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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **RFA (OS) NO. 38/2016**

Reserved on : 29th July, 2016
Date of Decision: 29th September, 2016

DINESH SAREEN & ANR Appellants

Through: Ms. Meena Kohli, Advocate.

Versus

NAVIN SAREEN & ORS Respondents

Through: Ms. Hetu Arora Sethi, Advocate for
respondent Nos.1 to 5.

Ms. Gurkamal Hora Arora, Advocate
for the respondent No.7.

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MS. JUSTICE SUNITA GUPTA

SANJIV KHANNA, J.

Dinesh Sareen and Bharat Sareen (the Appellants, for short), both sons of late Shayam Lal Sareen, in this Regular First Appeal under Section 10 of the Delhi High Court Act impugn the order dated 8th March, 2016, whereby a preliminary decree of partition has been passed in CS (OS) No.2051/2012. The appellants have also prayed for setting aside of the order of the same date, by which the application for impleadment- I.A. No. 10121/2014- under Order I Rule 10 of the Code of Civil Procedure, 1908 filed by Navneet Singh Anand has been allowed.

2. During the course of hearing, it was brought to the notice of the appellants that they are the plaintiffs in CS (OS) No.2051/2012 in which they sought a decree of partition and the preliminary decree of partition granted is in terms of their prayer. Learned counsel for the appellants, in view of the said position, did not press and challenge the preliminary decree of partition. For the sake of convenience and lest there be any confusion, we would like to reproduce a portion of the impugned order dated 8th March, 2016 passed in CS (OS) No.2051/2012 relating to the preliminary decree of partition:-

“1. This is a suit for partition of the property bearing no. A-33, Vishal Enclave, Nazafgarh Road, New Delhi. As per para 1 of the plaint, this suit property was purchased by four persons namely Sh. Shyam Lal Sareen, late Sh. Madan Lal Sareen, late Sh. Satish Chand Sareen and Sh. Ramesh Chander Sareen and which four persons were sons of late Sh. Gian Chand Sareen.

2. There are two plaintiffs in the suit and these two plaintiffs are the legal heirs of one co-owner Sh. Shyam Lal Sareen. Plaintiffs will therefore get 1/4th ownership interest in the suit property which was of Sh. Shyam Lal.

3. Defendant nos. 1 to 3 are the legal heirs of one co-owner Sh Madan Lal Sareen and defendant nos. 4 and 5 are the legal heirs of one another co-owner Sh. Satish Chand Sareen. Defendant no.6 is the fourth sole surviving original co-owner namely Sh. Ramesh Chander Sareen.

4. Therefore, defendant nos. 1 to 3 will get 1/4th share in the suit property which was of Sh. Madan Lal Sareen. Defendant nos. 4 and 5 will get 1/4th share of Sh. Satish Chand Sareen and defendant no.6 will get 1/4th share which belongs to him.

5. Defendants who appear through counsel do not dispute the relief of partition which is claimed, and that therefore, a preliminary decree is liable to be passed in terms of the shares as stated above.”

3. In view of the aforesaid position and the statement made by the learned counsel for the appellants, to this extent, the appeal does not survive.

4. The main and core dispute raised by the appellants in the present appeal relates to the observations and findings recorded in paragraphs 6 and 7 of the impugned order, which read:-

“6. I.A.No. 10121/2014 is accordingly allowed and disposed of by substituting Sh. Navneet Singh for defendant nos. 1 to 5 as it is noted that 1/4th shares of defendant nos. 1 to 3 and defendant nos. 4 and 5 have been transferred by them to the applicant in I.A.No. 10121/2014 Sh. Navneet Singh and accordingly it is agreed between Sh. Navneet Singh and defendant nos. 1 to 5 that the 50% share of defendant nos. 1 to 5 will vest with Sh. Navneet Singh. On so vesting there is no prejudice to the plaintiffs because plaintiffs will continue to have their 1/4th ownership rights in the suit property and as pleaded in paras 1 and 2 of the plaint.

7. Accordingly, a preliminary decree is passed giving 1/4th/25% co-ownership rights in the suit property to the two plaintiffs jointly. 50%/half co-ownership rights in the suit property will fall to Sh. Navneet Singh and 1/4th /25% ownership rights in the suit property will fall to defendant no.6 Sh. Ramesh Chander Sareen. A preliminary decree be drawn up accordingly.”

