

(2013) 07 BOM CK 0149

In the Bombay High Court

Case No : Appeal (L) No. 285 of 2012 in Chamber Summons No. 1600 of 2010
in Suit No. 2318 of 2010

Shri Swastik Developers and Others

APPELLANT

Vs

Saket Kumar Jain and Another

RESPONDENT

Date of Decision : 26-07-2013

Acts Referred:

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

Citation : (2014) 2 ALLMR 183 : (2014) 2 MhLj 968

Hon'ble Judges : S.C. Gupte, J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : M.U. Pandey and Mr. Rakesh M. Pandey, for the Appellant; Rajesh Rathod instructed by . Mr. Sunil R. Rawal, for the Respondent

Final Decision : Disposed Off

Judgement

D.Y. Chandrachud, J.—Admit. By consent of Counsel and at their request, taken up for hearing and final disposal. The appeal arises from an order of a Learned Single Judge by which the Chamber Summons for amendment of a plaint in a suit for specific performance has been allowed. The First and Second Appellants are Defendants in the suit for specific performance which has been instituted by the First and Second Respondents. The Third Appellant has been impleaded as a party to the suit, in view of the fact that he has entered into an agreement on 2 August 2008 with the First Appellant. The agreement of the Third Appellant is subsequent to the agreement of the original Plaintiff. The Third Appellant claims under the First Appellant and does not claim a title adverse to that of his vendor. The Third Appellant is the father of the Second Appellant.

2. The suit for specific performance has been instituted by the First and Second Respondents against the First and Second Appellants for enforcement of a letter of allotment dated 10 November 2005. The subject matter of the suit for specific performance is a residential flat, Flat No. 303, admeasuring 1055 sq. ft. in

Sadguru Complex, D-Wing, Phase-I, General A.K. Vaidya Marg, Goregaon (East), Mumbai. On 2 August 2008 an agreement was entered into between the First Appellant and the Third Appellant. The Second Appellant is a partner of the First Appellant, while the Third Appellant is his father. By the proposed amendment, the First and Second Respondents sought to implead the Third Appellant who claims to be a subsequent purchaser. Admittedly, the Third Appellant claims title under the First Appellant and under a subsequent agreement dated 2 August 2008. In addition to the impleadment of the Third Appellant, the First and Second Respondents sought the impleadment of the Third Respondent with whom a licence agreement was entered into by the First Appellant. Now, it is common ground that before the Learned Single Judge an affidavit in reply was filed on behalf of the Appellants stating that the Third Respondent had vacated the premises upon the term of the licence coming to an end. In this view of the matter, during the course of the hearing, Counsel appearing on behalf of the First and Second Respondents, the original Plaintiffs, states that it is not necessary to implead the Third Respondent and that this part of the proposed amendment is consequently not pressed. Hence, the only subsisting issue is as to whether the Learned Single Judge was in error in allowing the impleadment of the Third Appellant and with the consequential amendments which are sought to be pressed.

3. Section 19 of the Specific Relief Act, 1963, provides that specific performance of a contract may be enforced against a party to the contract or 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. In allowing an application for impleadment under Order 1 Rule 10 of the Code of Civil Procedure, 1908, the Court is required to consider whether the proposed addition is of a party who is either necessary or proper. Now, in a suit for specific performance, when a subsequent purchaser is sought to be impleaded, the true test that has to be applied by the Court is to determine whether the purchaser claims title under the vendor of the Plaintiff or whether, contrariwise, he claims a title independent of or adverse to the title of the vendor. Impleadment is permissible where the party which is proposed to be joined claims under the vendor of the Plaintiff and under a subsequent agreement. This is to be distinguished from a case where a title adverse to or independent of the vendor is sought to be asserted. In the former case, it is but necessary to join the subsequent purchaser in order to ensure that when a decree is passed by the Court at the trial of the suit, the subsequent purchaser is directed to join in completing the title which is to be conferred upon the Plaintiff.

4. This principle has been laid down in several judgments of the Supreme Court commencing from *Lala Durga Prasad and Another Vs. Lala Deep Chand and Others*, which is a decision of three Learned Judges. The Supreme Court held 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.

The judgment in Durga Prasad was subsequently considered by three Learned Judges in Dwarka Prasad Singh and Others Vs. Harikant Prasad Singh and Others, where it was held 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.

5. In Kasturi Vs. Iyyamperumal and Others, a Bench of three Learned Judges of the Supreme Court held that under Order 1 Rule 10(2) of the Code of Civil Procedure, 1908, the parties to a contract for sale were necessary parties in a

suit for specific performance as well as 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 since such a person who claims a title adverse to the vendor does not fall within any of the categories mentioned in Section 19 of the Specific Relief Act. The underlying principle is that the nature and character of the suit would be altered to a suit on title, if a party who claims independently or adverse to the vendor were to be impleaded as a party to the suit. In that context 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.

These principles have been reiterated in the judgment of the Supreme Court in Thomson Press (India) Ltd. Vs. Nanak Builders and Investors P. Ltd. and Others,

6. The decision of the Supreme Court in Bharat Karsondas Thakkar Vs. Kiran Construction Co. and Others, rested on facts which were as follows:

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. Hence, the Supreme Court held 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, in the case before the Supreme Court, the agreement in question was prior to the suit agreement. Significantly, the Supreme Court observed as follows:

... 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.

These principles have been followed by a Division Bench of this Court in a judgment dated 9 April 2013 in *Shree Kamal Constructions vs. Kamlakar Jiwan Patil*⁶.

7. In the present case, the Third Appellant is a necessary party to the suit for specific performance. The Third Appellant claims under the First Appellant. The Third Appellant does not set up a title adverse to that of the First Appellant or an independent title. Moreover, the agreement between the First and Third Appellants of 2 August 2008 is subsequent to the agreement dated 10 November 2005 that was entered into between the First and Second Appellant and the Plaintiffs. Hence, the application for amendment would not change the character of the suit for specific performance.

8. During the course of the hearing, Counsel appearing on behalf of the First and Second Respondents has pressed only prayer clause (b)(i) of the two prayers and has sought the deletion of the words "illegal, null and void and". The proposed amendment in terms of prayer clause (b)(ii) has not been pressed. In order to obviate any dispute, we have bracketed out the portion of the schedule to the Chamber Summons which the First and Second Respondents do not press in consequence.

9. Time to carry out the amendment in pursuance of this order is extended by three weeks from today. The appeal is accordingly disposed of. There shall be no order as to costs.

6. Appeal 330/12 in Chamber Summons 250/12 in Suit 327/12