

(1997) 04 MAD CK 0097

In the Madras High Court

Case No : Application No. 3697 of 1996 in C.S. No. 625 of 1994

R.R. Square, by Partner Ramachand Rao

APPELLANT

Vs

Mrs. Shobalatha Debi

RESPONDENT

Date of Decision : 17-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 1, Order 1 Rule 10, Order 1 Rule 10(2), Order 1 Rule 3, 151
Transfer of Property Act, 1882 — Section 52

Citation : (1997) 04 MAD CK 0097

Hon'ble Judges : K. Sampath, J

Bench : Single Bench

Advocate : C.S. Gopalakrishnan for M/s Surana and Surana, for the Appellant; Nalini Chidambaram for Messrs. Sai Chandra Vadana and H. Mohamed Sheriff, for the Respondent

Final Decision : Dismissed

Judgement

K. Sampath, J.—This is an application filed under Order 1, Rule 10, CPC, Order 14, Rule 8 of O.S. Rules and Section 151 of the CPC for impleading respondents 2 to 4 defendants 2 to 4 in the suit. The allegations in the affidavit are as follows:

The applicant has filed the above suit for specific performance of an agreement dated 20-5-1991 executed between the plaintiff/applicant and the defendant/first respondent in respect of the point "B" Schedule property and for other reliefs. Pending suit the applicant filed an application for an injunction in O.A. No. 510/94 restraining the defendant from in any manner dealing with the point "B" Schedule property till the disposal of the suit. An interim injunction was granted and after the first respondent entered appearance and contested the same, it was made absolute by the learned single Judge. However, the O.S. appeals in O.S.A. Nos. 57 and 58 of 1995 filed by the first respondent were allowed and the application for interim injunction was dismissed holding that any transaction would be hit by the doctrine of lis pendens. The order of the Appellate Court had

become final. The applicant recently heard from authentic source which it believes to be true that the defendant/first defendant had entered into an agreement deed with respondents 2 and 3 herein to alienate the property. The details of the agreement are not known to the applicant. The third respondent had started demolishing the building. The fourth respondent/MMDA had also sanctioned a plan for putting up a building on the plaint "B" Schedule property. When the suit for specific performance was pending, if respondents 2 and 3 had entered into an agreement with the defendant/first respondent, it would be subject to the applicant suit and respondent's 2 and 3 are necessary and proper parties to the suit and the rights of the plaintiff as against the defendant should be necessarily decided in the presence of respondents 2 and 3. Otherwise the decree that the applicant will get may not be enforceable against them and it would become a mere paper decree. So far as the fourth respondent is concerned, it had originally sanctioned a plan for putting up apartments in plaint "B" Schedule property and the validity of the sanctioned plan and the planning permit expired only on 25-8-1995. The fourth respondent even before the expiry of the time had sanctioned new construction plan and issued new permit to the defendant without any reference to the applicant. The fourth respondent had acted illegally and high-handedly. Therefore, it is just and necessary that the fourth respondent is to be impleaded in the suit, so that the rights of the plaintiff as against respondents 1 to 3 could be decided in the present suit along with the fourth respondent. None of the respondents could have any valid or just objections for impleading respondents 2 to 4 as defendants 2 to 4 in the suit.

2. The prayer in the application is that respondents 2 to 4 have to be impleaded as defendants 2 to 4 in the suit and the plaintiff applicant must be permitted to carry out the consequential amendments in the plaint.

3. The first respondent/defendant has filed counter to the following effect: An agreement was entered into between the applicant and this respondent for sale of an extent of 3 grounds 600 sq.ft. in the "B" Schedule of the suit property for Rs. 18 lakhs, that the plaintiff/applicant would hand over a flat in the third floor to be constructed by the applicant/plaintiff, the cost having been worked out to be Rs. 9 lakhs, the total sale consideration thus being Rs. 27 lakhs. At the time the agreement was entered into, the first respondent/defendant received an advance of Rs. 1.25 lakh and another sum of Rs. 1 lakh from M/s. Gem Cables and Conducts Ltd. by way of advance for allotment of flat. The applicant/plaintiff obtained the planning permit from the fourth respondent on 26-8-1992 describing this respondent/defendant as the owner of 5 grounds 680 sq./ft. and thereby became eligible for higher floor space index than the actual entitlement. This respondent sought legal advice on the legality of the sanction accorded by the fourth respondent and she was advised that the application for planning permission contained incorrect particulars and hence the planning permission was liable to be cancelled. This respondent repudiated the contract and informed the applicant/plaintiff orally on 7-3-1994. The applicant/plaintiff filed the present suit C.S. No. 625/94 for specific performance of the agreement for sale of the