A reading of the aforesaid quotation from the impugned order shows that the appellants have filed a suit for partition of property No. A-33, Vishal Enclave, Nazafgarh Road, New Delhi (the property, for short), which was purchased by four brother, namely, Shyam Lal Sareen, Madan Lal Sareen, Satish Chand Sareen and Ramesh Chand Sareen, sons of Gian Chand Sareen. Shyam Lal Sareen, Madan Lal Sareen and Satish Chand

Sareen have expired. Dinesh Sareen and Bharat Sareen are sons of Shyam Lal Sareen. Navin Sareen, Chander Khurana and Anjana Sharma, respondent Nos.1, 2 and 3, respectively, are the son and daughters of late Madan Lal Sareen. Respondent No.4, Naresh Sareen and respondent No.5, Rajesh Sareen are sons of late Satish Chander Sareen. Respondent No.7, Navneet Singh Anand, the applicant in I.A.No. 10121/2014, had entered into an agreement dated 10th May, 2008 with Madan Lal Sareen, father of Respondents 1-3, for purchase of his 25% share of the property and another agreement dated 2nd October, 2008 for purchase of 25% share in the property held by respondent Nos.4 and 5, inherited by them from late Satish Chander Sareen.

5. The sole question which arises, is whether I.A.No. 10121/2014 impleading the 7th respondents as a party to the suit, is as per the mandate of the law.

6. In order to appreciate the controversy, we would like to first notice the proceedings *inter se* the parties, including proceedings initiated by Navneet Singh Anand, the newly impleaded defendant. The details are:-

- (i) Execution proceedings arising from the arbitration award dated 8th October, 1985, which has been made rule of the Court. The execution proceedings were filed by late Satish Chander Sareen S/o Gian Chand before the District Judge, Srinagar, and are stated to be pending before the District Judge, Jammu. Navneet Singh Anand is not a party to the said proceedings.
- (ii) Two suits, CS(OS) No. 1448/2012, titled Navneet Singh Anand v. Naveen Sareen and CS(OS) No. 1449/2012, Navneet Singh Anand v. Naresh Kumar Sareen and Others. These suits were for specific

performance of the two agreements to sell mentioned in paragraph 4 above. Pursuant to the mediation settlement dated 20th January, 2014, the suits have been decreed vide compromise decree dated 6th February, 2014. The terms of the mediation settlement, the decree, and its effect have been discussed below. The appellants, Dinesh and Bharat Sareen, had filed applications for impleadment in these two suits, but the applications were dismissed by the Court vide order dated 20th November, 2012.

(iii) A suit for partition CS(OS) No. 2051/2012, titled Dinesh Singh and Another v. Naveen Sareen and Others, filed by the appellants. The present appeal arises out of the preliminary decree of partition dated 8th March, 2016 passed in the said suit. By the impugned order dated 8th March, 2016, application under Order 1 Rule 10 of the Code, IA No. 10121/2014 filed by Navneet Singh Anand, has been allowed. This order, impleading Navneet Singh Anand as a party, is under challenge in the present appeal.

(iv) A suit for declaration CS(OS) No. 3518/2014, titled Dinesh Sareen and Another v. Naveen Sareen and Others, for permanent injunction and mandatory injunction, challenging the decrees dated 20th January, 2014 passed in CS (OS) Nos. 1448/2012 and 1449/2012.

7. The primary contention of the appellants and also respondent No.6, Ramesh Chand Sareen, who had appeared in person, is that the property is the subject matter of a stay order dated 27th January, 1996 passed by the District Judge, Srinagar in the execution application, which was filed by late Satish Chander Sareen against his brothers including respondent No.6,

Ramesh Chand Sareen. The said execution proceedings arise from an Award dated 8th October, 1985. The order dated 27th January, 1996 is on record and states that the property was forming a part of the execution proceedings and would not be alienated by any mode till further orders.

