

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
ORDINARY ORIGINAL CIVIL JURISDICTION  
APPEAL NO.368 OF 2017  
IN  
CHAMBER SUMMONS NO.55 OF 2015  
IN  
SUIT NO.783 OF 1987**

**1 Behram Nowrosji Gamadia )  
a Parsi of Mumbai Indian Inhabitant )  
residing at Gamadia Bungalow, 31, )  
Napeansea Road, Mumbai 400 026 )**

2 Jehangir Dhan Mistri )  
a Parsi of Mumbai Indian Inhabitant )  
residing at 1<sup>st</sup> floor Burhani Mahal, )  
Mumbai 400 026 )

**..Appellants  
(orig Plaintiffs)**

## Versus

**1 Smt. Babli Samrathmal Seth )  
of Mumbai Indian Inhabitant )  
residing at 41/42 Purab Apartment )  
16<sup>th</sup> floor, Ridge Road, Opp Jain Temple )  
Malbar Hill, Mumbai 400 006 )**

**2 Shri Ramesh Samrathmal Seth )  
of Mumbai Indian Inhabitant )  
residing at Gondecha Chambers )  
N. M. Road, Fort, Mumbai 400 023 )**

3 Smt. Manju Dinesh Shah )  
of Mumbai Indian Inhabitant )  
residing at Jogani Apartment 11<sup>th</sup> floor )  
Behind Elizabeth Nursing Home, )  
Doongreshi Road, Malbar Hill )  
Mumbai 400 006 )

4 Smt. Vidya S. Seth )  
of Mumbai Indian Inhabitant )  
residing at Shankar Mahal, 7<sup>th</sup> floor )

Breach Candy, Sophia College Lane )  
Warden Road, Mumbai 40006 )

5 Mah-Hill Properties Pvt Ltd. )  
having its registered office address at )  
601, 6<sup>th</sup> floor, Hallmark Business )  
Plaza, Opp Guru Nanak Hospital )  
Government Colony, Bandra (East) )  
Mumbai 400 051 )

6 Vision Finstock Ltd. )  
3, Narayan Building, 23 L. N. Road )  
Dadar (East) Mumbai 400 014 )

..Respondents  
(orig. Defendants &  
Applicants

WITH  
APPEAL (L)NO.285 OF 2017  
IN  
CHAMBER SUMMONS NO.55 OF 2015  
IN  
SUIT NO.783 OF 1987

Shri Ramesh Samrathmal Seth )  
Age 54 Years, Residing at )  
41/42, Pural Apartment, 16<sup>th</sup> Floor )  
Bridge Road, Opp Jain Mandir )  
Malabar Hill, Mumbai 400 006 )

..Appellant

Versus

1 Mah-Hill Properties Pvt Ltd. )  
having its registered office address at )  
601, 6<sup>th</sup> floor, Hallmark Business )  
Plaza, Opp Guru Nanak Hospital )  
Government Colony, Bandra (East) )  
Mumbai 400 051 )

2 Vision Finstock Ltd. )  
3, Narayan Building, 23 L. N. Road )  
Dadar (East) Mumbai 400 014 )

3 Behram Nowrosji Gamadia )  
a Parsi of Mumbai Indian Inhabitant )  
residing at Gamadia Bungalow, 31, )

Napeansea Road, Mumbai 400 026 )

4 Jehangir Dhan Mistri )  
a Parsi of Mumbai Indian Inhabitant )  
residing at 1<sup>st</sup> floorm Burhani Mahal, )  
Mumbai 400 026 )

5 Smt. Babli Samrathmal Seth )  
Age 78 years )  
residing at 41/42 Purab Apartment )  
16<sup>th</sup> floor, Ridge Road, Opp Jain Temple )  
Malbar Hill, Mumbai 400 006 )

6 Smt. Manju Dinesh Shah )  
Age 51 years )  
residing at Jogani Apartment 11<sup>th</sup> floor )  
Behind Elizabeth Nursing Home, )  
Doongreshi Road, Malbar Hill )  
Mumbai 400 006 )

7 Smt. Vidya S. Seth )  
Age 50 years )  
residing at Shankar Mahal, 7<sup>th</sup> floor )  
Breach Candy, Sophia College Lane )  
Warden Road, Mumbai 40006 )

..Respondents

WITH  
APPEAL (L) NO.289 OF 2017  
IN  
CHAMBER SUMMONS NO.55 OF 2015  
IN  
SUIT NO.783 OF 1987

Shri Babli Samrathmal Seth )  
Age 78 Years, Residing at )  
41/42, Pural Apartment, 16<sup>th</sup> Floor )  
Bridge Road, Opp Jain Mandir )  
Malabar Hill, Mumbai 400 006 )

..Appellant

Versus

1 Mah-Hill Properties Pvt Ltd. )

having its registered office address at )  
 601, 6<sup>th</sup> floor, Hallmark Business )  
 Plaza, Opp Guru Nanak Hospital )  
 Government Colony, Bandra (East) )  
 Mumbai 400 051 )

2 Vision Finstock Ltd. )  
 3, Narayan Building, 23 L. N. Road )  
 Dadar (East) Mumbai 400 014 )

3 Behram Nowrosji Gamadia )  
 a Parsi of Mumbai Indian Inhabitant )  
 residing at Gamadia Bungalow, 31, )  
 Napeansea Road, Mumbai 400 026 )

4 Jehangir Dhan Mistri )  
 a Parsi of Mumbai Indian Inhabitant )  
 residing at 1<sup>st</sup> floorm Burhani Mahal, )  
 Mumbai 400 026 )

5 Shri Ramshsaruara Thermal Seth )  
 Age 54 years residing at 309, )  
 Gundecha Chambers, N. M. Road, )  
 Fort Mumbai 400 023 )

6 Smt. Manju Dinesh Shah )  
 Age 51 years )  
 residing at Jogani Apartment 11<sup>th</sup> floor )  
 Behind Elizabeth Nursing Home, )  
 Doongreshi Road, Malbar Hill )  
 Mumbai 400 006 )

7 Smt. Vidya S. Seth )  
 Age 50 years )  
 residing at Shankar Mahal, 7<sup>th</sup> floor )  
 Breach Candy, Sophia College Lane )  
 Warden Road, Mumbai 40006 )

