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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.905 OF 2015

IN

SUIT NO.208 OF 1950

Bai Rabiabai Widow of Ebrahim Mia

Mohamed Haji Janmahomed Chotani And Ors. ...Plaintiffs

vs

The Official Assignee of Bombay ...Defendant

And

M/s. Kalpataru Constructions, Pune ...Applicant/Intervener

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Mr. Girish S. Godbole, a/w. Mr. Karan S. Thorat, for Plaintiff Nos. (1-(b)), (1-(c)), (1-(d)), (1-d(i)) to (1-d(v)), (2-(b)), (2-(c(i)) to 2-(c(iv)), (3(a)), 3(b)), (4-(c)), (4-(d)), 4-(e)) in Suit No. 208 of 1950.

Mr. Vishal Kanade, a/w. Mr. Vishesh Kalra and Mr. Prakash Kadam, i/b. Vidhii Partners, for the Applicant.

Mr. Z.A. Shaikh, Section Officer from Official Assignee.

Mr. K.D. Rane, Master & Second Court Receiver.

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CORAM : S.C. GUPTE, J.

DATED : 23 FEBRUARY, 2018

P.C. :

. Heard learned Counsel for the parties.

2. This chamber summons is taken out by a third party applicant, who claims to have interest in the subject matter of the present suit.

3. The suit is for partition of property. The property was initially owned by one Mia Mahomed Chotani. The Plaintiffs claim to be legal heirs

of Mia Mahomed. The suit was originally filed against one Usman Chotani, who is the only other legal heir and representative of the deceased Mia Mahomed. A preliminary decree was passed in the suit determining the respective shares of the parties. Since Usman was declared insolvent during the pendency of the suit, the Official Liquidator was brought on record in place and stead of Usman. Mia Mahomed had during his lifetime entrusted the property to one Krishnadas Gordhandas Madiwale to manage the same, but on or after his death, his heirs (collectively described hereinafter as 'Madiwale family') claimed to hold the property in lieu of certain debts claimed as due by the deceased Mia Mohamed. The Court Receiver appointed in the suit in respect of the property filed a suit for possession against Madiwale family, who claimed to have interest in the suit property as transferee from Mia Mahomed and Usman. By a consent decree passed in that suit, 1/4th share of Madiwale family in the entire suit property was recognized. The share was made up of 1/5th share of Usman in the suit property and the other part coming from Mia Mahomed. Pursuant to the preliminary decree, there was a physical partition of the suit property, by which Plot Nos. 13 to 16, forming part of the suit property, were *inter alia* allotted to Madiwale family as their share in the suit property. Apart from the property, which was divided physically, there is one particular portion of the suit property, which could not be divided *inter alia* by reason of reservation under the relevant development control regulations. Presently, the surviving contest in the suit herein pertains to this plot of land having an area of 25422.10 sq. ft., which is under reservation. (There is a contest between the parties as to the correct area of this plot of land, the Plaintiffs claiming the area to be 25422.10 sq. ft., whilst, according to the Applicant, it is 45978 sq. ft. We are, however, not concerned with this dispute in this chamber summons.)

4. The Applicant claims to be a transferee under Madiwale family. By reason of several documents executed by the latter in favour of the former, the entire portion of the suit property, which came to Madiwale family, is said to have been dealt with by them in favour of the Applicant. The Applicant has, in pursuance of these documents, which are placed on record, developed Plot Nos. 13 to 16, erected buildings thereon, and sold flats and tenements therein to third parties. Even conveyances have been effected in respect of these properties in favour of organisation/s of flat purchasers. The Applicant, however, would like to implead himself as a party defendant to the present suit so as to agitate the rights of Madiwale family in respect of the balance property, namely, the reserved portion of land, which is still undivided, as noticed above.

5. Mr. Godbole, learned Senior Counsel appearing for the Plaintiffs, opposes the application. Learned Counsel, firstly, submits that the documents, on which the Applicant claims his entitlement to be impleaded as a party Defendant, are insufficiently stamped. Learned Counsel further submits that the Applicant is a third party, who only has commercial interest in the suit property as opposed to legal interest. Learned Counsel also relies on Section 54 of the Transfer of Property Act and submits that as an agreement purchaser, that is to say, if the documents relied upon by the Applicant are held to amount to an agreement for purchase, the Applicant merely has a right to specific performance and that right he can claim only against Madiwale family. Learned Counsel submits that the Applicant has no locus to contest the present suit on behalf of Madiwale family. Learned Counsel relies on several judgments including the cases of **Mumbai International Airport Private Limited vs. Regency Convention Centre**

And Hotels Private Limited¹, Raheja Universal Limited vs. NRC Limited², Suraj Lamp And Industries Private Limited vs. State of Haryana³, and Kasturi vs. Iyyamperumal⁴, in support of his submissions.