8. The second order relied by the appellants and respondent No. 6, Ramesh Chand Sareen is the order dated 18th July, 2012 in CS(OS) No. 2051/2012, ***Dinesh Sareen & Anr. v. Navin Sareen & Ors.*** The operative portion of the said order is encapsulated below:-

“2. Learned counsel for the plaintiffs has drawn my attention to the sale deed by which four brothers namely late Sh. Shyam Lal Sareen, late Sh. Madan Lal Sareen, late Sh. Satish Chand Sareen and Sh. Ramesh Chand Sareen purchased the suit property. Counsel for the plaintiffs also argues that between the parties there was an Award of the Arbitrator dated 8.10.1985, and as per which Award, all the parties were held to be equal co-owners of the suit property, and there were further directions for joint enjoyment including by making further construction on the property. Learned counsel for the plaintiffs also argues that once the plaintiffs are co-owners, and there is no partition, no person including any of the defendants can claim that they have specific right in specific portion of a property, including specific right to possession of the property for transferring the same to a third person. It is argued that such a right will only be available after partition by metes and bounds between the co-owners is effected.

3. Till further orders unless varied by the Court, the defendants are in any manner restrained from creating any third party interest or transferring possession of any portion of the property bearing no.A-33,Vishal Enclave, Nazafgarh Road, New Delhi-110027.

4. Plaintiffs shall comply with the provisions of Order XXXIX Rule 3 CPC within a period of 4 days from today.”

9. The third contention is that vide order dated 16th December, 2014

passed by a single Judge of this Court in CS (OS) No. 3518/2014, ***Dinesh Sareen & Anr. v. Navin Sareen & Ors.*** operation of the order dated 6th February, 2014 passed in CS(OS) Nos. 1448/2012 and 1449/2012 has been stayed. To avoid the peradventure of confusion, the order dated 16th December, 2014 is reproduced below:-

“CS(OS) 3518/2014 and IA No.22848/2014 (O.XXXIX Rules 1 and 2 CPC)

1. It is urged by the learned counsel for the Plaintiffs that the compromise order dated 06.02.2014 was obtained by Defendant no.1 in collusion with Defendants no.4 to 7 at the back and without information to the Plaintiffs.
2. The Plaintiffs have filed this suit for declaration, permanent and mandatory injunction with the averments that the order dated 06.02.2014 is null and void and is not binding upon the Plaintiffs.
3. Admittedly, the Plaintiffs herein were not the party to CS(OS) No.1448/2012. The application under Order 1 Rule 10 CPC moved by the Plaintiffs was dismissed by the Court.
4. Issue summons of the suit and notice of the application to the Defendants by ordinary process, registered AD cover, speed post as well as through approved courier service, on steps to be taken within one week, returnable before the Joint Registrar on 05.03.2015.
5. In the meanwhile, operation of the impugned order dated 06.02.2014 passed in CS(OS) No.1448/2012 is stayed till the next date of hearing.
6. Written statement and reply shall be filed by the Defendants within 30 days of the service. Rejoinder/Replication, if any, shall be filed within two weeks thereafter.
7. Compliance of Order XXXIX Rule 3 CPC shall be made within three days.

XXXXX

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It is pertinent to mention here that the 7th respondent Navneet Singh Anand is a party to suit CS(OS) 3518/2014, filed by the appellants herein. Paragraph 5 of the aforesaid quotation from the order dated 16th December, 2014, refers to the order dated 6th February, 2014 passed in CS (OS) No.1448/2012 titled *Navneet Singh Anand v. Naveen Sareen & Ors.* and CS(OS) No. 1449/2012 titled *Navneet Singh Anand v. Naresh kumar Sareen*. The said suits for specific performance were filed by the 7th respondent Navneet Singh Anand against respondent Nos.1, 2 & 3 and respondent Nos.4 & 5 respectively. By two orders similarly worded dated 6th February, 2014, CS (OS) Nos.1448/2012 and 1449/2012 were disposed of, recording as under:-

“Counsel for the parties submit that the matter stands settled between the parties before Delhi High Court Mediation and Conciliation Centre. The settlement Agreement dated 20.1.2014 has been placed on record, which is marked as Ex.C-1. Counsel for the parties identify the signatures of the parties on the settlement agreement and pray that the suit be decreed in terms of settlement.

Accordingly, the suit is decreed, in terms of the settlement dated 20.1.2014, Ex.C-1. The court appreciates the efforts put in by the learned Mediator, the parties and their respective counsel. Plaintiff will be entitled to refund of the Court Fees in terms of section 16A of the Court Fees Act.

I.A. 9589/2012 and I.A. 2830/2013

In view of the order passed in suit today, the present applications stand disposed of.”