..Respondents

WITH  
 APPEAL (L) NO.292 OF 2017  
 IN  
 CHAMBER SUMMONS NO.55 OF 2015  
 IN

## SUIT NO.783 OF 1987

Smt. Vidya S. Seth )  
 Age 50 years )  
 residing at Shankar Mahal, 7<sup>th</sup> floor )  
 Breach Candy, Sophia College Lane )  
 Warden Road, Mumbai 40006 )

..Appellant

## Versus

1 Mah-Hill Properties Pvt Ltd. )  
 having its registered office address at )  
 601, 6<sup>th</sup> floor, Hallmark Business )  
 Plaza, Opp Guru Nanak Hospital )  
 Government Colony, Bandra (East) )  
 Mumbai 400 051 )

2 Vision Finstock Ltd. )  
 3, Narayan Building, 23 L. N. Road )  
 Dadar (East) Mumbai 400 014 )

3 Behram Nowrosji Gamadia )  
 a Parsi of Mumbai Indian Inhabitant )  
 residing at Gamadia Bungalow, 31, )  
 Napeansea Road, Mumbai 400 026 )

4 Jehangir Dhan Mistri )  
 a Parsi of Mumbai Indian Inhabitant )  
 residing at 1<sup>st</sup> floorm Burhani Mahal, )  
 Mumbai 400 026 )

5 Smt. Babli Samrathmal Seth )  
 Age 78 years )  
 residing at 41/42 Purab Apartment )  
 16<sup>th</sup> floor, Ridge Road, Opp Jain Temple )  
 Malbar Hill, Mumbai 400 006 )

6 Smt. Manju Dinesh Shah )  
 Age 51 years )  
 residing at Jogani Apartment 11<sup>th</sup> floor )  
 Behind Elizabeth Nursing Home, )  
 Doongreshi Road, Malbar Hill )  
 Mumbai 400 006 )

|                                                     |   |               |
|-----------------------------------------------------|---|---------------|
| 7 Ramesh Samrathmal Seth                            | ) |               |
| Age 54 years                                        | ) |               |
| residing at 41/42 Purab Apartment                   | ) |               |
| 16 <sup>th</sup> floor, Ridge Road, Opp Jain Temple | ) |               |
| Malbar Hill, Mumbai 400 006                         | ) | ..Respondents |

Mr. Darius Khambata, Senior Advocate, a/w Mr. Snehal Shah,a/w Mr. S.V. Doijode, a/w Ms. Falguni Thakkar, a/w Mr. Saurish Shetye, i/b. Doijode Associates, for Appellant in Appeal No.368/2017 and for R.No.3 & 4 in Appeal (L) No.285/2017.

Mr. P.S. Dani, Senior Advocate, i/b. Mr. A.I. Sheth, for Appellant in Appeal (L) No. 285/2017 and for the Respondent No.2 in Appeal No.368 of 2017.

Mr.Vikram Nankani, Senior Advocate, a/w Ms. Rujuta Patil, i/b. Negandhi, Shah & Himayatullah, for R.Nos. 5 & 6 in Appeal (L) No.285/17, 292/17 and for the Respondent No.6 in Appeal (L) 289 of 2017.

Mr. Mayur Khandeparkar a/w Ms Pooja Pandey i/b. Mr. A.A.Pandey, for Appellant in Appeal (L) No.289/17 for the Respondent No.5 in Appeal (L) No.285 of 2017 and (L) No.292 of 2017

Mr. Sidharth Samantaray, i/b. Mr. Y.K. Deshpande, for Appellant in Appeal (L) No.292/17 for the Respondent No.4 in Appeal No.368 of 2017, Respondent No.7 in Appeal (L) No.285 of 2017 and Appeal (L) No.289 of 2017.

CORAM :R. M. SAVANT, &  
SARANG V KOTWAL, JJ

RESERVED ON: 28<sup>th</sup> NOVEMBER, 2017

PRONOUNCED ON : 21<sup>st</sup> DECEMBER, 2017

JUDGMENT (PER R.M.SAVANT J.)

1 All the above Appeals to stand “Admitted”. By the consent of the Learned Counsel for the parties are taken up for hearing forthwith.

2           The above Appeals challenge the order dated 22-1-2017 passed by a Learned Single Judge of this Court by which order the Chamber Summons for impleadment being No.55 of 2015 filed by the Respondent Nos.5 and 6 herein came to be allowed and resultantly the said Respondent Nos.5 and 6 were directed to be impleaded as party Defendants to the Suit in question and consequential amendments were directed to be carried out in the Plaint.

3           The above Appeals involve common facts and an identical challenge. By the consent of the Learned Counsel for the parties the above Appeal No.368 of 2017 is treated as the lead matter.

          The Applicants who are the executors of the Will of the original Plaintiff Nowrosji Jehangir Gamadia would be referred to as the original Plaintiffs whereas the Respondent Nos.5 and 6 would be referred to as the Applicants.

4           The facts giving rise to the filing of the above Appeal can in brief be stated thus:

          The Appellants herein as indicated above are the executors of the Will of the original Plaintiff Nowrosji Jehangir Gamadia who had filed the Suit in question for a declaration that the original partnership entered into between the parties has been abandoned or is of no legal effect and that the Suit property is not a partnership property of the firm but absolute property of the

Plaintiff, and neither the original Defendant i.e. Samarathmal Seth or any person claiming through him has any right or interest in the same. In the alternative the Plaintiff had prayed for dissolution of the suit partnership and accounts. In the context of the challenge raised in the above Appeal, it would be apposite to refer to the reliefs sought in the Suit in question being Suit No.783 of 1987. The gist of the same is as follows:-

By prayer clause (a) the Plaintiff was seeking a declaration that the partnership constituted between the original Plaintiff and the original Defendant by the said Deed of Partnership dated 30<sup>th</sup> January, 1974 and as modified by the said Deed of Retirement dated 2<sup>nd</sup> August, 1976, has been abandoned and is of no legal effect and further that the property in question is not partnership property but the absolute property of the Plaintiff and that the Defendant or Defendants do not have any right.

By prayer clause (b) the Plaintiff sought the dissolution of the suit firm and the consequential reliefs thereto.

By way of interim reliefs the Plaintiff sought an injunction against the Defendant from dealing with the suit property and for appointment of the Court Receiver as Receiver of the suit property under Order 40 of the CPC.

