

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION  
WRIT PETITION NO.5844 OF 2016

Prakash Dattatraya Patil ... Petitioner  
Vs.  
Ismail Abdul Jamdar and others ... Respondents

Mr. Chetan G. Patil for Petitioner.  
Mr. P. D. Dalvi for Respondent No.1.

**CORAM : R. G. KETKAR, J.**  
**DATE : FEBRUARY 28, 2017**

**P.C. :**

Heard Mr. Patil, learned Counsel for petitioner and Mr. Dalvi, learned Counsel for respondent No.1 at length. On the motion made by Mr. Patil leave to delete respondents No.2A and 2B, being the legal representatives of respondent No.2, is granted as respondent No.1 being the original plaintiff is the only contesting respondent. Amendment shall be carried out forthwith. Rule. Mr. Dalvi waives service for respondent No.1. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'applicant', has challenged the judgment and order dated 01.03.2016 passed by the learned 6<sup>th</sup> Joint Civil Judge, Junior Division, Ichalkaranji below exhibit-64 in Regular Civil Suit No.159 of 2013. By that order, the learned trial Judge rejected the application made under Order I, Rule 10(2) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for impleading applicant as defendant in the Suit.

3. Mr. Patil submitted that respondent No.1, hereinafter referred to as 'plaintiff', has instituted Suit against respondent No.2, hereinafter referred to as 'defendant', on the ground that defendant had executed agreement of sale dated 07.06.2004 in his favour for a consideration of Rs.1,40,000/-. Defendant is avoiding to execute the sale deed and he is trying to sell the suit property to others. Due to old age, defendant could not attend the proceedings of the Suit and therefore, executed Power of Attorney in favour of the applicant on 24.04.2013. On 25.04.2013, applicant made statement that defendant will not create third party interest till next date i.e. 14.06.2013. On 14.06.2013, the learned trial Judge passed order of status-quo till the decision of exhibit-5. On 14.06.2013, written statement was filed on behalf of the defendant opposing the Suit. It is not in dispute that on 22.01.2014, defendant executed registered sale deed in favour of the applicant.

4. During the pendency of the Suit, defendant expired on 14.02.2015. His legal representatives were brought on record. On 31.01.2017, plaintiff has filed Purshis setting out therein that the Suit is likely to be compromised, and therefore, the matter may be referred for mediation. The learned trial Judge has referred the matter to mediation and the mediation is fixed on 18.02.2017.

5. Mr. Patil submitted that in view of the decision of the Apex Court in ***Thomson Press (India) Ltd vs. Nanak Builders & Investors (P) Ltd., (2013) 5 SCC 397***, applicant deserves to be impleaded as a party defendant. He states that applicant is present in the Court. He has tendered photocopy of applicant's Aadhar Card, which is taken on record and marked 'X' for identification. Upon taking instructions from the applicant, he states that applicant will not claim that he is a bonafide purchaser and is, therefore, not protected against the specific performance of contract with the plaintiff and defendant's owner in the

Suit. He invited my attention to the summary made by the Apex Court in paragraph 57 and submitted that order in similar lines may be passed in this Petition.

6. Mr. Dalvi submitted that applicant has not made application under Order XXII, Rule 10 of the C.P.C. but application is made under Order I, Rule 10(2). He invited my attention to the recitals in the sale deed to the effect that in respect of the suit property, no proceedings are pending in any Court and that the suit property is free from encumbrances. He submitted that the said recital is factually incorrect and contrary to record. As the applicant has purchased the property with full knowledge of the interim order, the sale deed executed in his favour by the defendant on 22.01.2014 is null and void and does not confer any title on the applicant. He further submitted that Suit is essentially for specific performance of contract between plaintiff and defendant. Applicant is not party to the agreement. He is, therefore, neither a necessary nor a proper party. He, therefore, submitted that no case is made out for interfering with the impugned order.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that plaintiff has instituted Suit against the defendant for specific performance of the agreement of sale dated 07.06.2004. On 24.04.2013, defendant executed power of attorney in favour of the applicant. Perusal of the power of attorney shows that defendant authorized applicant to defend the Suit by taking necessary steps. In other words, defendant did not give authority to the applicant to dispose of the suit property. Perusal of the sale deed dated 22.01.2014 also shows that defendant executed the registered sale deed in favour of the applicant. It is also evident from record that on

25.04.2013, applicant made statement on behalf of the defendant that defendant will not create third party interest till next dated i.e. 14.06.2013. It is equally not in dispute that on 14.06.2013 that status-quo was continued till disposal of exhibit-5. It is also not in dispute that on the date of execution of the sale deed dated 22.01.2014. status-quo was in force. In other words, despite status-quo order being in force, defendant executed sale deed in favour of the applicant. As the applicant was defending the Suit on behalf of the defendant as also made statement on 25.04.2013 that defendant will not create third party interest till the next date i.e. 14.06.2013, it cannot be said that he was unaware of passing of order by the learned trial Judge. In fact, the said fact was also not seriously disputed by the applicant.

8. In the case of **Thomson Press (India) Ltd.** (*supra*), the Apex Court considered the question as to whether if the appellant, who is the transferee pendente lite, having notice and knowledge about the pendency of the suit for specific performance and order of injunction can be impleaded as party under Order I, Rule 10 on the basis of sale deeds executed in their favour by the defendants Sawhneys.

9. After considering law on this subject, in paragraph 57, the Apex Court has summarized the legal position thus,

“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 owner defendants 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 defenses as were available and taken by the original defendants and none other.”

10. In view thereof, applicant herein cannot claim to be a bonafide purchaser and is therefore, not protected against the specific performance of contract between the plaintiff and defendant's owner in the Suit. The transfer in favour of the applicant pendente lite is effective in transferring title to the applicant 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. Since the applicant has purchased the entire estate that forms the subject matter of the Suit, the applicant is entitled to be added as a party defendant to the Suit. Applicant shall as a result of his addition raise and pursue only such defenses as were available and taken by the original defendants and none other.

11. Mr. Dalvi submitted that applicant is not party to the agreement of sale dated 07.06.2004 executed in favour of the defendant, and therefore, he is neither a necessary nor a proper party. In the case of ***Kasturi Vs. Iyyamperumal, (2005) 6 SCC 733***, the Apex Court has observed in paragraph 7 thus,

“7. In our view, a bare reading of this provision namely, second part of Order 1 Rule 10 sub-rule (2) of the 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 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.”

12. In view thereof, in my opinion, applicant is a necessary party as he would be affected if he has purchased the suit property with or without notice of the contract. Hence, impugned order deserves to be set aside and is accordingly set aside. Application exhibit-64 stands allowed. Plaintiff shall carry out amendment within 14 days from the production of the authenticated copy of this order in the trial Court. Mr. Patil, upon taking instructions from the applicant, states that pending the Suit, applicant will not create third party interest on the basis of the sale deed dated 22.01.2014. Statement made by Mr. Patil, on instructions, is recorded. Rule is made absolute in the aforesaid terms with no order as to costs. Order accordingly.

**(R. G. KETKAR, J.)**

*Minal Parab*