10. The mediation agreement dated 20th January, 2014, placed on record, would show that the Court and the parties were aware and conscious of the

interim orders dated 27th January, 1996 passed in the execution proceedings and 18th July, 2012 in the CS (OS) No.2051/2012. The settlement agreements dated 20th January, 2014 record that respondent No.7, Navneet Singh Anand had entered into two agreements for purchase of the 1/4th undivided shares of respondent Nos.1, 2 & 3 and respondent Nos. 4 & 5, for an amount of Rs.2,25,00,000/- and Rs.2,60,00,000/- respectively. Payments of Rs.94,00,000/- to respondent Nos.1, 2 & 3 and Rs.65,00,000/- to respondent Nos.4 & 5 were also made. These payments were made under agreement-to-sell dated 10th May, 2008 between respondent No.7 and late Madan Lal Sareen and agreement-to-sell dated 2nd October, 2008 between respondent No.7 and respondent Nos.4 and 5, being the legal representatives of late Satish Chander Sareen, who had expired on 28th October, 2005.

11. In view of the stay orders, the settlement agreement dated 20th January, 2014 between respondent No.7 and respondent Nos.1, 2 & 3 had made stipulations as under:-

“WHEREAS after the filing of the present suit by the First Party one of the co-owners of the property filed a suit for partition being CS(OS) No. 2051/2012 titled Dinesh Sareen and Another v. Naveen Sareen and others before the High Court of Delhi. The Hon’ble High Court of Delhi by order dated 18.7.2012 passed an interim injunction order restraining the parties from creating any third party right, interest in the property bearing no.A-33, Vishal Enclave, New Delhi.

WHEREAS two other co-owners of the property namely Shri Naresh Sareen and Shri Rajesh Sareen have filed an Execution Petition before the Distt. Court, Jammu with respect to the property. The District Court of Jammu has passed a stay order against the alienation of the property bearing No. A-33, Vishal

Enclave, New Delhi.”

Accordingly, the settlement agreement had postulated:-

“5. That the parties herein shall file an appropriate application in CS (OS) No.2051/2012 pending adjudication before this Hon’ble Court for an appropriate order to effectuate the present sale of the suit property and for substitution of the First Party in the said suit in place of the Second Party.

6. that the Second Party accepts the undertaking given by the other co-owners namely Shri Naresh Sareen and Shri Rajesh Sareen in the Settlement Agreement entered into between the First Party and the said co-owners in the suit bearing CS (OS) No.1449/2012 with respect to the withdrawal of the execution petition pending before the Civil Court, Jammu.

7. That the First Party and the Second Party shall bear the cost of getting the property free hold in equal ratios i.e. 50:50.

8. That the parties shall file an application for grant of permission in suit bearing CS (OS) no.2501/2012 before the Hon’ble High Court of Delhi and for withdrawal of the execution petition before the Civil Court, Jammu on or before 15.02.2014.”

The mediation settlement agreement dated 20th January, 2014 between respondent No.7 and respondent Nos.4 & 5 is similar in nature and effect.

12. Another clause in the settlement agreements had stated and referred to the undertaking given by respondent Nos.1, 2 & 3 and respondent Nos.4 and 5 for withdrawal of the execution proceedings pending before the Civil Court, Jammu upon transfer of the said proceedings from Srinagar. The two settlement agreements refer to the deposit of the balance amounts due, as

consideration for sale by the respondent No.7 in the Court. The settlement agreements also stipulate that upon grant of permission in CS (OS) 2051/2012 pending in the High Court of Delhi and upon withdrawal of execution petition before the Civil Court, Jammu, that the amounts have to be paid to respondent Nos. 1 to 3 and respondent Nos.4 and 5. Thereupon, the sale deed and other documents for transfer are to be executed. The two agreements also postulate conversion of the property from lease hold to free hold and the amount payable as and when such conversion is done.

13. It is, therefore, clear that respondent Nos. 1 to 3, respondent Nos.4 & 5 and respondent No.7 had not concealed or withheld any fact from the Court. The Court was aware while passing the order dated 6th February, 2014 taking the mediation settlement agreements on record, of the stay order dated 27th January, 1996 passed in the execution proceedings at Srinagar, now transferred to Jammu, and the stay order in the present suit for partition dated 18th July, 2012. Despite the aforesaid background, keeping in view the terms settled, the decree in CS(OS) Nos. 1448/2012 and 1449/2012 were passed on 6th February, 2014. We have only noted the said facts and would not elaborate and expound on this decree, as the appellants have filed a civil suit CS (OS) No.3518/2014 challenging the said decree.