4 In so far as the partnership is concerned, the same was constituted

between the original Plaintiff [since deceased and now represented by the Plaintiff Nos.1(a) and 1(b)] and the original Defendant [since deceased now represented by the Defendant Nos.1(a) to 1(d)]. The said partnership was originally between the Plaintiff and the Defendant and one Omer Ahmed which was in the name and style of M/s S. P. Building Corporation and which came to be modified by a Deed of Retirement executed between Omer Ahmed (retiring partner) on one hand and the original Plaintiff and the original Defendant (continuing partners) on the other hand. There is also a Deed of Sub-Partnership dated 5-4-1984 between the original Defendant and 8 others concerning the 75% share of the original Defendant in the suit partnership. During the pendency of the Suit, by a Deed of Assignment dated 21-6-2008 the original Defendant assigned the actionable claim and/or chose in action including the right to contest the present Suit and all incidental benefits and claims arising out of the subject matter of the Suit (including his share in the suit partnership) in favour of one Housing Development and Infrastructure Ltd. (HDIL) for valuable consideration and upon the terms and conditions recorded in the Sub-Partnership Deed. The Deed of Assignment has been duly registered with the Sub-Registrar of Assurances. The original Defendant also executed an irrevocable Power of Attorney in favour of the HDIL. The said Power of Attorney has also been duly registered. On 5-4-2010 the said HDIL further assigned the actionable claim and/or chose in action including the rights forming part of the Deed of Assignment dated 21-6-2008, referred to

above in favour of one D. B. Properties Pvt Ltd. and Vision Finstock Ltd. The latter assignors also executed an irrevocable Power of Attorney in favour of the two assignee in respect of the subject matter of the Deed of Assignment. By Share Sale Agreement dated 7-6-2011, shareholders of D. B. Properties Pvt Ltd. sold and transferred their entire shareholding in D. B. Properties Pvt Ltd. whereupon the name of the Company was changed to Mah-Hill Properties Pvt Ltd., which is the Applicant No.1 in the above Chamber Summons. Hence by the above Chamber Summons the Applicants have sought their impleadment consequent upon the assignment of the beneficial interest of the original Defendant in the suit firm including the right to contest the above Suit on behalf of the deceased original Defendant Samarthmal Seth during the pendency of the Suit. In support of their case for impleadment, the Applicants have relied upon the registered Deeds of Assignment between (i) original Defendant and HDIL, (ii) HDIL and D. B. Properties Pvt Ltd. and Vision Finstock Ltd., (iii) Sub-Partnership in the share of the original Defendant in the suit partnership and D. B. Properties Pvt Ltd. and Vision Finstock Ltd. The case of the Applicants is therefore based on the interest in the subject matter of the Suit devolving upon them pending the Suit. The Applicants have therefore sought permission to defend the Suit under Order XXII Rule 10 of the Civil Procedure Code.

5                   To the said Chamber Summons, an Affidavit in Reply came to be

filed by the Plaintiffs objecting to the impleadment as also questioning the entitlement of the Applicants to such impleadment. In so far as the heirs of the original Defendant are concerned, they have questioned the documents on the basis of which the Applicants have sought their impleadment. In so far as the Plaintiffs are concerned, they are objecting to the impleadment on the ground that the Plaintiffs would have to face two sets of Defendants who claim to represent the same estate and whose interests conflict with each other. It is also sought to be contended in the Affidavit in Reply that the impleadment of the Applicants would result in the Suit being diverted towards a different end, namely the resolution of the dispute between the heirs of the original Defendant and the Applicants which would be detrimental to the interest of the Plaintiffs.

6           The heirs of the original Defendant who are brought on record and who are the Defendant Nos.1(a) and 1(b) and who have filed the above Appeals being Appeal (L) No.289 of 2017 and Appeal (L) No.285 of 2017 filed their Affidavits opposing the application i.e. the Chamber Summons filed by the Applicants. The said objection was on the ground that the original Defendant had not executed any document in favour of the HDIL they also denied the execution of the Deed of Assignment dated 5-4-2010 and Deed of Assignment dated 28-7-2010 and the Power Of Attorney dated 18-8-2010, meaning thereby the heirs were questioning the assignment which was

executed in favour of the Applicants by the original Defendant. The heirs also opposed the application on the ground of delay.

7           The Learned Single Judge considered the said application i.e. Chamber Summons and has by the impugned order dated 22-6-2017 allowed the same. The gist of the reasoning of the Learned Single Judge as can be seen from the impugned order is that Order XXII Rule 10 is merely an enabling provision. It gives an assignee of a party's interest during the pendency of the Suit an option to apply for leave to continue the Suit. It does not impose any obligation on the assignee to come on record. He may not choose to come on record and leave the prosecution of the Suit to his assignor in which case he is bound by the result of the Suit. The Learned Single Judge further held that the assignee at a proper juncture may seek leave to prosecute or defend the Suit as the case may be, if he is of the view that his interest would be better protected by taking over the conduct of the Suit. The Learned Single Judge observed that the reliance placed on behalf of the Plaintiffs on the Judgment of the Division Bench of the Karnataka High Court in Akka Bai Vs. Gowrawwa was misplaced. The Learned Single Judge was of the view that the law cited by the Learned Judges of the Karnataka High Court is contrary to the law laid down by the Supreme Court not only in Khemchand Shankar's case but also in various other cases. The Learned Single Judge further observed that whilst considering the application under Order XXII Rule 10 a detailed inquiry is not

contemplated and that the Court has only to be prima facie satisfied that the interest has devolved by assignment or devolution and that the validity of the assignment or devolution can be considered at the trial of the Suit on merits. The Learned Single Judge was of the view that the said issue is rested finally by the Supreme Court in the Judgment in Amit Kumar Shaw Vs. Farida Khatoon, wherein it has been held that the Court has only to be prima facie satisfied for exercising its discretion in granting leave to continue the Suit by or against the person on whom the interest has devolved by assignment or devolution. The Learned Single Judge rejected the submissions urged on behalf of the Plaintiffs that they would have to defend the Suit against the two sets of Defendants who claimed to represent the interest of the deceased original Defendant and yet plead their case differently. The Learned Judge observed that there was nothing unusual about such predicament. The Learned Single Judge held that merely because the Defendant may in accordance with Order VIII Rule 9 can seek leave of the Court to file his Written Statement and which leave can be granted by the Court in appropriate case upon such terms as it thinks fit, the said ground cannot be a ground for not allowing the Defendant to take different stands. The learned Single Judge also rejected the objection on the ground of delay by observing that the instant application has been filed by the Applicants in close proximity of the death of the original Defendant. The Learned Single Judge observed that if the Applicants are of the view that the interest of the deceased are better protected

by them as assignees rather than by legal heirs of the deceased Defendant, they may very well choose to come before the Court and apply for impleadment. As indicated above, the Learned Judge for the aforesaid reasons deemed it appropriate to allow the above Chamber Summons filed by the Applicants for their impleadment as Defendants in the Suit .