suit property or in the alternative for refund of the amount paid by the applicant/plaintiff along with interest and for damages, etc. Though interim injunction was granted on 15-6-1992 and the application for vacating injunction filed in A. No. 4065/94 by this respondent, was dismissed by the learned single Judge, this respondent took the matter by way of appeals in O.S.A. Nos. 57 and 58/95 and the Bench allowed the appeals stating that the applicant/plaintiff was only a real estate agent and had entered into the contract with this respondent only for the purpose of developing the land suitable for construction of flats thereon, so as to sell the flats to third parties. The Division Bench also held that the applicant/plaintiff did not hold any personal interest in the property and if ultimately it succeeded, it was only going to sell the completed flats to third parties and therefore there was no justification for preventing the admitted owner, namely, this respondent from dealing with the property during the pendency of the suit. The Division Bench also observed that the applicant/plaintiff could always be compensated in terms of money with regard to whatever it had spent and also for damages. Against the order in the O.S. appeals the applicant/plaintiff preferred Special Leave Petitions before the Supreme Court and the Supreme Court dismissed the petitions on merits and confirmed the order of the Division Bench. The order of the Division Bench had thus become final. As the Division Bench has clearly held that there was no justification for preventing the admitted owner of the property from dealing with the land during the pendency of the suit, there was no reason whatsoever for the applicant/plaintiff to come up with the present application for impleading respondents 2 to 4. The suit itself is liable to be dismissed as the plaintiff/applicant had come to Court with unclean hands. This respondent had also repudiated the agreement entered into with the applicant/plaintiff and the repudiated agreement cannot be legally enforced due to the fraud perpetrated by the applicant/plaintiff while applying for planning permission. The applicant/plaintiff did not have legal right to compel this respondent to enforce the agreement which had been duly repudiated. The second and the third respondents are strangers to the agreement, there being no privity of contract between them and the applicant/plaintiff. The application for interim injunction restraining this respondent from dealing with the property having been dismissed, the present application did not lie. The impleading of the second and third respondents, who are strangers to the agreement, would amount to misjoinder of parties. This respondent had liberty to deal with the property in any manner with any person. So far as the fourth respondent is concerned, there is absolutely no necessity to implead the fourth respondent as a defendant in the suit. The presence of the fourth respondent is not required to decide the inter-se-rights of the applicant/plaintiff and this respondent.

4. The second respondent has filed a counter adopting the counter of the first respondent and stating further that he had entered into an agreement with the first respondent on 20-11-1995 for sale of 50% undivided share and had agreed to construct and give 50% built up area to the first respondent. He applied to the fourth respondent for approval for construction and he has engaged the third

respondent, who is a building contractor for doing the construction work. This respondent is a stranger to the agreement of sale dated 20-5-1991, there being no privity of contract between the applicant/plaintiff and this respondent. There is no cause of action against this respondent. Since the earlier application filed by the applicant/plaintiff had been dismissed by the Supreme Court, the present application for impleading did not lie. The first respondent had liberty to deal with the property in any manner she chose.

5. The third respondent has also filed a counter adopting the first respondent's counter. He is a building a contractor engaged for construction and he is not a necessary and proper party, being a stranger to the agreement of sale dated 20-5-1991. There is no cause of action against him and the Supreme Court having dismissed the earlier application for interim injunction filed by the applicant/plaintiff, the present application is not maintainable. His being made a party will amount to misjoinder of parties.