14. It is also pertinent to mention that the appellants have filed a contempt petition before the execution court at Jammu for violation and disobedience of the directions given in the order dated 27th January, 1996. However, it was apparently filed after the death of Madan Lal Sareen on 1st November, 2011, for Madan Lal Sareen is not a party to the said contempt proceedings and has been described as late Madan Lal Sareen. It is also

relevant to state that the appellants herein had filed applications I.A. Nos. 13060/2012 and 13072/2012 under Order I Rule 10 C.P.C., for being impleaded as a party to the two suits filed by Navneet Singh Anand being CS (OS) Nos. 1448/2012 and 1449/2012, but the applications were dismissed by the common order dated 20th November, 2012 , inter alia, holding:-

“5. The applicants themselves admit that late Shri Mohan Lal Sareen had 1/4th share in the property bearing number A-33, Vishal Enclave, Vishal Cinema Road, New Delhi-110 027. Therefore, it would be difficult to dispute that he had the right to sell or enter into an agreement to sell in respect of his undivided share in the aforesaid property. The pendency of the suit for partition by metes and bounds would not come in the way of a decree being passed in the present suit. Similarly, if there is an injunction against alienation of the suit property, by the Court at Jammu, the implication of such an order would be considered at an appropriate stage, in the event of the suit being decreed and the injunction being still in force at that time. But, as far as the applicants are concerned, they are neither necessary nor proper party to the present suit.

The applications are devoid of any merits and are hereby dismissed.”

15. The facts stated would reveal the following:-

- (i) The appellants, who are the plaintiffs in CS (OS) 2051/2012, were aware of the agreement-to-sell dated 10th May, 2008 between respondent Nos.7 and late Madan Lal Sareen and agreement-to-sell dated 2nd October, 2008 between respondent No.7 and respondent Nos.4 and 5. They had also filed applications for being impleaded in the suit for specific performance being the co-owners of the property, but the

applications were dismissed on the ground that in the suit for specific performance, which is based upon agreements, they were third parties, though they had a share in the property. The principle of privity of contract was invoked. The order had also recorded that the suit for partition was pending.

- (ii) The two agreements-to-sell dated 10th May, 2008 and 2nd October, 2008 between respondent Nos.7 and late Madan Lal Sareen and respondent No.7 and respondent Nos.4 & 5, respectively, being anterior, would not be hit and prohibited by the stay order passed on 18th July, 2012 in CS (OS) No.2051/2012, ***Dinesh Sareen & Anr. v. Navin Sareen & Ors.***, out of which the present appeal arises. In fact, a reading of the plaint in the said suit would show that the appellants had stated and referred to the stay order dated 27th January, 1996, passed by the execution court at Jammu, and also mentions that three/four persons had visited the property and inquired about ownership and claimed that the appellants apprehended that the defendants would create third party interest by entering into some agreements. Pertinently, the agreements-to-sell, which were the subject matter of the two suits for specific performance and permanent injunction being CS (OS) No.1448/2012, ***Navneet Singh Anand v. Naveen Sareen & Ors.*** and CS (OS) No.1449/2012, ***Navneet Singh Anand v. Naresh Kumar Sareen & Anr.***, were entered into much earlier than the partition suit, CS (OS) No. 2051/2012, ***Dinesh Sareen & Another v. Naveen Sareen & Others***. The suit for

partition was filed subsequently.

- (iii) As far as the stay order dated 27th January, 1996 is concerned, it had directed that the property in question shall not be alienated by any mode till further orders. Whether there was violation of the stay order and whether the agreements-to-sell would amount to alienation would be the subject matter of contempt proceedings pending in Jammu and not directly an issue or question before us. This stay order, therefore, on its own would not materially affect the impugned order allowing the application under Order I Rule 10 C.P.C. impleading the 7th respondent as a defendant to the suit for partition.