8            Heard the Learned Counsel for the parties.

9            **Submissions of the Learned Senior Counsel Mr.D. J. Khambata  
appearing for the Appellant**

(i)            The Learned Senior Counsel would re-urge the submissions made before the Learned Single Judge namely that if the Applicants are impleaded as party Defendants to the Suit, the Plaintiffs would have to face two different sets of Defendants who claim to represent the same estate and whose interest conflict with each other.

(ii)            That the impleadment of the Applicants would entail an inquiry as regards the devolution of the interest of the original Defendants in the subject matter of the Suit which inquiry would be foreign to the Plaintiffs cause of action.

(iii) That if the Applicants claim to have any right on the documents on the basis of which they seek impleadment, then they have to file their own Suit against the legal heirs of the original Defendant for asserting their right.

iv) That having regard to Section 29 of the Indian Partnership Act, the right if any of the Applicants is only to a share in the profits and the Applicants cannot seek their impleadment. Reliance is placed on the Division Bench Judgment of this Court reported in **Dhanaji Jelaji Vs. Gulabchand Pana & Ors.**<sup>1</sup> Full Bench judgment of the Lahore High Court in **Ajudhina Pershad Ram Pershad Vs. Sham Sunder & Ors.**<sup>2</sup>

(v) That in the instant case the application i.e. the Chamber Summons filed by the Applicants is not for substitution of the heirs of the original Defendant who are already brought on record but is an application for being impleaded as the Defendants which would not be permissible whilst the heirs are on record. Reliance is sought to be placed on the Judgment of the Apex Court in the matter of **Amit Kumar Shaw Vs. Farida Khatoon**<sup>3</sup>

(vi) That the application suffers from delay and laches as the assignment on the basis of which the Applicants claim their impleadment is of the year 2010, whereas the application has been filed in the year 2015 and

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<sup>1</sup> AIR 1925 Bombay 347

<sup>2</sup> AIR(34) 1947 Lahore 13 (Full Bench)

<sup>3</sup> (2005) 11 SCC 403

therefore cannot be allowed at this stage. Reliance is sought to be placed on the judgment of the Apex Court in the matter of **Vidur Impex & Traders Pvt Ltd. & ors. Vs. Tosh Apartments Pvt Ltd., & Ors.**<sup>4</sup>

(vii) That implicit in the fact of the original Defendant filing a Suit in the year 2013 against the Plaintiffs, the third partner Mr. Omer Ahmed, is the fact of there being a dispute as regards the devolution of interest in favour of the Applicants.

(viii) That the Learned Single Judge has misinterpreted and misconstrued the judgment of the Karnataka High Court in the matter of Akkabai Vs. Gowrawwa. The Learned Single Judge has also not appreciated the judgment of the Apex Court in Khemchand Vs. Vishnu Hari Patil in its proper perspective.

(ix) That if the judgments on which reliance is sought to be placed on behalf of the Applicants and the judgments on which reliance is sought to be placed by the Appellants are harmonized, then what flows from a reading of the said judgments is the fact that if there is a dispute as regards the devolution of interest, then an application for impleadment cannot be permitted.

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<sup>4</sup> (2012) 8 SCC 384

10                    **Submissions of the Learned Senior Counsel Mr. P. S. Dani appearing for the Appellant in Appeal (L) No.285 of 2017**

(i)                    The Learned Senior Counsel Mr. Dani appearing for the Appellant in Appeal (L) No.285 of 2017 adopted the submissions made by the Learned Senior Counsel Mr. Khambata, but in addition would contend that an application under Order XXII Rule 10 can only be filed whilst the person who has executed the documents in favour of the Applicants as a result of which there is a devolution of interest, is alive and cannot be filed after his demise.

(ii)                    That an application for impleadment after the demise of the person who has executed the documents in favour of the Applicants is then required to be filed under Order I Rule 10 of the CPC.

11                    **Submissions of the Learned Counsel Mr. Mayur Khandeparkar appearing for the Appellant in Appeal (L)No.289 of 2017**

(i)                    The Learned Counsel sought to question the documents on the basis of which the application was founded and impleadment sought.

(ii)                    It was the submission of the Learned Counsel that since the heirs of the original Defendant amongst whom is the Appellant represented by him

is questioning the documents executed by the original Defendant Samarthmal Sheth, the application for impleadment cannot be allowed.

12                    **Submissions of the Learned Senior Counsel Mr. Vikram Nankani appearing for the Respondent Nos.1 and 2**

(i)                    That the apprehension expressed on behalf of the Applicants that the focus of the Suit would change to that of one of resolving the dispute between the Applicants and the heirs of the Defendant is misfounded. The Suit being one filed for a declaration and in the alternative for dissolution would continue to remain so notwithstanding the inter se dispute between the heirs of the original Defendant and the Applicants.

(ii)                    The contention urged on behalf of the Plaintiffs that they would have to face two sets of Defendants who might be taking contrary stands is only a bogey to stall the impleadment of the Applicants as Defendants in the Suit.

(iii)                    That Order XXII Rule 10 confers a discretion on the assignee as to whether he should seek his impleadment or allow the Suit to be prosecuted by his assignors. In the instant case though the assignment was made in favour of the Applicants in the year 2010, the assignees i.e. the Applicants had faith in the original Defendant and therefore permitted him to prosecute the Suit till

the year 2014 when he expired and it is on his demise that the instant application was filed as the Applicants desire to protect their interest in the Suit. Hence there is no delay in filing the application.

(iv) That an ostensible dispute between the heirs of the original Defendant and the Applicants is sought to be propounded by the Plaintiffs though the heirs of the original Defendant have not questioned the intermediate transaction of the Sub-Partnership between the original Defendant and eight others in respect of his 75% interest in the partnership firm M/s S. P. Building Corporation and therefore the challenge to the Assignment made in favour of the Applicants is hollow. The said fact is required to be considered in the context of the fact that the said eight partners have executed a Deed of Assignment in favour of the HDIL to which one of the heirs of the Defendant is a confirming party.