6. The fourth respondent/MMDA had chosen not to contest the application.

7. The undisputed facts are as follows:

On 20-5-1991 an agreement was entered into between the plaintiff/applicant and the first respondent/defendant for sale of the latter's property measuring an extent of 3 grounds and 600 sq.ft. A sum of Rs. 1,25,000/- was paid as advance. A further sum of Rs. 1 lakh was received by the defendant/first respondent from M/s. Gem Cables & Conducts Ltd. as advance for allotment of a flat. The total consideration thus fixed is Rs. 27 lakhs, Rs. 18 lakhs in cash and Rs. 9 lakhs in the shape of a flat in the third floor. The suit had been filed for specific performance or in the alternative for a direction to the defendant to pay back the advance of Rs. 1,25,000/- and interest Rs. 90,000/- totaling Rs. 2,15,000/- and further interest at 24% p.a. on Rs. 1,25,000/- from the date of plaint till realisation, return of Rs. 1 lakh paid by Gem Cables & Conducts Ltd. with interest at 24% p.a. from the date of plaint till realization, planning permission expenses at Rs. 6 lakhs with interest at 24% and compensation of Rs. 5 lakhs with interest at 24% and for a permanent injunction restraining the defendant, her men, servants, agents, etc. from dealing with the "B" Schedule property by alienation, such as sale, personal gifts, etc. Pending suit the plaintiff applied for interim injunction and ad interim injunction was granted and it was made absolute subsequently. On appeal by the first respondent/defendant, the order of injunction was set aside. While allowing the appeals, the Bench observed as follows:

"6. As regards the prima facie case, we find that in the plaint there is no averment that the plaintiff has spent any amount for the development of the land or construction of the flats thereon. In the alternative, the plaintiff has claimed Rs. 2,25,000/- towards advance paid; Rs. 6,00,000/- being the amount spent for obtaining planning permission, etc. and Rs. 5,00,000/- as compensation for breach of a contract. Thus, there is no mention whatever in the plaint that the

plaintiff had spent huge sums for the development of the land and construction of flats thereon. The observation made by the learned judge that the plaintiff has spent huge amount in that regard is erroneous and it is not based on any material on record. In the course of argument, learned Counsel for the plaintiff/respondent admitted before us that the statement that the plaintiff is in possession of the land or that the plaintiff has developed the land suitable for construction in it, is a mistake. The agreement between the parties does not also make any reference whatever to the possession of the property or the development of the land pursuant thereto.

7. It cannot also be said that the plaintiff will suffer irreparable hardship and grave injury if the injunction is not granted. It is well known that any alienation during the pendency of suit will be hit by the doctrine of *lis pendens*. If ultimately the plaintiff succeeds, it will be possible for the plaintiff to enforce the contract.

8. As regards the balance of convenience, we are of the view that it is only in favour of the defendant/applicant. As pointed out already, the plaintiff is only a real estate agent and it has entered into the contract with the defendant only for the purpose of developing the land suitable for construction of flats thereon so as to sell the flats to third parties. The plaintiff does not hold any personal interest in the property. If ultimately it succeeds, it is only going to sell the completed flats to third parties. In these circumstance, there is no justification for preventing the admitted owner of the land from dealing with the land during the pendency of the suit. The plaintiff can be compensated in terms of money with regard to whatever it has spent and also for damages."

The plaintiff filed Special Leave Petitions and those petitions were dismissed on 8-1-1996 holding that there was no merit in the case.

8. Mr. C.S. Gopalakrishnan, learned Counsel for the applicant/plaintiff, contends that "if respondents 2 to 4 are not made parties, in the event of success, the decree cannot be executed against them and that there will be multiplicity of proceedings and no prejudice will at all be caused to them if they are made parties. The learned counsel relies on the following passage from Saha's Commentary on the CPC 5th Edition page 684 paragraph (1):

