(2013) 04 BOM CK 0157

In the Bombay High Court

Case No : Appeal No. 330 of 2012 in Chamber Summons No. 250 of 2012 in Suit No. 327 of 2012

M/s. Shree Kamal Constructions and Others — APPELLANT

Vs

Shri Kamlakar Jiwan Patil and Others — RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2)
Specific Relief Act, 1963 — Section 19, 19(a)

Citation : (2013) 4 ABR 348

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Vivek R. Walavalkar with Mr. Sameer R. Bhalekar and Mr. S.R. Ingale, for the Appellant; Ram U. Singh for Respondent Nos. 1 to 7, 9 to 28 and 50 to 55, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Admit.

With the consent of learned Counsel for the Appellants and the Respondents, the appeal is taken up for final hearing.

Counsel for Respondents 1 to 7, 9 to 28 & 50 to 55 waives service.

The appeal arises from a judgment of a learned Single Judge dated 18 April 2012 by which the Chamber Summons that was taken out by the Appellants, who were the original Plaintiffs, for the amendment of a plaint in a suit for specific performance has been dismissed.

2. The Appellants instituted a suit in July 2011 seeking specific performance of an agreement dated 7 December 1984 under which Respondents 1 to 28 agreed to sell the suit property to the Appellants. The Appellants claimed that in pursuance of the agreement, they were put in possession of the property and paid an amount of Rs. 50.33 lakhs to Respondents 1 to 28. The Appellants also

claimed to have prosecuted three suits pending in the City Civil Court at their own costs and expenses. According to the Appellants, they have incurred expenses in the amount of approximately Rs. 2 crores towards the litigation. On 16 February 2010, 1 December 2010 and 15 December 2010, Respondents 1 to 28 are alleged to have executed deeds of conveyance along with Respondents 29 to 49 in favour of Respondents 50 to 55. The Appellants filed a Chamber Summons for impleading Respondents 29 to 55 as Defendants to the suit and for amendment of the plaint. The learned Single Judge by the impugned order came to the conclusion that by the amendment, the suit for specific performance would be converted to a suit on title in respect of the immovable property. In the view of the learned Single Judge, the question to be decided in a suit for specific performance is the enforceability of the contract entered into between the parties to the contract and the addition of parties as sought would convert the suit for specific performance into a suit on title, involving strangers to the contract. The learned Single Judge has, inter alia, observed as follows:-

Ultimately, if the Plaintiffs succeed in the suit, each one of these parties who are stated to be vendors and from whom the Plaintiffs have purchased the property and such persons who derived title from such vendors will all be directed to join in so as to convey the right, title and interest in the immovable property which is subject matter of the Agreement for Sale.

The Chamber Summons has been allowed only to permit the impleadment of the heirs and legal representatives of the deceased Defendant no. 8 but has been rejected as for the rest.

3. Learned Counsel appearing on behalf of the Appellants submits that: (i) Section 19(a) of the Specific Relief Act, 1963 specifically states that performance of a contract may be enforced against either party thereto, and under clause (b) against any person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract; (ii) The Appellants have sought the impleadment of persons who claim a title arising subsequently through the vendors of the Appellants. Moreover, the case of the Appellants is that the proposed Respondents had notice of the agreement between the Appellants and Respondents 1 to 28; (iii) The impleadment of the proposed Respondents was thus within the purview of Order I Rule 10 of the CPC inasmuch as the proposed Respondents are necessary parties to the suit for specific performance. The Appellants seek relief to the effect that Respondents 29 to 55 must join with the vendors of the Appellants in conveying title to the property in favour of the Appellants. In other words, according to the Appellants, Respondents 29 to 55 claim under their vendors and have not set up an independent title, adverse to the vendors of the Appellants. Hence, it was urged that the amendment was necessary and the Chamber Summons ought to have been allowed.

4. On the other hand, learned Counsel appearing on behalf of the Respondents submitted that: (i) In a suit for specific performance of a contract, necessary and

proper parties are those who are parties to the agreement of which performance is sought; (ii) A stranger to the agreement between the Plaintiffs-purchasers and their vendors is neither a necessary nor a proper party.

5. Section 19 of the Specific Relief Act, 1963 provides, inter alia, that specific performance of a contract may be enforced against (a) either party thereto; and (b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract. Now it is a fundamental principle of law that a necessary party is one in whose absence an effective decree cannot be passed by the Court. A proper party is a person whose presence would enable the Court to effectively adjudicate upon all matters and issues, though he may not be a person against whom a decree is made.