(v) That the heirs of the original Defendant though are questioning the Deed of Assignment executed by the original Defendant but have significantly not filed any proceedings to question the said Deed of Assignment.

(vi) That grave prejudice would be caused to the Applicants if they are not impleaded, as in the event the heirs of the original Defendant act in a

manner detrimental to the interest of the Applicants the same would lead to complications and multiplicity of proceedings. Reliance is sought to be placed on the judgment of the Apex Court in the matter of **Suresh Kumar Bansal Vs. Krishna Bansal and Anr.**<sup>5</sup>

(vii) That it is well settled by the judgments of the Apex Court that a third party in whose behalf there is devolution of interest is entitled to file an application for impleadment. Reliance is sought to be placed on the judgments of the Apex Court in **Amit Kumar Shaw Vs. Farida Khatoon** (supra) and **Thomson Press India Pvt Ltd Vs. Nanak Builders & Investors Pvt Ltd & Ors**<sup>6</sup>.

### 13 CONSIDERATION

Having heard the Learned Counsel for the parties, we have given our anxious consideration to the rival contentions. The issue which arises is whether the Applicants are entitled to be impleaded as party Defendants in the Suit in question. In the context of the said issue, it would be appropriate to reproduce the prayers in the Suit in verbatim:

(a) That this Hon'ble Court be pleased to declare that the partnership constituted between the original Plaintiff and the original Defendant by the said Deed of Partnership dated 30<sup>th</sup> January, 1974 and as modified by the said Deed of

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<sup>5</sup> (2010) 2 SCC 162

<sup>6</sup> (2013) 5 SCC 397

Retirement dated 2<sup>nd</sup> August, 1976, has been abandoned and is of no legal effect whatsoever from its very inception and the said property is not partnership property of the suit firm but the absolute property of the Plaintiffs and the original Defendant and the Defendants or any other person claiming through the original Defendant and the Defendants do not have any right title interest in the said property.

(b) that in the alternative to prayer (a) hereinabove:

(i) this Hon'ble Court be pleased to declare that the suit firm between the parties hereto stands dissolved and

(ii) that this Hon'ble Court be pleased to order and decree that the accounts of the suit firm be taken and all the partnership properties (including the said property) be disposed of in accordance with the provisions of the Indian Partnership Act, 1932 and the contracts between the parties.

(c) that pending the hearing and final disposal of the suit the Defendants their servants and agents be restrained by an order and injunction of this Hon'ble Court from transferring, selling, assigning, disposing of or dealing with or parting with possession of or creating any third party interest in the said property or any part thereof;

(d) that pending the hearing and final disposal of the Suit, Court Receiver, High Court, Bombay or some other fit and proper person be appointed as Court Receiver of the said property with full powers under order 40 Rule 1 of the Code of Civil Procedure, 1908.

A reading of the said prayers therefore discloses that the original Plaintiffs have sought a declaration that the Deed of Partnership dated 30-1-

1974 as modified by the Deed of Retirement dated 2-8-1976 have been abandoned and is therefore of no legal effect whatsoever and therefore the property in question is not a partnership property but the absolute property of the Plaintiffs and that the original Defendant has no right, title or interest in the said property. The Plaintiffs in the alternative have sought a declaration that the suit firm stands dissolved and had sought reliefs based on such declaration. Hence by the alternative prayer clause the Plaintiffs had sought the dissolution of the suit firm i.e. M/s. S. P. Building Corporation.

14           It would also be relevant to refer to the documents on the basis of which the Applicants i.e. the Respondent Nos.1 and 2 herein based their claim for impleadment. As indicated earlier there is a Deed of Sub-Partnership between the original Defendant i.e. Samarthmal Seth and 8 others concerning the 75% share of the original Defendant in the suit partnership. Thereafter by a Deed of Assignment dated 21-6-2008 the original Defendant assigned the actionable claim and/or chose in action including the right to contest the present Suit and all incidental benefits and claims arising out of the subject matter of the Suit (including his share in the suit partnership) in favour of one Housing Development and Infrastructure Ltd. (HDIL). The Deed of Assignment has been duly registered with the Sub-Registrar of Assurances. The original Defendant also executed an irrevocable Power of Attorney in favour of the HDIL. Thereafter on 5-4-2010 the said HDIL further assigned

the actionable claim and/or chose in action including the rights under the Deed of Assignment dated 21-6-2008 in favour of one D. B. Properties Pvt Ltd. and Vision Finstock Ltd. Similarly by Deed of Assignment executed on 28-7-2010 the sub-partners in the said Sub-Partnership assigned, sold and transferred unto the aforesaid two entities i.e. D. B. Properties Pvt Ltd. and Vision Finstock Ltd. their respective right title and interest under the Deed of Partnership for valuable consideration and on terms and conditions set out therein. The said latter assignors also executed an irrevocable Power of Attorney in favour of the two assignee entities in respect of the subject matter of the Deed of Assignment. Thereafter by Share Sale Agreement dated 7-6-2011, shareholders of D. B. Properties Pvt Ltd. sold and transferred their entire shareholding in D. B. Properties Pvt Ltd. whereupon the name of the company was changed to Mah-Hill Properties Pvt Ltd., which is the Applicant No.1 in the above Chamber Summons.

15           Hence the perusal of the aforesaid documents would disclose that the case of the Applicants is based on the assignment made by the original Defendant in favour of the Applicants. However, it is required to be noted that though the heirs of the original Defendant are seeking to question the assignment made in favour of the Applicants, significantly the heirs do not question the Sub-Partnership Agreement between the original Defendants and 7 others. It is required to be borne in mind that the Sub-Partnership

agreement is an intermediary transaction which has taken place between the original Defendant and 7 others, the said aspect in our view impacts the case of the heirs in so far as the dispute relating to the assignment is concerned. It is also required to be noted that though the heirs of the original Defendant seek to question the assignment in favour of the Applicants they have not filed any proceedings challenging the said assignment. In our view, it was for the heirs to challenge the said assignment by filing appropriate proceedings and the fact that the Applicants have not filed any proceedings to assert the rights if any, they have under the assignment would not impact their case in so far as their impleadment in the Suit is concerned.