16. This brings us to the issue in question; whether the 7th respondent's application under Order I Rule 10 should have been allowed? It is contended before us that the 7th respondent is an outsider and in these circumstances, he should not have been impleaded as a party. Respondent No.6, Ramesh Chand Sareen, who had appeared in person made similar submissions. Reliance is placed by the appellants on Section 44 of the Transfer of Property Act, 1882 and Section 4 of the Partition Act, 1893. The judgments in the case of *Gautam Paul v. Debi Rani Paul & Ors.* AIR 2001 SC 61, *Mandali Ranganna & Ors. v. T. Ramachandra & Ors.*, AIR 2008 SC 2291, *Autodesk Inc. & Anr. v. Arup Dass & Ors.*, 2014 II AD (Delhi) 451, *Saroj Aggarwal & Anr. v. Shakuntla Aggarwal*, 197 (2013) DLT 237, *Narshimha Murti v. Smt. Sushilabai & Ors.*, AIR 1996 SC 1826, *State of Bihar v. Rani Nabati Kumari*, AIR 1996 SC 221, *Sahib Zada Atul Bias Khan v. Budh Singh Bapna*, AIR 1973 Rajasthan 201, *Vidya Charan Shukla, Appellant v. Tamil Nadu Olympic Association &*

Anr. AIR 1991, Madras 323, *Sunil Gupta v. Nargis Khanna*, 185 (2011) DLT 760, *Century Floor Mills Ltd. v. S. Suppiah and Ors.* AIR 1975, Madras 270 (Full Bench), *Surender Singh & Ors. v. Lal Sheoraj Bahadursingh & Ors.* AIR 1985 M.P. 85, *Gobinda Parida & Ors. v. Chakradhara Routary & Ors.* AIR 171 Orissa 10, *Kishore Chandra Jagadev Ray v. Puri Municipality and Anr.*, AIR 1988 Orissa 284 and *Velamanchuli Vanketeswarqa Rao v. Tathineni Venkat Subhayya and Anr.*, AIR 1980, A.P. 208 have been relied upon

17. Reference at this stage need only be made to *Gautam Paul* (supra), for the ratio recorded therein supports the 7th respondent, Navneet Singh Anand. In the said case, the Supreme Court had interpreted Section 4 of the Partition Act, 1893. Section 4, it was observed, applies only when a third person, i.e. an outsider, files a suit for partition and would not be applicable when the suit for partition is filed by one of the co-owners. Reference was made to the decision of the Supreme Court in *Babulal v. Habibnoor Khan*, (2000) 5 SCC 662, wherein analysing the implications of section 4 of the Partition Act 1893, the Supreme Court had observed:-

“23.....The legislature was aware that in a suit for partition the stranger/outsider, who has purchased a share, would have to be made a party. The legislature was aware that in a suit for partition the parties are interchangeable. The legislature was aware that a partition suit would result in a decree for partition and in most cases a division by metes and bounds. The legislature was aware that on an actual division, like all other co-sharers, the stranger/outsider would also get possession of his share. Yet the legislature did not provide that the right for pre-emption could be exercised “in any suit for partition”. The legislature only provided for such right when the “transferee sues for partition”. The intention of the legislature is clear. There had to be initiation of proceedings or the making of a

claim to partition by the stranger/outsider. This could be by way of initiating a proceeding for partition or even claiming partition in execution. However, a mere assertion of a claim to a share without demanding separation and possession (by the outsider) is not enough to give to the other co-sharers a right of pre-emption. There is a difference between a mere assertion that he has a share and a claiming for possession of that share. So long as the stranger-purchaser does not seek actual division and possession, either in the suit or in execution proceedings, it cannot be said that he has sued for partition.....”

The aforesaid quotation specifically notices that the Legislature was aware that in a suit for partition a stranger/outsider, who had purchased a share, would have to be made a party. This was the position in the present case also, when the suit for partition was filed on or about 13th July, 2012, as by then an outsider, namely, Navneet Singh Anand, respondent No.7 had already entered into agreements in 2008, and thus could have been made a party to the suit for partition.

18. In *Sunil Gupta v. Nargis Khanna* (supra), which is relied by the appellants, a single Judge of this Court [Valmiki J. Mehta J., who is also the author of the impugned order and the stay order dated 18th July, 2012 passed in CS (OS) No. 2051/2012, *Dinesh Sareen & Anr. v. Navin Sareen & Ors.*] had observed that a stranger should not be allowed to enter into possession, and referring to section 44 of the Transfer of Property Act, 1882, it was elucidated that the provision is a part of a scheme of agnate and cognate statutes which have the object and purpose of ensuring that in the residential dwelling of a family, no stranger is allowed to enter into possession. Section 44 of the Transfer of Property Act, 1882 relates to entitlement of joint possession and other common or part enjoyment of a

house. These are all aspects and issues which can be relied and examined during the course of trial. Section 44 would not, in our opinion, bar or prohibit the impleadment in the present case. Other judgments, with respect, we state are of no relevance to the issue in question.

