at a price less than the agreed price with the plaintiff, with a view to defeat the legitimate claim of the plaintiff. Applying the test laid down above, should the plaintiff succeed the result would have a direct bearing on the sale transaction between the proposed defendant and the defendant and thus the proposed defendant is a proper and necessary party to ensure that the proposed defendant is bound by the result in the suit and for the proper and effective determination of the issues raised. Consequently, the application is allowed. *Veejay Buildwell Pvt. Ltd., J-27, Jungpura Extn., New Delhi*, is impleaded as a party to the present suit.

21. Application stands disposed of.

CS(OS) 320/2006 & IA.No.3276/2011 (u/O.6 R.17 CPC)

22. Let a complete set of paper book be supplied to the newly impleaded defendant. The written statement will be filed by the proposed defendant within 30 days. Replication be filed within 30 days thereafter.

23. List on 21.5.2014 for addressing arguments on the application [IA.No.3276/2011 (u/O.6 R..17 CPC)].