16           Now whether the Suit filed for the reliefs claimed would on impleadment of the Applicants be diverted to resolving the inter-se disputes between the heirs and the Applicants, in our view the apprehension of the Plaintiffs in that regard is misfounded. The Suit, even if the Applicants are impleaded would continue to be a Suit revolving around the reliefs claimed in respect of the partnership firm viz M/s. S. P. Building Corporation. It is in the context of the reliefs sought in the Suit that the Applicants would have to take a stand in the Written Statement that they would be entitled to file on their impleadment. It is always for the Trial Court to keep the parties within the bounds of the lis which is involved in the Suit, in our view therefore the apprehension of the Plaintiffs is misfounded and can be said to be a red

herring as rightly contended by the Learned Senior Counsel appearing for the Applicants i.e. the Respondent Nos.5 and 6 to the above Appeal.

Reliance placed by the Learned Senior Counsel for the Appellants / original Plaintiffs on the Judgment of the Division Bench of the Karnataka High Court in Akkabai's case, in our view is misplaced. The said judgment is sought to be relied upon to buttress the contention that only when there is no dispute as regards the identity and the right which is devolved on the legatee, transferee and/or an assignee as the case may be that an application for his impleadment can be allowed. In so holding the Division Bench of Karnataka High Court has relied upon the judgment of the Apex Court in the case of Khemchand Shankar Choudhary Vs. Vishnu Hari Patil as rightly held by the Learned Single Judge in the impugned order, the Apex Court in Khemchand's case has not laid down the extreme proposition that the hint of a dispute would disentitle a legatee, a transferee or an assignee to being impleaded until the dispute is decided before another forum. In the said case the partition of the properties under Section 54 of the CPC in terms of the decree was in contention. The Apex Court held that the over arching factor in so far as Section 54 was concerned is equitable partition. It is in the said context that the Apex court held that if there is no dispute in case of transferees pendente lite the Collector may proceed to make allotment of properties in an equitable manner rather than rejecting their claim on the

ground that they have no locus standi as the same would be in keeping with the legislature intent. Hence the use of the word “no dispute” was in the said context. We are therefore in respectful agreement with the view of the Learned Single Judge expressed in the impugned order as regards the application of the Judgment in Akkabai's case and his interpretation of the judgment of the Apex Court in Khemchand's case.

17           The next issue is whether Section 29 of the Indian Partnership Act impacts the right of the Applicants to seek impleadment. The said Section 29 of the Indian Partnership Act is therefore reproduced hereinunder for the sake of ready reference:

**29 Rights of transferee or a partner's interest:-**

(1) A transfer by a partner of his interest in the firm, either absolute or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect the books of the firm, but entitles the transferee only to receive the share of profits of the transferring partner, and the transferee shall accept the account of profits agreed to by the partners.

(2) If the firm is dissolved or if the transferring partner ceases to be a partner the transferee is entitled as against the remaining partners to receive the share of the assets of the firm to which the transferring partner is entitled, and for the purpose of ascertaining that share, to an account as from the date of the dissolution.

18               Hence Section 29 of the Indian Partnership Act only regulates the rights of a transferee of a partner of his interest in the firm.

In the context of Section 29 reliance is sought to be placed on behalf of the Plaintiffs on the judgment of a Division Bench of this Court in Dhanaji Jhelaji's case, the relevant extract of the said Judgment is reproduced hereinunder :-

“Therefore at common law the assignment by one of the partners of his share in the partnership without the consent of the other partners did not cause an immediate dissolution of the partnership. It did not give the assignee a right to an account of the profits. He had to accept the account of the profits as agreed to by the partners. And that must obviously be according to the principles of commonsense, because when there is a contract of partnership, one partner cannot by his action introduce a third party without the consent of the other partners, so as to give the third party a right to interfere in the management of the business or to ask for an account. It is only when dissolution occurs that the right of the assignee arises to take action in the same way as his assignor could have done to claim an account as from the date of the dissolution.

The Plaintiffs also seek to rely upon the Full Bench of the Lahore High Court in Ajudhina Pershad Ram Pershad (supra), the relevant extract of the said judgment reads thus:

“25. (Extract): The Transfer of such an interest by a partner to an outsider is provided for in S.29, Partnership Act, and the terms of this section

make it quite clear that the rights of the transferee are on a distinctly lower place than those of his transferor. Such a transferee is not entitled to interfere in the conduct of the business or to require accounts or to inspect the books of the firm and he must be content to receive a share of profits calculated on the basis of accounts agreed to by the existing partners, which he is bound to accept. It is only if the firm is dissolved that he is entitled as against the remaining partners to receive the share of the partnership property to which his transferor was entitled as well as to ask for an account, and that only from the date of dissolution.”

In our view the said judgments would not further the case of the Plaintiffs in so far as the claim for impleadment of the Applicants is concerned. The said cases dealt with the right of an assignee of the interest of a partner in the affairs of the partnership firm and not a case where the assignee pendente lite has applied for impleadment in a Suit by invoking Order XXII Rule 10 of the CPC. Having regard to the principal relief sought in the Suit in our view the said judgment (supra) would not come in the way of the Applicants from seeking their impleadment in the Suit.

19           The application for impleadment filed by the Applicants is also sought to be challenged by the Plaintiffs on the ground of delay. It is sought to be contended against the Applicants that though the assignment in favour of the Applicants was made in the year 2010, the application i.e. the Chamber Summons was filed only in the year 2015 and after the original Defendant had

expired in the year 2014. In support of the said contention reliance was sought to be placed on the judgment of the Apex Court in *Vidur Impex and Indus Pvt Ltd. (supra)* wherein the Apex Court had rejected the application for impleadment on the ground of delay. The facts in the said case would have to be noted. In the said case, Agreement for Sale and the Sale Deeds were executed in favour of the Appellants who were the Applicants in a clandestine manner and in violation of the injunction order granted by the Delhi High Court. However, on account of suppression of material facts from the Calcutta High Court on the basis of which the Calcutta High Court was persuaded to pass orders in their favour, took the Appellants out of the category of bonafide purchasers. The Apex Court held that their presence was therefore not required to decide the controversy involved in the Suit filed by the Respondent No.1 nor required to pass an effective order. The Learned Single Judge of the High Court had also dismissed the application on the ground of there being delay of 11 years, since the execution of the Agreement for Sale in their favour. The Division Bench of the High Court had approved the said rejection by the Learned Single Judge. In our view, the facts in *Vidur Impex (supra)* are clearly distinguishable from the facts of the instant case. In the instant case, the original Defendant was prosecuting the Suit whilst he was alive and the Applicants can be said to have condescended to such prosecution. It is only after the death of the original Defendant that the Applicants felt the need to bring themselves on record as assignees of the original Defendant to protect

their interest. Since under Order XXII Rule 10 such a discretion is vested with the assignees, the fact that the Applicants had filed the application 5 years after the assignment in their favour, cannot be held against them as the said application has been filed in the immediate proximity of the death of the original Defendant.