19. Recently, the Supreme Court in ***Thomson Press (India) Ltd. v. Nanak Builders and Investors Private Ltd. and Ors.*** (2013) 5 SCC 397 examined the question whether a transferee/purchaser pendente lite would be entitled to impleadment when there is a Court injunction restraining further transaction or alienation of the suit property in a suit for specific performance. This judgment refers to Section 52 of the Transfer of Property Act, which incorporates the doctrine of *lis pendens* with the object and purpose to strike at the attempts by the parties to the litigation to circumvent the jurisdiction of the court. The provision binds alienees acquiring any immovable property during the litigation. Section 19 of the Specific Relief Act, 1963, the judgment holds, manifests that a contract of specific performance may be enforced against parties to the contract and the person mentioned in the said Section. Clause (b) of the Section 19 makes it clear that a suit for specific performance cannot be enforced against a person, who is a transferee from the vendor for valuable consideration and without notice of the original contract. M.Y. Eqbal, J. on consideration of the facts held that the appellant therein had entered into a clandestine transaction and had got the property transferred. The appellants were not *bona fide* purchaser without notice. Nevertheless it was ruled and held that the High Court, including the Division Bench, had not gone into the question whether a person who purchases a property in violation of an order of injunction and having such sufficient notice, need be added as a party for

passing the effective decree. Reference was made to several decisions and Section 52 of the Transfer of Property Act and it was held that the ends of justice would be met if the appellant therein was added as a party defendant in spite of the clear violation of interim injunction orders.

20. The judgment by M.Y. Eqbal, J. had referred to ***Surjit Singh and Others v. Harbans Singh and Others*** (1995) 6 SCC 50, where a suit for partition was filed and a preliminary decree had been passed between the legal heirs of the original owners and there was also an order restraining the parties or otherwise transferring in any manner any part of the property. The impleadment application filed by the assignee, under Order XXII Rule 10, was allowed by the trial court and upheld by the High Court, but the order was set aside by the Supreme Court on the ground that when the Court intends a particular state of affairs to exist while it is in seisin of a lis, then such state of affairs is not only required to be maintained, but is presumed to exist till the Court orders otherwise. It is the duty of the Court and also the right of the parties adversely affected to treat the alienation as having not taken place for all purpose. This decision was distinguished in ***Savitri Devi v. District Judge, Gorakhpur and Others*** (1999) 2 SCC 577 on the ground that in the latter case the transferees, it was claimed, were bona fide purchasers for value and in good faith. Whether or not their stand was correct could only be decided after impleadment in the suit and if the application for impleadment was thrown out without decision on the question, the said respondents would come up for claim in a separate suit for proceedings, thereby resulting in multiplicity of proceedings. *Surjit Singh's* case (supra) was distinguished on the ground that in the said case, the assignees had knowledge of the injunction order passed by the Court.

In *Vidhur Impex and Traders Pvt. Ltd. v. Tosh Apartments Pvt. Ltd. & Ors.* 2012 (8) SCC 384, the following broad principles for disposal of an application for impleadment were laid down:-

“41. Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:

41.1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the Suit.

41.2. A necessary party is the person who ought to be joined as party to the Suit and in whose absence an effective decree cannot be passed by the Court.

41.3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

41.4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.

41.5. In a Suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files Application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

41.6. However, if the applicant is guilty of contumacious conduct or

is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment.”

21. Relying upon **Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay & Ors.**, 1992 (2) SCC 524, it was observed that Order I Rule 10 gives wide discretion to the Court to meet every case or defect of a party and then proceed to decide whether the person is necessary or a proforma/proper party, whose presence in the Court is essential for effective determination of the issues involved. The said party should be one who would be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless the person is a party to the proceedings. Mere interest in the litigation would not be sufficient. The true test lies not so much in an analysis of what are the constituents of the applicants’ rights, but rather what would be the result on the subject matter of the action if those rights were affected. The core test being whether the order which the plaintiff is asking for, directly affects the intervenor in the enjoyment of his legal rights.

22. T.S Thakur, J. (as his Lordship then was) in his concurring and supplementing opinion in **Thomson Press** (supra) had observed and held:-

“53. There is, therefore, little room for any doubt that the transfer of the suit property pendente lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent court, we do not see any reason why the

breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor.

