

(2017) 06 BOM CK 0152

In the Bombay High Court

Case No : 55 of 2015 IN SUIT NO 783 of 1987

Mah-Hill Properties Pvt. Ltd. And Another (In the matter between) Behram Nawrosji Gamadia And Another

APPELLANT

Vs

Smt. Babli Samarthmal Seth, & Ors.

RESPONDENT

Date of Decision : 22-06-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 22Rule 10](#), [Section 54](#), [Order 8Rule 9](#) - Partition of estate or separation of share

Citation : (2017) 06 BOM CK 0152

Hon'ble Judges : S.C.Gupte

Bench : SINGLE BENCH

Advocate : Darius Khambatta, Snehal Shah, Shrikant Doijode, Falguni Thakkar, Priyanka Ravindran, Vikram Nankani, Anoshak Daver, Rutuja Patil, Niyathi Kalra, Negandhi Shah, Himayatullah, K.S. Dubey, J.P. Singh, A.A. Pandey, Prasad Dani, Amit Sheth, K.C. Nichani, Yoge

Judgement

1. This Chamber Summons is taken out by third party applicants for impleadment as party defendants to the suit and consequential amendments in the plaint and pending proceedings.

2. In short, the Applicants' case can be stated as follows : The present suit concerns a partnership constituted between the original Plaintiff (since deceased and now represented by Plaintiff Nos.1(a) and 1(b)) and the original Defendant (since deceased and now represented by Defendant Nos.1(a) to 1(d)). The Plaintiffs pray for a declaration that the partnership originally entered into between the parties, namely, original Plaintiff, original Defendant and one Oomer Ahmed, in the name and style of M/s S.P. Building Corporation and modified by a deed of retirement executed between Oomer Ahmed (retiring partner) on one hand, and the original Plaintiff and the original Defendant (continuing partners) on the other hand, has been abandoned or is of no legal effect and that the suit property is not as a partnership property of the firm but the absolute property of

the original Plaintiff, and neither the original Defendant or any person claiming through him has any right or interest in the same. In the alternative, the Plaintiffs pray for dissolution of the suit partnership and accounts. There is also a deed of subpartnership between the original Defendant and eight others concerning 75% share of the original Defendant in the suit partnership. During the pendency of the suit, by a deed of assignment dated 21 June 2008, the original Defendant assigned the actionable claim and/or chose in action including the right to contest the present suit and all incidental benefits and claims arising out of the subject matter of the suit (including his share in the suit partnership) in favour of Housing Development and Infrastructure Ltd ("HDIL"), for a valuable consideration and upon terms and conditions recorded in the deed. The deed of assignment has been duly registered with the SubRegistrar of Assurances. The original Defendant also executed an irrevocable power of attorney in favour of HDIL. This power of attorney has also been duly registered. On 5 April 2010, HDIL further assigned the actionable claim and/or chose in action including the rights forming part of the deed of assignment dated 21 June 2008, referred to above, in favour of one D.B. Properties Pvt. Ltd and Vision Finstock Ltd. Similarly, by a deed of assignment executed on 28 July 2010, the subpartners referred to in the deed of subpartnership referred to above, assigned, sold and transferred unto the aforesaid two entities, namely, D.B. Properties Pvt. Ltd and Vision Finstock Ltd, their respective right, title and interest under the deed of subpartnership for valuable consideration and on terms and conditions set out therein. These latter assignors also executed an irrevocable power of attorney in favour the two assignee entities in respect of the subject matter of the deed of assignment. By Share Sale Agreement dated 7 June 2011, shareholders of D.B. Properties Pvt. Ltd. sold and transferred their entire shareholding in D.B. Properties Pvt. Ltd., whereupon, the name of the company was changed to MahHill Properties Pvt. Ltd., Applicant No.1 in the present Chamber Summons.

3. The Chamber Summons seeks impleadment consequent upon the assignment of interest of the original Defendant during the pendency of the suit. The Applicants rely on registered deeds of assignment as between (i) original Defendant and HDIL, (ii) HDIL, and D.B. Properties Pvt Ltd. and Vision Finstock Ltd, (together with powers of attorney, respectively, executed consequent upon these assignments), and (iii) subpartners in the share of the original Defendant in the suit partnership, and D.B. Properties Pvt. Ltd and Vision Finstock Ltd. (together with the power of attorney). Based on these, it is submitted that the Applicants, being assignees of the interest of the original Defendant in the subject matter of the suit, should be joined as party defendants and allowed to defend the suit by granting leave under Order 22 Rule 10 of the Code.