1. Necessary and proper Party: Tests. - Against a necessary party there must be a right to some relief in respect of the matters involved in the proceeding in question; it must not be possible to pass an effective decree in the absence of such party. The test for determining the effectiveness of decree is whether the decree can be executed without the presence of the party in question as regards the property sought to be decreed in favour of the plaintiff. Only such persons are necessary parties who have interests in the subject matter of the suit and who are likely to be affected. A necessary party is one without whom no order can be made effectively and proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved in the proceeding. Thus when a mortgagor is

adjudged insolvent, and his interest vests in Court and receiver, in mortgage decree proceeding, the receiver is a necessary party. Thus in a suit for partition on declaration of plaintiffs title alleging that an ostensible owner was a mere name lender the persons who would otherwise be interested in the event of such ostensible owner being found to have a share is a necessary party. Similar is the case when a stranger also claimed to be interested in the property in suit on basis of document impugned by the plaintiff as not binding on him. Thus in a suit for specific performance of contract of sale by A against B, the purchaser in auction sale in a decree against B - the auction sale being held during the pendency of the suit for specific performance, is a proper party."

He also relies on the following two decisions:

(1) Raj Singh Vs. Ram Nivas and Another,

(2) Adapa Venkateswra Rao and another Vs. Mohammad Suleman and others, .

9. The learned Senior Counsel Mrs. Nalini Chidambaram for the first respondent/defendant contends that after the dismissal of the Special Leave Petitions and after the finding by the Division Bench that any alienation during the pendency of the suit would be hit by Section 52 of the Transfer of Property Act the proposed parties are neither proper nor necessary parties to suit.

10. In Razia Begum Vs. Sahebzadi Anwar Begum and Others, it was held as follows:

"The question of addition of parties under O. 1, R. 10 of C.P.C, is generally not one of initial jurisdiction of the Court, but of a judicial discretion which has to be exercised in view of all the facts and circumstances of a particular case, but in some cases, it may raise controversies as to the power of the Court, in contra distinction to its inherent jurisdiction, or, in other words, of jurisdiction in the limited sense in which it is used in S. 115 of the Code. In a suit relating to property, in order that a person may be added as a party, he should have a direct interest as distinguished from a commercial interest, in the subject-matter of the litigation. Where the subject matter of a litigation is a declaration as regards statues or a legal character, the rule of present or direct interest may be relaxed in a suitable case where the Court is of the opinion that by adding that party, it would be in a better position effectually and completely to adjudicate upon the controversy."

In the Supreme Court case, the appellant sought for a declaration that she was the legally wedded wife of the third respondent. The first respondent claiming to be the lawful and legally wedded wife of the third respondent and the second respondent claiming to be their son, applied under Order 1 Rule 10(2) C.P.C, as being interested in denying the marriage of the appellant and the third respondent. Impleading was ordered. The revision against that was dismissed by the High Court and this was affirmed by the Supreme Court.

11. The principle for impleading a third party to a proceeding is avoidance of

multiplicity of proceedings and hence the Court has no jurisdiction to add a party, unless it is a necessary or proper party. A necessary party is one without whom no order can be made effectively and a proper party is one whose presence is necessary for a complete and final decision on the questions involved in the proceedings. If the question at issue can be worked out without any one being brought in, a stranger, should not be added to the litigation. The eventual interest of the party in the fruits of the litigation cannot be held to be a true test of impleading the parties according to the Code of Civil Procedure.

12. In *Firm of Mahadeva Rice and Oil Mills and Others Vs. Chennimalai Goundar, Ramaprasada Rao, J.* (as he then was) has held as follows:

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

No amount of assertion on the part of the parties to a lis to the effect that it would avoid multiplicity of suits, that it would be convenient for purposes of trial, that it would not cause prejudice to any party, would be of any avail. If the cardinal test, namely, for a final adjudication of the "real controversy" such addition is necessary, is not satisfied, then it cannot be said with any reasonable certainty that the proposed party is a proper party."