6. When a purchaser to an agreement to sell seeks specific performance against his vendor, the issue often arises as to whether a person with whom the vendor has subsequently entered into a contract for sale can or should be joined. In order to trace the evolution of judicially evolved doctrine on the subject, a reference to some of the decisions of the Supreme Court is necessary.

7. In Lala Durga Prasad and Another Vs. Lala Deep Chand and Others, , a Bench of three learned Judges of the Supreme Court dealt with a case where the Plaintiff was a purchaser; the first Defendant the vendor while the second and third Defendants were the subsequent purchasers. The Supreme Court observed that though the practice of the Courts in India had not been uniform, there were three distinguishing lines of thought. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the Plaintiff and direct conveyance by the vendor alone. The second would consider that both the vendor and the vendee should join, while a third would limit the execution of the conveyance to the subsequent purchaser alone. The Supreme Court held after evaluating the three alternatives as follows:-

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in- Kafiladdin and Others Vs. Samiraddin and Others, , and appears to be the English practice. See Fry on specific Performance, 6th Edn. Page 90, paragraph 207; also-''Poter v. Sanders'', (1846) 67 ER 1057 (D). We direct accordingly.

8. The judgment in Durga Prasad was considered by another Bench of three learned Judges of the Supreme Court in Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, . The Supreme Court observed as follows:-

There appears to be some divergence between the High Courts on the question whether in a suit for specific performance against a purchaser with notice of a prior agreement of sale the vendor is a necessary party or not. In other words the conflict has arisen on the question whether the decree in a suit for specific performance when the property in dispute has been sold to a third party should be to only direct the subsequent purchaser to execute a conveyance or whether the subsequent purchaser and the vendor should both execute a conveyance in favour of the plaintiff: See Gourishankar & Others v. Ibrahim Ali and Kafiladdin & Others v. Samiraddin & Others. This Court has, however, held in Lala Durga Prasad & Another v. Lala Deep Chand & Others that in a suit instituted by a purchaser against the vendor and a subsequent purchaser for specific performance of the contract of sale the proper form of the decree is to direct specific performance of the contract between the vendor and the plaintiff and further direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. This was the course followed by the Calcutta High Court in the above case and it appears that the English practice was the same. Thus according to this decision, the conveyance has to be executed by the vendor in favour of'' the plaintiff who seeks specific performance of the contract in his favour and the subsequent transferee has to join in the conveyance only to pass his title which resides in him. It has been made quite clear that he does not join in any special covenants made between the plaintiff and his vendor. All that he does is to pass on his title to the plaintiff. In a recent decision of this Court in R.C. Chandiok & Another v. Chunni Lal Sabharwal & Others while passing a decree for specific performance of a contract a direction was made that the decree should be in the same form as in Lala Durga Prasad''s case (supra). It is thus difficult to sustain the argument that the vendor is not a necessary party when, according to the view accepted by this Court, the conveyance has to be executed by him although the subsequent purchaser has also to join so as to pass on the title which resides in him to the plaintiff.

Consequently, the Supreme Court was of the view that the vendor to an agreement to sell was a necessary party and the conveyance, if the Plaintiff was to succeed, was to be executed by him although the subsequent purchaser would also have to join so as to pass on the title which resided in him to the Plaintiff.

9. In a judgment of three Learned Judges of the Supreme court in Kasturi Vs. Iyyamperumal and Others, , it was held that under Order I Rule 10(2) of the Code of Civil Procedure, the parties to a contract for sale were necessary parties in a suit for specific performance as also a person who had purchased a contracted property from the vendor. However, a person who claims adversely to the claim of the vendor would not constitute a necessary party. A person who did not claim under the vendor but claimed a title adverse to the vendor was held not fall within any of the categories enumerated in Section 19 of the Specific Relief Act. If a person who claims independent of the vendor as distinct from the vendor was impleaded, the suit for specific performance shall be enlarged and practically converted into a suit on title. In that decision, the Supreme Court observed as follows:-

7. In our view, a bare reading of this provision, namely, second part of Order 1 Rule 10 sub-rule (2) 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 or without 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.

