

In the High Court of Punjab and Haryana, at Chandigarh

Civil Revision No. 5302 of 2015 (O&M)

Date of Decision: 09.05.2016

Anil Ghai

... Petitioner(s)

Versus

Sagar Singh Dua and Others

... Respondent(s)

CORAM: Hon'ble Mr. Justice Shekher Dhawan.

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| 1. | Whether reporters of local newspapers may be allowed to see judgment? | Yes |
| 2 | To be referred to reporters or not? | |
| 3 | Whether the judgment should be reported in the Digest? | Yes |

Present: Mr. Deepak Jain, Advocate
for the petitioner(s).

Mr. B.S.Bedi, Advocate
for respondent No.1.

Mr. Rahul Garg, Advocate
for respondent No.3.

Shekher Dhawan, J.

Present petition under Article 227 of the Constitution of India for setting aside order dated 6.8.2015, passed by learned Civil Judge (Senior Division), Chandigarh, whereby the Court below decided preliminary issue, which was framed on 26.5.2015 that N.K. Bansal is not a necessary party but a proper party and his impleadment as defendant No.3 is as per law and thereafter, fixed the case for evidence

of proforma defendant.

Facts relevant for the purpose of decision of the present petition that plaintiff/respondent No.1 had filed suit for specific performance against petitioner as well as respondent No.2 alleging that he had executed agreement of sale dated 22.1.2007 with respondent No.2-Sohan Lal Arora for sale of House No. 161, Sector 8A, Chandigarh owned and possessed by the petitioner. In the aforesaid suit, plaintiff had also arrayed respondent No.3 as defendant No.3 on the ground that he was an attesting witness to the agreement. More so, Estate Officer, Chandigarh was also impleaded as defendant No.4, though no relief was sought against them.

Learned counsel for the petitioner submitted that the entire plaint reveals that as no relief was being claimed against defendant No.3 & 4, they were not proper and necessary parties and petitioner had been contesting the suit and also cancelled agreement dated 21.8.2006 on 10.5.2007 and earnest money had already been returned by way of bank draft. On 9.5.2008, defendant No.3 was proceeded against *ex parte*. Issues were framed on 11.5.2009 and despite availing 14 effective adjournments, plaintiff could not complete the evidence and his evidence was closed by Court order on 20.3.2013. Plaintiff wanted to start *de novo* trial and for that purpose, respondent No.3 moved an application dated 11.5.2009 for setting aside the *ex parte* order dated 9.5.2008. The said application was at the instance of respondent No.1-plaintiff. Plaintiff consented to the said application moved by respondent No.3 and *ex parte* proceedings were set aside.

Defendant No.3 wanted to file the written statement but the same was objected to by the present petitioner. This Court in Civil Revision Nos. 3521 of 2015, 3523 of 2015 & 3524 of 2015, filed against the orders dated 21.11.2014, 26.11.2014 & 13.5.2015, had passed the following order on 21.5.2015:-

"Counsel for the petitioner seeks withdrawal of the petition with liberty to take all the pleas, taken herein, before the court below at an appropriate stage and intends to move an application before the court for framing of preliminary issue as to whether defendant No.3 is a necessary party for adjudication of the matter in dispute in the pending suit.

As prayed, dismissed as withdrawn with liberty aforesaid.

If such an application is moved, issue with regard to essential nature of the party would be framed as a preliminary issue, which would be decided within two months, before proceeding further with the suit."

On the basis of above said order, the Court below decided the preliminary issue vide impugned order dated 6.8.2015 holding N.K.Bansal not to be necessary party but a proper party and present petition is challenge to the said order.

Learned counsel for the petitioner, while challenging the said order, mainly took the plea that undisputedly respondent No.3 is not a party to the agreement of sale dated 21.8.2006 but just a witness