The matter arose in revision. The revision petitioners were co-owners of a rice mill along with one Palaniappa, who sold his moiety to the respondent alleging that he was a co-sharer. The respondent filed a suit for partition. The defence taken was that the mill was a partnership property and that there could not be a suit for partition during the continuance of the partnership. During the pendency of the suit by the respondent, the petitioners filed a suit against the respondent for an injunction restraining him from trespassing into the rice mill premises and interfering in the business of the petitioners. The two suits were transferred to another Court for joint trial. The respondent took out applications for impleading his vendor alleging that he was a necessary and property party. The applications were resisted by the petitioners, but the first Court allowed the applications. However, the revisions were allowed by the High Court holding that the person sought to be impleaded was not a necessary and proper party.

13. In the course of this judgment Justice Ramaprasada" Rao (as he then was) referred to *In re Ibrahim Haji* (AIR 1957 Madras 699) and extracted the following passage from that judgment:

"The discretion to be exercised by the Court under Order 1 Rule, 10(2), C.P.C, is subject to two limitations, viz. (1) that the Court has no power to join a person as a party if he could not have even originally impleaded under Order 1, Rule 1 or Rule 3, C.P.C, and (2) that the presence of the person added must be necessary to effectually and completely adjudicate upon and settle all points involved in the suit. If persons who are sought to be impleaded have no subsisting rights over the properties and they are sought to be impleaded only

for the purpose of getting their evidence, it would not be proper to make them parties to the suit and the petitioners' apprehension that they would be driven to the necessity of filing a separate suit against these persons was not a sufficient justification to compel the plaintiff to implead them as parties to the suit."

The principles will equally apply even in the case where the plaintiff's ask for impleading a third party as an additional party defendant.

14. In *Narayan Chandra Carai and Others v. Math Bhandar Pvt. Ltd.*, and another (AIR 1974 Calcutta 358) it has been held that,

"A person is not to be added as a defendant merely because he or she would be incidentally affected by the judgment. The main consideration is whether or not the presence of such a person is necessary to enable the Court to effectually and completely adjudicate upon and settle and questions involved in the suit. If the question at issue between the parties can be worked out without any one else being brought in, the stranger should not be added as a party."

15. In *B. Somaiah and Others Vs. Amina Begum*, it has been held that Order 1, Rule 10, C.P.C, cannot be resorted to where there is no need for adding new parties for adjudicating upon the questions involved in the suit. In *Pranakrushna v. Umakanta Panda and others* (AIR 1989 Orissa 148), a Division Bench of the Orissa High Court has held that the purchasers of properties during the pendency of the suit are neither necessary nor proper parties inasmuch as they would be bound by the decree in the suit in view of the principle enunciated in Section 52 of the Transfer of Property Act.

16. In the light of the established legal position set out above, I do not think that the parties sought to be impleaded as defendants in the present suit are either necessary or proper parties to the present proceedings.

17. In the first decision cited by the learned Counsel for the applicant *Raj Singh v. Ram Nivas and another* (AIR 1977 Allahabad 104) a person who purchased the suit property in auction during the pendency of the suit was impleaded as a defendant. That person applied for striking out his name, which was rejected by the Court. In the second case *Adapa Venkateswra Rao and another Vs. Mohammad Suleman and others*, the purchaser wanted to implead himself as a party and the application was opposed, but the Court rejected the objection and the purchaser was impleaded as a party. However, in *Sarvinder Singh Vs. Dalip Singh and Others*, , where the alienees had themselves applied under Order 1, Rule. 10, C.P.C, for impleading, it was held that since the alienation had been, made pending suit it was hit by the doctrine of *lis pendens* u/s 52 of the Transfer of Property Act and that they were neither necessary nor proper parties.

18. This is a case where the subsequent agreement holder does not want to be made a party. He is" willing to take the risk and as observed by the Bench in *O.S.A. Nos. 57 and 58/95* any alienation subsequent to the filing of the suit is hit by the doctrine of *lis pendens*. The so-called subsequent purchaser is aware of

the proceedings and he is definitely bound by the decision in the suit. And again, if parties come to court seeking for impleading one after another during the course of the proceedings, it will be next to impossible to keep on adding the parties and in such event the suit can never come to an end. In the above circumstances, I am of the view that the application for impleading respondents 2 to 4 as defendants 2 to 4 in the suit has to be rejected and accordingly, the application is dismissed. However, there will be no order as to costs.