In the case before the Supreme Court, it was an admitted position that Respondents 1 and 4 to 11 did not seek their addition in the suit on the strength of the contract in respect of which the suit for specific performance had been filed but based their claim on an independent title and possession of the contracted property. Since the claim was not founded under the vendor of the Plaintiff but was a claim to an independent title, the Supreme Court was of the view that the addition of the suit parties would enlarge the suit for specific performance into a suit on title. The principles in the earlier judgments of the Supreme Court have been followed in a recent judgment of the Supreme Court in Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others, .

10. In the present case, the Appellants as the Plaintiffs have sought the addition of Respondents 29 to 55. The specific averment in the proposed paragraph 15A which is sought to be introduced into the plaint is that in all the conveyances subsequent to the agreement for sale in favour of the Appellants Defendants 29 to 34 are not bona fide purchasers but persons who were aware of the rights and claims of the Plaintiffs. The Appellants seek a declaration that the deeds of conveyance dated 1 December 2010, 15 December 2010 and 16 February 2010 would not bind them. The Appellants seek a decree to the effect that Defendants 29 to 34 be ordered and decreed to join Defendants 1 to 28 in conveying the suit property in favour of the Appellants. The relief as structured would clearly fall within the principle that was enunciated in the judgment of the Supreme Court in Durga Prasad''s case as subsequently followed.

11. Reliance was sought to be placed on behalf of the Respondents on a judgment of the Supreme Court in Bharat Karsondas Thakkar Vs. Kiran Construction Co. and Others, A distinguishing feature of the case before the Supreme Court was that by the proposed amendment what was sought to be introduced was a challenge to a consent decree which the Appellant had obtained. Although this fact was brought to the notice of the first Respondent in March 1984, no steps were taken to amend the plaint at that stage and the first Respondent waited until a consent decree was passed before applying for

amendment of the plaint. In this view of the matter, the Supreme Court was of the view that the proper course of action was for the first Respondent to challenge the consent decree not in its suit for specific performance but in a separate suit for a declaration that the consent decree ought not to have been passed and was not binding on the first Respondent. Significantly however the following observations of the Supreme Court are extremely material to the issue in the present case:-

... If, as was held in Durga Prasad''s case (supra), the impleadment of the appellant was only for the purpose of joining him in the conveyance if the respondent No. 1''s suit ultimately succeeded, the ratio of the said decision would possibly have been applicable to the facts of this case. Unfortunately, that is not the case here, since the respondent No. 1 has by amending the plaint prayed for a declaration that the consent decree obtained by the appellant was not binding on him and also for a declaration that the consent decree was null and void and was liable to be quashed.

The judgment of the Supreme Court, therefore, clearly recognises that if impleadment was sought for the purpose of joining the Appellant there in the conveyance if the suit of the first Respondent was to ultimately succeed, the ratio of the decision in Durga Prasad''s case would have been attracted.

12. The learned Single Judge was, with respect, in error in coming to the conclusion that the proposed amendment would convert what was essentially a suit for specific performance into a suit on title. The case of the Plaintiffs is that conveyances that were executed after the agreement between the Plaintiffs and their vendors were entered into by subsequent purchasers who had notice of the prior transaction. The Plaintiffs-Appellants seek a decree to the effect that subsequent purchasers must join in conveying the title to them, if the suit were to succeed. The learned Single Judge has as noted earlier recognised that if the Plaintiffs were to succeed in the suit, each one of those parties who are vendors and from whom the Plaintiffs had purchased the property and persons who derived title from such vendors will all be directed to join in so as to convey the right, title and interest in the immovable property which is the subject-matter of the agreement for sale. Once this is the position, it is impossible to conceive as to how the impleadment of those persons who claim title under the vendors of the Appellants would not be necessary parties. Again at the cost of repetition, it is necessary to note that the proposed Respondents do not claim an independent title adverse to the vendors of the Appellants but claim under the vendors. In this view of the matter, we are of the view that the learned Single Judge was in error in rejecting the Chamber Summons for amendment.

13. We, accordingly, allow the appeal and set aside the impugned order dated 18 April 2012 except to the extent to which the Chamber Summons was allowed for the impleadment of the heirs of the deceased Defendant no. 8. The Chamber Summons for amendment shall accordingly stand allowed. The amendment shall be carried out within a period of four weeks from today.

14. All rights and contentions of the parties both on merits and on the question of limitation are kept open to be decided in the suit. The appeal is disposed of in the aforesaid terms. There shall be no order as to costs.