

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.11925 OF 2016

1. Rama @ Ramdas Bapu Khakal,
Age-50 years, Occu-Agriculturist,

2. Navnath s/o Rama Khakal,
Age-38 years, Occu-Agriculturist,
Both r/o Raui-Chhatishi,
Tq. and Dist.Ahmednagar

-- PETITIONERS

VERSUS

1. Narayan Govinda Khakal,
Age-78 years, Occu-Agriculturist,

2. Sonyabapu s/o Narayan Khakal,
Age-47 years, Occu-Agriculturist,
Both respondent Nos. 1 and 2
R/o Raui-Chhatishi,
Tq. and Dist. Ahmednagar.

3. Paraji s/o Rangnath Bhogade,
Age-52 years, Occu-Agriculturist,
R/o Pandhari, Tq.Ashti,
Dist.Beed,

4. Asaram @ Ashok s/o Bapu Khakal,
Age-57 years, Occu-Agriculturist,
R/o Raui-Chhatishi,
Tq. and Dist.Ahmednagar,

5. Bandu Madhukar Bhavar,
Age-33 years, Occu-Agriculturist,

6. Santosh Haribhau Gore,
Age-37 years, Occu-Agriculturist,

7. Anita Santosh Gore,
Age-31 years, Occu-Agriculturist and
Household,

Respondent Nos. 5 to 7 r/o
Rau-Chhatishi,
Tq. and Dist. Ahmednagar

-- RESPONDENTS

Mr.V.P.Latange, Advocate for the petitioners.
Mr.A.G.Ambetkar, Advocate for respondent Nos.1, 2 and 5 to 7.
Mr.A.T.Kanawade, Advocate for respondent No.3.
Mr.N.B.Patekar, Advocate for respondent No.4.

(CORAM : Ravindra V.Ghuge, J.)

DATE : 09/06/2017

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard finally by the consent of the parties.
2. The petitioners are aggrieved by the order dated 04/10/2016 passed by the learned Principal District Judge, Ahmednagar vide which application Exh.31 filed by respondent Nos.5, 6 and 7 herein for being added as defendants in Reg.Appeal No.351/2010, has been allowed.
3. Mr.Latange, learned Advocate for the petitioners submits that the petitioners are the original plaintiffs. They had preferred Reg.Civil Suit No.268/2008 for seeking partition and separate possession to the extent of half share of the suit land bearing No.151 and 743. By judgment dated 30/09/2010, the suit was dismissed. The plaintiffs

preferred the appeal before the Appellate Court. During the pendency of the appeal, respondent Nos. 5 to 7 purchased a portion of the suit property to the extent of 20 R and 24 R from Gat No.151 on 06/11/2012. An application under Order 1 Rule 10 of the CPC was preferred by them praying for being arrayed as defendants. Mr.Latange strenuously submits that the said purchase is prohibited by Section 52 of the Transfer of Property Act, 1882 and in the face of such a prohibition, the purchase of the property *pendenti lite* would not create any rights in the said applicants. The fate of the suit or the appeal which is the continuation of the suit, to be suffered by the original defendants will also have to be suffered by the subsequent purchasers.

4. Mr.Latange further submits that respondent Nos. 5 to 7 are not bonafide purchasers. They reside in the same village in which the litigating parties reside and are therefore presumed to have the knowledge of the pending litigation. He further submits that these respondents have not paid any consideration to defendant No.4 while purchasing the said property. The intention is to complicate the litigation and cause obstruction in the path of the petitioners.

5. Learned Advocates for respondent Nos. 5, 6 and 7 have

supported the impugned order and have strenuously submitted that there cannot be a presumption that these respondents are not bonafide purchasers.

6. The petitioners have relied upon the judgment of this Court in the matter of Shri Premanand Gajanan Naik and another Vs. Sachit Gajanan Naik and another [2014(6) All MR 6].

7. Respondent Nos. 5, 6 and 7 have relied upon the following judgments :-

- (i) *Somnath Banerjee Vs. Smt.Arati Rani Chakraborty and another*, AIR 2010 Gauhati, 187,
- (ii) *Shuwam Construction Pvt.Ltd., Vs.Smt.Babita Mohanty and another*, AIR 200 Orissa, 65,
- (iii) *Gauri Shankar Pathak and others Vs. Dr.Shankaranand Upadhyay and others*, AIR 2011 Patna 66,
- (iv) *Ramader Appala Narasinga Rao Vs. Chundurur Sarada*, AIR 1976 AP 226,
- (v) *Satyanarayan s/o Swaroopnarayan Khandelwal Vs. Chandrakalabai w/o Ramssahay Khandelwal and others*, 2009(4) Mh.L.J.541,
- (vi) *Amit Kumar Shaw and another Vs. Farida Khatoon and another*, 2005(3) Mh.L.J. 330.