4. Mr. Khambata, learned Senior Counsel appearing for the Plaintiffs, raises several objections to the application for impleadment. Learned Counsel submits that the Applicants do not have any independent right to defend the suit. It is submitted that they claim through the original Defendant under various deeds of assignment, which are disputed by the parties to the suit. It is submitted that the

original Defendant expired on 30 October 2014 and his legal heirs have already been brought on record as Defendant Nos.1a to 1d to the suit and that these Defendants alone are entitled to represent the estate of the original Defendant. Learned Counsel submits that if the Applicants are also impleaded as party defendants to the suit, the Plaintiffs will have to face two different sets of defendants who claim to represent the same estate and whose interests conflict with each other. It is submitted that an enquiry as to the succession or devolution of the interest of the original Defendant in the subject matter of the present suit is foreign to the Plaintiffs' cause of action. It is submitted that the Applicants may have to file their own suit against the defendants impleaded as legal heirs of the original Defendant for setting up a title to the interest of the deceased original Defendant; they have no role to play so far as the present suit is concerned. Learned Counsel also submits that the Applicants are guilty of grave delay and laches in coming to the Court, the deeds of assignment in their favour having been executed as far back as on 5 April 2010 (the original Defendant himself having executed an assignment deed on 21 June 2008) and the Applicants having approached the Court for impleadment on 5 December 2014. Learned Counsel submits that, at any rate, the question as to whether or not there is infact an assignment of the interest of the original Defendant in the suit in favour of the Applicants, as alleged by them, needs to be decided by this Court at the outset, before they are impleaded as party defendants.

5. In the first place, Rule 10 of Order 22 of the Code is merely an enabling provision. It gives an assignee of a party's interest during the pendency of the suit an option to apply for a leave to continue the suit. It does not impose any obligation on the assignee to come on record. He may or may not choose to come on record, in the latter case leaving the conduct of the suit to his assignor. The only consequence in that case is that he is bound by the result of the litigation. Correspondingly, such assignee does not, by reason of leaving the conduct of the suit to his assignor, lose his right to continue the proceedings. At a proper juncture, he may seek leave to prosecute or defend the suit, as the case may be, if he is of the view that his interests would be protected better by taking over the conduct of the suit. In the present case, the assignor continued to defend the suit till his death on 30 October 2014. After his death, when the legal heirs of the deceased were brought on record, the Applicants, as purported assignees of the interest of the original Defendant, have chosen to come forward and represent the estate of the deceased Defendant in their capacity as such assignees so as to protect their interests. As held by the Supreme Court in the case of *Amteshwar Anand Vs. Virender Mohan Singh*, (2006) 1 SCC 148, Rule 10 gives an assignee of a party's interest during the pendency of the suit an option to apply for leave to continue the suit and this option can be resorted to at any stage by the assignee, "when he is of the opinion that his interest would be better protected thereby." If the legal heirs of the assignor, who are brought on record as party defendants in place and stead of the original Defendant, take a stand which may not be in the interest of the assignee, as it infact turns out in

the present case, going by the respective pleadings of the parties and stands adopted by them at the Bar, nothing prevents the assignee from approaching the Court to represent the interest of his assignor with a view to protect his interests.