to the execution thereof. As such, he cannot be impleaded as party to the suit. On this point, reliance was placed upon the judgment rendered by Bombay High Court (Nagpur Bench) in ***Rajubha alias Rajendra Kamdar v. Sunia 2008(2) ALLMR 134***, wherein a view was taken that witness to the agreement cannot be a necessary or a proper party as such. On the same point, reliance was placed upon the judgment rendered by Delhi High Court in ***Spectrum Technologies Usa Inc. v. Spectrum Power Generation Co. Ltd. 1998(46) DRJ 441***, wherein similar view was taken. Reliance was also placed upon the judgment rendered by the Hon'ble Apex Court in ***Mumbai International Airport Pvt. Ltd. v. Regency Convention Centre and Hotels Pvt. Ltd. And Others 2010(7) UJ SC 3266***, wherein a view was taken that if any party's interest is not directly affected, such a party is neither a necessary party nor a proper party and has no right to be impleaded as such. Reliance was also placed upon the judgment rendered by Kerala High Court in ***Thavarayil Salim v. Thekkeveettill Karuvantevalappil Saru Umma 2011 (4) RCR (Civil) 273***, wherein it was observed that an attesting witness to the agreement for sale is neither a necessary party nor a proper party to the suit for specific performance. Learned counsel for the petitioner prayed that present petition be accepted and impugned order dated 6.8.2015 be set aside.

Learned counsel for the respondents submitted that undisputedly, respondent No.3 has got an interest as he was to charge commission and that is why the Court below has already accepted the

contention of respondent No.1 and impleaded N.K.Bansal as defendant No.3 being a proper party. More so, the contention of learned counsel for the petitioner has already been dismissed vide order dated 21.11.2014 by the Court below. The contention of petitioner was also declined by the Court below on 13.5.2015. Even the revision petition filed against the said orders, before this Court, was dismissed as withdrawn on 21.5.2015.

Learned counsel for the respondents also took the plea that as per provisions of Order 1 Rule 13 CPC, the plea regarding mis-joinder of parties can be taken only before settlement of the issues and as in this case, issues were framed long back and the case was fixed for evidence of the defendants, such an objection regarding mis-joinder of party is legally not tenable. Respondent No.3 being directly interested in the result of the litigation and the Court below has rightly accepted the contention of respondent No.1 for impleadment of respondent No.3 as party being a proper party, present petition is without any merit and the same be dismissed.

Having considered the submissions made by learned counsel for the parties and gone through the record of the case, this Court is of the considered view that undisputedly, preliminary issue was ordered to be framed as per directions given by this Court vide order dated 21.5.2015. However, while deciding the preliminary issue, the Court below fell in error while returning the finding that respondent No.3-N.K.Bansal is a proper party because the main suit was for specific performance of the agreement of sale dated 21.8.2006 and respondent

No.3 is just a witness to the said agreement and as such he was arrayed as proforma defendant only. More so, he was proceeded against ex parte long back vide order dated 9.5.2008 and he was not appearing before the Court intentionally as he had no interest to the litigation. Thereafter, case remained pending for plaintiff's evidence, which was closed by Court order and at that stage, application for setting aside the *ex parte* proceedings was filed by N.K.Bansal and written statement was filed by him, which was duly objected to by the present petitioner. The only question to be seen in the present petition is whether the Court below has taken a correct view regarding impleadment of N.K.Bansal as defendant No.3 in the case of specific performance of agreement.

As per view taken by Kerala High Court in ***Thavarayil Salim's case*** (*supra*), in identical matters, witness to the agreement is neither a necessary party nor a proper party to the suit for specific performance. This is so because grant or refusal of the relief of specific performance of the contract for sale is not dependent on the presence of the attesting witness of the agreement as party to the suit. Similar view was taken by the Delhi High Court in case ***Spectrum Technologies Usa Inc. v. Spectrum Power Generation Co. Ltd.*** (*supra*) that in a suit for specific performance, witness is neither a necessary party nor a proper party. It is not enough that the intervener should be commercially or indirectly interested in answer to the question. He must be directly or legally interested in the answer. A person is legally interested in the answer only if he can say that it may lead to a result that will affect him legally i.e. by curtailing his legal

right. Similar view was taken by Bombay High Court (Nagpur Bench) in ***Rajubha alias Rajendra Kamdar's case*** (*supra*).

However, the Court below has not considered these aspects while passing the order dated 6.8.2015 and the said order is legally not sustainable and the same stands set aside.

As regard to plea taken by learned counsel for the respondents that as per provisions of Order 1 Rule 13 CPC, the plea regarding mis-joinder of parties can only be taken before settlement of the issues. In this case, preliminary issue was ordered to be framed by this Court vide order dated 21.5.2015. The said order was never challenged by either of the parties and it had attained finality and respondents cannot take such an objection at this stage.

In view of above, the impugned order is legally not sustainable. Thus, present petition is hereby accepted and order dated 6.8.2015 stands set aside.

(Shekher Dhawan)
Judge

May 09, 2016
"DK"