In so far as the judgment in Vidur Impex (supra) is concerned, apart from the fact that the application was filed after 11 years, the Agreement for Sale and the Sale Deeds were executed in a clandestine manner whilst there was an injunction running and the transactions were therefore lacking in bonafides. Hence the judgment in Vidur Impex (supra) would not support the Plaintiffs to oppose the application for impleadment filed by the Applicants.

The broad principles laid down in the judgment of Vidur Impex are also sought to be relied upon by the Plaintiffs to contend that the Applicants being neither “necessary” nor “proper” parties their impleadment is impermissible. The said broad principles laid down by the Apex Court in Vidur Impex which are contained in paragraph 41 are reproduced hereinunder for the sake of ready reference:

“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.”

20           Hence a reading of the said broad principles discloses that the Apex Court after explaining who is a “necessary” party and who is a “proper” party laid down that if a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment. In the

instant case, the application for impleadment as indicated above is founded on the assignment made by the original Defendant in favour of the Applicants during the pendency of the Suit. The Applicants as assignees have therefore sought their impleadment to protect their interest. Once they are impleaded, they would obviously want to say something about the reliefs sought in the Suit. The Applicants can therefore surely qualify to be “proper parties”, even assuming for a moment that there is a genuine dispute between the heirs of the original Defendant and the Applicants in respect of the assignment. In our view therefore, the challenge to the impleadment of the assignee on the ground that they are neither “necessary” nor “proper parties”, is without merit.

A reference to the judgment of the Apex Court in Suresh Kumar Bansal's case is required to be made. The said case concerned the application made by the legatee of an unprobated Will of the deceased Plaintiff-landlord. The Apex Court held that the legatee was entitled to be substituted / impleaded in the Suit subject to grant of probate by the Competent Court, along with the heirs of the Plaintiff-landlord. The Apex Court observed that if such a course of action was not followed it would result in multiplicity of proceedings as then the legatee would have to file proceedings against the heirs for recovery of possession of the tenanted premises if the heirs succeed in the Suit and obtain possession. The avoidance of multiplicity of proceedings is therefore a factor which weighs in favour of the Applicants in so far their claim

for impleadment is concerned. What is significant to note that even though in the said case there was a dispute raised as regards the genuineness of the Will the Apex Court deemed it appropriate to allow the Application by setting aside the order of the High Court.

21           Now coming to the judgment of the Apex Court in Amit Kumar Shaw (supra) and Thomson Press India Ltd. (supra) on which much store has been laid on behalf of the Applicants.

In Amit Kumar's case the Apex Court was seized with the issue as to whether the application for substitution by a subsequent transferee be rejected and the subsequent purchaser be non suited altogether. The Apex Court observed that power to add a party to a proceeding cannot solely depend on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as party. The conclusions which are material in the context of the present case are in Paragraphs 12 and 16 which for the sake of ready reference are reproduced hereinunder:

12. Under Order XXII, Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the

assignment or devolution can be considered at the final hearing of the proceedings. The Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.

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.

Hence the Apex Court in Amit Kumar Shaw's case held that no detailed enquiry was necessary whilst considering an application under Order XXII Rule 10. The Apex Court also hypothetically considered the consequences

flowing out of a transferee pendente lite not being impleaded and the Suit is allowed to be prosecuted by the transferor who has lost all interest in the property. The apprehension expressed by the Apex Court would equally apply in the facts of the present case.

In Thomson Press India Ltd. (supra) the Apex Court was again concerned with an application for impleadment filed by a purchaser pendente lite in a Suit for specific performance of a prior Agreement to Sale / Contract for Sale (CFS) filed by the buyer under the said CFS against the original owner/transferor pendente lite. In the said case the transferee pendente lite had purchased the entire property pending the Suit from the Respondent No.2 who had made a statement before the court that till disposal of the Suit the property in question would not be transferred or alienated. However, whilst the said Suit was pending, 5 Sale Deeds were executed by the Defendants i.e. the Respondent No.2 in favour of Thomson Press India Ltd. The Apex Court held that since the transferee was neither bonafide nor without notice of prior CFS, the Appellant Thomson Press was not protected under Section 19 of the Specific Relief Act against the specific performance of the prior Agreement (CFS). The Apex Court further observed that if the purchaser pendente lite is not made a party to the pending Suit, there may be a situation where the transferor pendente lite may not defend the title properly as he has no interest remaining or may collude with the Plaintiff in which case the interest of purchaser pendente lite will be ignored. The Apex Court further held that

purchaser pendente lite may be impleaded in such Suit as decree for specific performance of prior CFS can only be enforced against him as he holds title / interest which is the subject matter of the prior CFS and the original owner does not hold it any more.

22           The Apex Court thereafter referred to the Judgment of the Calcutta High Court in Kafiladdin Vs. Samiruddin (AIR 1931 Cal 67) and its earlier judgments in Durga Prasad Vs. Deep Chand (AIR 1954 Sc 75), R. C. Chandiok Vs. Chuni Lal Sabharwal ((1970) 3 SCC 140), Dwarka Prasad Singh Vs. Harikant Prasad Singh ((1973) 1 SCC 179) and held that Thomson India Ltd be added as party Defendant in the Suit. Paragraphs 37, 44, 45, 54, 55 and 56 of the said Judgment are material and are reproduced hereinunder:

37. Taking into consideration all these facts, we have no hesitation in holding that the appellant entered into a clandestine transaction with the defendants-Sawhneys' and got the property transferred in their favour. Hence the appellant – M/s Thomson Press cannot be held to be a bonafide purchaser, without notice.

44. Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the appellant is to be added as party-defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside.

45. Before parting with the order, it is clarified that the appellant after impleadment as party-defendant shall be permitted to take all such defences which are available to the vendor Sawhneys' as the appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the plaintiff and during the pendency of the suit.