6. The only question in such a case is, whether or not, at the stage when the application for joinder is made, the Court is expected to make any detailed inquiry or come to any definitive finding as to the correctness or otherwise of the assignment claim. Mr. Khambata, learned Counsel relies on the judgment of Karnataka High Court in the case of Akka Bai Vs. Gowrawwa, AIR 1990 Karnataka 278. Relying on observations of the Division Bench of Karnataka High Court in this case, learned Counsel submits that it is only when the identity of the heir, legatee, transferee or assignee, as the case may be, is not in dispute that the question of permitting him to be impleaded as successor or transferee pendente lite would arise. Whenever there is any dispute, the Court must reject the application for impleadment. No doubt, the Division Bench of Karnataka High Court has observed so, purportedly relying on observations of the Supreme Court in the case of Khemchand Shankar Choudhary Vs. Vishnu Hari Patil., AIR 1983 SC 124 But, and I say this with great respect to the learned Judges of Karnataka High Court, the law cited by them is contrary to the law laid down by the Supreme Court not only in Khemchand Shankar's case but also in various other cases. In fact Khemchand Shankar's case says nothing of the kind. That was a case, where there was no dispute as to the transfer and the transferees had asked for an equitable partition post a preliminary decree of partition, relying on the deed of transfer executed in their favour pendente lite. The argument before the Court was that the transferees during the pendency of the suit for partition do not have locus standi to appear before the revenue authority in proceedings under Section 54 of the Code and ask for an equitable partition of land, if they had not been impleaded as parties to the suit before the Civil Court. The Supreme Court held that in case where there was no dispute, if the Collector made an equitable partition taking into consideration the interests of all concerned including those on whom any interest in the subject matter had devolved during the pendency of the suit, he would neither be violating the decree nor transgressing the law; his action would not be ultra vires; on the other hand, it would be in conformity with the intention of the legislature which has placed the work of partition of lands, subject to payment of assessment to the Government, in his hands, to be carried out in accordance with the law (if any), for the time being in force, relating to partition of property or separate possession of shares. Nonexistence of a dispute as to the fact of transfer is referred to in this context and this context alone. There is no law laid down by the Supreme Court to the effect, as suggested by the learned Judges of Karnataka High Court, that, by implication, when there is a dispute as to the fact of transfer, the application of the transferee pendente lite for leave under Order 22 Rule 10 ought to be rejected, relegating the parties to have the disputed facts decided before another forum.

7. Our Court in fact in the case of Jawaharlal Vs. Smt. Saraswatibai Babulal Joshi,

AIR 1987 Bombay 276, has clearly laid down that no detailed enquiry is contemplated at the stage of grant of leave under Order 22 Rule 10 of the Code. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution and the validity of the assignment or devolution can be considered at the trial of the suit on merits.

8. Just to rest the controversy finally, we may note the following observations of the Supreme Court in the case of Amit Kumar Shaw Vs. Farida Khatoon, (2005) 11 Supreme Court Cases 403 :

"12. Under Order 22 Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings."

9. But such impleadment, argues Mr. Khambata, causes clear inconvenience to the Plaintiffs. They have to defend the suit against two sets of defendants, who claim to represent the interest of the deceased original Defendant and yet plead their cases differently. It is but natural that the Plaintiffs have to do so. There is nothing unusual about such predicament. Whenever there is any contest as to devolution of interest as between the successors of the original party in a suit and more than one successor claim such devolution, there would be two or more sets of defendants, each within his or her rights to take such stand as suits them. It is another matter, whether they are entitled to take a stand contrary to the one urged by the original Defendant. But there is nothing in law to suggest that they must take stands in conformity with each other.

10. Mr. Khambata contends that in a case such as this, the Plaintiffs have no way to join issues, since there is nothing that the Plaintiffs can say once differing written statements of these two sets of defendants are filed. Even this is no unusual predicament. No doubt, no pleadings subsequent to the written statement of the defendant, other than by way of defence or set off is permitted in a trial, but, in accordance with Rule 9 of Order 8, the defendant can always seek leave of the Court and the Court in appropriate case, upon such terms as it thinks fit, permit the defendant to file subsequent pleadings. Anyway, that is not a ground for not allowing the defendants to take different stands.

11. In view of the discussion above, concerning the right of the assignee to come to the Court as and when he is of the opinion that his interests would be better protected thereby, there is no need to consider in this case the question of delay and laches. Even otherwise, the application is made in close proximity of the death of the original Defendant and if the Applicants are of the view that interests of the deceased are better protected by them as assignees rather than legal heirs of the deceased, who are already brought on record, they may very

well chose to come before the Court and apply for impleadment.

12. For all these reasons, the Chamber Summons is made absolute in terms of prayer clause (a).

13. On the application of Mr. Khambata, the Plaintiffs are permitted to defer carrying out of the amendment for a period of four weeks from today. The amendments must be carried out immediately thereafter.