8. Learned Advocates for the respective sides fairly state that

there is no prohibition expressly carved out under the Civil Procedure Code or any other law by which a purchaser *pendenti lite* would always be prohibited from participating in any litigation pertaining to the portion of the suit property purchased by him. Section 52 of the Transfer of Property Act though creates an embargo on creating third party interest in the suit property during the pendency of the suit, it does not prescribe a prohibition on addition of the third party purchaser as a defendant in any proceeding. Section 52 reads as under :-

*“52. Transfer of property pending suit relating thereto : During the (pendency) in any Court having authority [within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government] [***] of [any] suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”*

9. The judgment of this Court in the case of Premanand Gajanan (supra) may not assist the petitioners since this Court has concluded in paragraph No.17 that the party, who seeks its impleadment, must

satisfy that its presence is necessary for determination of the real controversy in the suit. The observations of this Court in paragraph Nos. 17 to 19 of the Premanand Gajanan (supra) read as under :-

“17. There can be no quarrel about the principle that the power under Order 1 Rule 10 of C.P.C. must be exercised by a Civil Court in a manner as to advance the cause of justice by doing that which is a must for determination of real controversy involved in the suit. The power is not to be used just for the asking by any party. The party who seeks its impleadment in the suit must satisfy that its presence is necessary for determination of real controversy in the suit. The real test for ascertaining of the presence of the party would lie in answer to the question as to whether the party has interest in the suit and if the answer is yes, the presence of party would become necessary. Reason being that a party having interest in the lis is most likely to be affected directly and substantially in its rights by a decision in the suit. But, care has to be taken to ensure that interest of the party is real and direct, and is not based upon a claim which has no direct relation with the subject matter or cause of action of the suit or the reliefs claimed in the suit. If the interest is remote or indirect, the party would not be a necessary party and thus cannot be joined as party to the suit.

18. A plaintiff, no doubt, enjoys a status in the suit of what is called as "dominus litus" entitling him to decide as to who should be the party and who should not be. But such entitlement of the plaintiff is not absolute and certainly cannot be used to defeat

the rights and interests of the other persons in relation to subject matter of the suit and the reliefs claimed therein.

19.

19. In the case of Shaila Subrao Shetye Vs. Kunda Madhukar Shetye, 2014(2) ALL MR 165, the learned Single Judge of this Court has taken a view that status of the plaintiffs being "dominus litus" is not absolute and it cannot be used to defeat the statutory rights of the other party to the suit and therefore, it could not be an impediment in the way of the Court considering an application either for addition or for deletion of the parties. This view fortifies the above view taken by me."

10. The Hon'ble Apex Court in Amitkumar Shaw (supra) has observed in paragraph No.15, 16 and 17 as under :-

"15. Section 52 of the Transfer of Property Act is an expression of the principle "pending a litigation nothing new should be introduced". It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This Section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:

1. There must be a suit or proceeding pending in a Court of competent jurisdiction.

2. *The suit or proceeding must not be collusive.*
3. *The litigation must be one in which right to immovable property is directly and specifically in question.*
4. *There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation,*
5. *Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.*
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, whether / 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 XXII 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 the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

17. In the instant case, the applications for substitution were filed by the respective appellants in the second appeals which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see bona fide in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants are absolutely necessary in order to decide the appeals on merits. Since the High Court has committed error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited. We have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as prayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation."

11. The law is thus settled that an *alienee pendente lite* would always be bound by the verdict of the Court in the suit and would always be subject to the final decree that would be passed. Such an alienee could be brought on record as a defendant under Order 1 Rule 10 of the CPC if it appears that his substantial interest in the suit property would depend upon the verdict in the said suit.

12. It also cannot be ruled out that the defendant who has sold the suit property or a portion thereof during the pendency of the litigation, may not subsequently demonstrate or exhibit that level of interest in contesting the suit which he would have normally generated, had his interest in the suit property survived. Having given up the right, title and interest in the property, he may not eventually have the desire to defend his non-existing interest which he would have otherwise defended. In such a situation, there is a possibility that the alienee on the one hand would be precluded from espousing his cause and on the other hand would be left to the mercy of the defendant who has lost interest in the suit.

13. Order 1 Rule 10 of the CPC reads as under :-

“10. Suit in name of wrong plaintiff.- (1) Where a suit has been instituted in the name of the wrong person as plaintiff or

where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the Suit has been instituted through a bone fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the court thinks just.

(2) Court may strike out or add parties — The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended — Where a defendant is added, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877

(15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

14. Considering this case in the light of the facts and the law laid down by the Hon'ble Supreme Court in the Amitkumar Shaw case (supra), I do not find that the impugned order dated 04/10/2016 could be termed as being perverse or erroneous.

15. This petition, being devoid of merit, is therefore dismissed.
Rule is discharged.

(Ravindra V.Ghuge, J.)