54. The third dimension which arises for consideration is about the right of a transferee pendete lite to seek addition as a party defendant to the suit under Order I, Rule 10 CPC. I have no hesitation in concurring with the view that no one other than 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 I, Rule 10 CPC. What must all the same be addressed is whether the prayer made by the appellant could be allowed under Order XXII Rule 10 of the 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 I 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 I Rule 10 CPC but the enabling provision of Order XXII Rule 10 CPC could always be invoked if the fact situation so demanded. It was in any case not urged by counsel for the respondents that Order XXII 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.

55. We are not on virgin ground in so far as that question is concerned. Decisions of this Court have dealt with similar situations and held that a transferee pendente lite can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post transfer. In Khemchand Shanker Choudhary v. Vishnu Hari Patil (1983) 1 SCC 18, this Court held that the position of a person on whom any interest has devolved on account of a transfer during the pendency of a 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. Any such heir, legatee or transferee cannot be turned away when she applies for being added as a party to the suit. The following passage in this regard is apposite:

“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 in so far 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.” (emphasis supplied)

56. To the same effect is the decision of this Court in *Amit Kumar Shaw v. Farida Khatoon* (2005) 11 SCC 403 where this Court held that a transferor pendente lite may not even defend the title properly as he has no interest in the same or 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:

“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 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”

To the same effect is the decision of this Court in [Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass](#) (deceased) through his Chela Shiama Dass, (1976) 1 SCC 103.

in Amit Kumar Shaw and Thomson Press India Ltd are sought to be relied upon to contend that the instant case is not a case of substitution of the heirs of the original Defendant on account of devolution of interest, but is one for impleadment in addition to the heirs who are already brought on record. The judgment in Amit Kumar Shaw is also sought to be relied upon to contend that the said judgment was rendered in the absence of any contest as inspite of notice issued no appearance was entered on behalf of the Respondents. In our view, the said fact namely the application not being for substitution and the judgment in Amit Kumar Shaw being rendered in the absence of the Respondents would not detract from what has been held by the Apex Court and the proposition of law laid down therein. In our view, the proposition of law laid down in the judgments (supra) cements the case of the Applicants for impleadment.

24           It is now necessary to refer to the submission of the Learned Senior Counsel Mr. P. S.Dani appearing for the Appellant in Appeal (L) No.285 of 2017, who is one of the heirs of the original Defendant. The said submission is to the effect that the application filed invoking Order XXII Rule 10 of the CPC by the Applicants is not maintainable in view of the fact that the application to be filed under Order XXII Rule 10 has to be in the life time of the transferee. In the said context it would be necessary to refer to Order XXII Rule 1 to 10. The gist of Rules 1 to 9 and full text of Rule 10 is reproduced

hereinunder:

1. No abatement by party's death, if right to sue survives
2. Procedure where one of several plaintiffs or defendants dies and right to sue survives.
3. Procedure in case of death of one of several plaintiffs or of sole plaintiff.
4. Procedure in case of death of one of several defendants or of sole defendant.
- 4-A. Procedure where there is no legal representative.
5. Determination of question as to legal representative.
6. No abatement by reason of death after hearing.
7. Suit not abated by marriage of female party.
8. When plaintiff's insolvency bars suit.
9. Effect of abatement or dismissal
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).”

Hence Rules 1 to 9 as above contemplate different situations in

which the legal heirs and the representatives can be brought on record on the death of the Plaintiff or the Defendant. In so far as Order XXII Rule 10 is concerned, it covers the other cases of assignment or devolution or creation of interest other than ones covered by Rules 1 to 9. To read Rule 10 so as to mean that an application under the said Rule has to be filed in the life time of the assignor would be reading into the said Rule something which the legislature had not intended. The cases under the said Rule as the Rule itself indicates are the cases not covered by Rules 1 to 9. Hence the application under Rule 10 can therefore be made either in the life time of the assignor or even after his death. The choice is obviously of the assignee. It is therefore not possible to accept the contention urged on behalf of the said heir that under Rule 10 the application has to be made in the life time of the assignor and since in the instant case, the application is made after the death of the assignor, the same is not maintainable.

In so far as the submission of the Learned Counsel Mr. Khandeparkar is concerned, the said submission need not detain us, as it is well settled by the judgments of the Apex Court that whilst considering an application for impleadment of devolution of interest a detailed enquiry is not contemplated.

25           On behalf of the Plaintiffs the factum of a Suit filed by the Original Defendant against the Plaintiffs and third partner and others in

respect of a plot of land which is one of the assets of the partnership firm was sought to be relied upon to contend that even the original Defendant after executing the assignment in the year 2010 has filed a Suit in the year 2013 in respect of one of the partnership properties. In our view, the filing of the Suit by the original Defendant would also not impact the claim of the Applicants for impleadment in the present Suit as the assignees of the original Defendant. If the Plaintiffs succeeds in the said Suit, the decree would obviously enure either to the benefit of the Applicants or the heirs of the original Defendant, as the case may be. Hence the reliance placed on the filing of the said Suit is therefore misplaced.

26           Lastly to put the matter in perspective, having regard to the fact that whilst considering an application under Order XXII Rule 10 a detailed enquiry is not contemplated, the Court is therefore only required to see whether there is a transfer or a devolution interest in favour of the Applicants, once that be so the application for substitution / impleadment is required to be allowed. Applying the said yardstick to the facts of the present case and having regard to the law laid down by the Apex Court the impugned order passed by the Learned Single Judge allowing the Chamber Summons filed by the Applicants cannot be faulted with. To conclude, for the reasons aforestated, there is no merit in the above Appeal and the companion Appeals which are accordingly dismissed.

27            In view of the dismissal of the above Appeals, Notice of Motion (L) No.1557 of 2017 and Notice of Motion (L) No.1559 of 2017 do not survive and to accordingly stand disposed of.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]

After pronouncement

Date: 21<sup>st</sup> DECEMBER 2017

At the time of pronouncement, the Learned Counsel appearing for the Appellant in Appeal No.368 of 2017, Mr. S. V. Doijode seeks extension of time to carry out the amendment in terms of the order passed by the Learned Single Judge. Time to carry out the amendment is accordingly extended by a period of 6 weeks from date.

[SARANG V KOTWAL, J]

[R.M.SAVANT, J]