54. The third dimension which arises for consideration is about the right of a transferee pendente lite to seek addition as a party-defendant to the suit under Order 1 Rule 10 CPC. I have no hesitation in concurring with the view that no one other than the parties to an agreement to sell is a necessary and proper party to a suit. The decisions of this Court have elaborated that aspect sufficiently making any further elucidation unnecessary. The High Court has understood and applied the legal propositions correctly while dismissing the application of the appellant under Order 1 Rule 10 CPC. What must all the same be addressed is whether the prayer made by the appellant could be allowed under Order 22 Rule 10 CPC, which is as under:

“10. Procedure in case of assignment before final order in suit.—(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

A simple reading of the above provision would show that in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. What has troubled us is

whether independent of Order 1 Rule 10 CPC the prayer for addition made by the appellant could be considered in the light of the above provisions and, if so, whether the appellant could be added as a party-defendant to the suit. Our answer is in the affirmative. It is true that the application which the appellant made was only under Order 1 Rule 10 CPC but the enabling provision of Order 22 Rule 10 CPC could always be invoked if the fact situation so demanded. It was in any case not urged by the counsel for the respondents that Order 22 Rule 10 could not be called in aid with a view to justifying addition of the appellant as a party-defendant. Such being the position all that is required to be examined is whether a transferee pendente lite could in a suit for specific performance be added as a party-defendant and, if so, on what terms.”

23. Thereafter, the following passage from ***Khemchand Shankar Choudhari Vs. Vishnu Hari Patil*** (1983) 1 SCC 18 was quoted:-

“6. Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject-matter of a suit from any of the parties to the suit will be bound insofar as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. *Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard.* He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a

party who dies during the pendency of a suit or a proceeding, or an Official Receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an Official Receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to the court to be impleaded as parties they cannot be turned out.”

Reference was made to *Amit Kumar Shaw Vs. Farida Khatoon* (2005) 11 SCC 403 and it was observed:-

“56. To the same effect is the decision of this Court in *Amit Kumar Shaw v. Farida Khatoon* [(2005) 11 SCC 403] wherein this Court held that a transferor pendente lite may not even defend the title properly as he has no interest in the same or may collude with the plaintiff in which case the interest of the purchaser pendente lite will be ignored. To avoid such situations the transferee pendente lite can be added as a party-defendant to the case provided his interest is substantial and not just peripheral. This is particularly so where the transferee pendente lite acquires interest in the entire estate that forms the subject-matter of the dispute. This Court observed: (SCC p. 411, para 16)

“16. The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. *A transferee pendente lite to the extent he has acquired interest from the defendant is vitally interested in the litigation, where the transfer is of the entire interest of the defendant; the latter having no more interest in the property may not properly defend the suit. He may collude with the plaintiff. Hence, though the plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may*

be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.”

24. In the end, to sum up, T.S. Thakur, J. (as his Lordship then was) observed:-

“57. To sum up

57.1. The appellant is not a bona fide purchaser and is, therefore, not protected against specific performance of the contract between the plaintiffs and the defendant owners in the suit.

57.2. The transfer in favour of the appellant pendente lite is effective in transferring title to the appellant but such title shall remain subservient to the rights of the plaintiff in the suit and subject to any direction which the Court may eventually pass therein.

57.3. Since the appellant has purchased the entire estate that forms the subject-matter of the suit, the appellant is entitled to be added as a party-defendant to the suit.

57.4. The appellant shall as a result of his addition raise and pursue only such defences as were available and taken by the original defendants and none other.”

25. The aforesaid judgment of the Supreme Court in the case of *Surjit Singh* (Supra) would foreclose the issues and contentions raised by the

appellants challenging impleadment of the 7th respondent to the suit for partition. The appeal, therefore, to this extent has to be dismissed.

26. We would, however, clarify that the single Judge would be entitled to go into and examine the question relating to Section 44 of the Transfer of Property Act, 1882 as well as relevant provisions of the Partition Act, 1893 to the extent they are applicable. By upholding the order allowing application for impleadment, the said issues have not been foreclosed and exhausted.

27. Recording the above, the appeal is dismissed. There would be no order as to costs.

-sd-

(SANJIV KHANNA)
JUDGE

-sd-

(SUNITA GUPTA)
JUDGE

SEPTEMBER 29, 2016
NA/ssn/VKR