6. The Applicant claims to be a constituted attorney of Madiwale family. But quite apart from his position as a constituted attorney, he claims through documents executed by Madiwale family, by which the latter, according to him, transferred their interest in the suit property to him. Mr. Godbole claims that these are not documents of transfer and they do not create any right in the property and, therefore, the Applicant cannot come in as a party to defend the present suit, claiming co-ownership of the suit property along with the Plaintiffs. Now, a third party applicant can apply for impleadment under Order 1 Rule 10 of the Code of Civil Procedure on the ground that he is either a necessary or a proper party. He may also claim to prosecute or defend the suit in cases of assignment, creation or devolution of interest within the meaning of Rule 10 of Order 22. Rule 10 provides for procedure in case of an assignment before a final order is passed in the suit. It is obvious, and not open to debate, that even after a preliminary decree is passed, an assignee of a party can come before the Court and apply for leave of the Court to prosecute or defend the suit. Assignment, creation or devolution of interest referred to in Rule 10 of Order 22 is not exactly the same as assignment, creation or devolution of interest in the suit property as such. The assignment, creation or devolution of interest referred to in Rule 10 concerns an interest in the subject matter of the suit. If such interest is created during the pendency of the suit, the party, in whose favour such interest is created, can apply to the Court for

1 (2010) 7 Supreme Court Cases 417

2 (2012) 4 Supreme Court Cases 148

3 (2012) 1 Supreme Court Cases 656

4 (2005) 6 Supreme Court Cases 733

joinder. Let me explain this with an example. In the case of, say, a specific performance suit, an assignee *pendente lite* of the plaintiff agreement purchaser may claim to prosecute the suit under this Rule. What is assigned in his favour is not an interest in the suit property, but the right to sue for specific performance. He, thus, is an assignee or holder of an interest (upon its creation or devolution) in the subject matter of the suit, namely, the right to specific performance. The 'interest' would in this sense include any transferable right to sue so far as the subject matter of the suit is concerned. It is possible, under this provision, even for an agreement purchaser, who is said to be in possession of the property and in whose case the entire purchase consideration is paid to the transferor and the transferor is no more interested in prosecuting or defending the suit, to apply for leave to prosecute or defend a partition suit on behalf of his transferor. In the present case, Madiwale family is not before the Court. That may be for a good reason, namely, that they have entered into the transactions referred to by the Applicant and purportedly divested themselves substantially of their title or interest in the suit property; they have purportedly received their consideration under these documents and may not be interested in prosecuting or defending the suit. It is the Applicant, who alone is now interested in the subject matter of the suit and that is what is relevant for the purposes of Order 22 Rule 10. The right of Madiwale family to sue for partition of the suit property can be said to have been effectively transferred to the Applicant. It is no more necessary to consider whether the Applicant has 'legal' as contrasted with 'commercial' interest in the 'suit property'. What is important is that the Applicant is the only person, who may now claim to represent the share of Madiwale family and, to that extent, defend the suit. The Applicant, in short, is interested in the subject matter of the suit by virtue of creation of rights in his favour pending the suit and must,

therefore, be impleaded under Order 22 Rule 10 of the Code of Civil Procedure.

7. The judgments of **Mumbai International Airport Private Limited** and **Kasturi** (supra) cited by Mr. Godbole are of no help to him, since these deal with the rights of agreement purchasers and others having legal or commercial interest in the suit property, whilst considering applications under Order 1 Rule 10 of the Code of Civil Procedure. An application under Order 1 Rule 10 is on an entirely different footing. Here, the application is made not for substitution of a party to the suit by the assignee or right holder. It is made in the presence of the party from whom such assignment or right is claimed, such party himself continuing to prosecute or defend the suit. Rather than prosecuting or defending the suit in place or stead of a party, the application is for asserting the applicant's own right claimed by virtue of the instrument of assignment, creation or devolution of interest, as the case may be. As noted above, we are concerned with the rights of an applicant to defend the suit under Order 22 Rule 10 of the Code of Civil Procedure. The Applicant claims to represent the interest of the party in place or stead of the latter and applies for impleadment accordingly. And, as I have noted above, the Applicant has clearly made out a case for such impleadment.

8. The other two judgments cited by Mr. Godbole, namely, the cases of **Raheja Universal Limited** and **Suraj Lamp And Industries Private Limited** (supra) concern the nature of rights that can be claimed under an agreement for sale as opposed to a sale deed. In the light of the above discussion, even these judgments have no direct bearing on the question of an agreement purchaser's right to sue for his vendor's interest.

9. Mr. Godbole alternatively submits that such application cannot be decided in the absence of Madiwale family. There is no question presently as to any contest between the Applicant and Madiwale family. The former claims to represent the interest of the latter and the latter does not come forward to oppose such claim. If the Plaintiffs want to bring up such contest, they may well do so by bringing in Madiwale family. It is not for the Applicant to bring them in whilst applying for impleadment.

10. One more important aspect, which bears a mention here, is that when the Court allows an applicant to represent the interest of a party, on an application under Order 22 Rule 10, it is not as if the contest on the entitlement of the party to do so is fully and finally decided. All contentions on merits concerning such entitlement are still a matter of trial. It is just that on a *prima facie* assessment of the applicant's locus to do so, the Court permits him to defend or prosecute the suit. The merit of his defence or prosecution itself is open to debate in the trial and that includes the assessment of his right on the basis of which he claims to defend or prosecute the suit. This Court in the case of **Mah-Hill Properties Pvt. Ltd. - Applicant in the matter of Behram Nawrosji Gamadia vs. Babli Samarthlal Seth**⁵ has laid down that the Court has only to be *prima facie* satisfied for exercising its discretion in granting leave for continuing or defending the suit by the applicant under Order 22 Rule 10 on assignment or devolution and the validity of the assignment or devolution can be considered at the trial of the suit on merits. In the present suit, the questions such as whether the documents executed by Madiwale family are documents of transfer or they do or do not invest the Applicant with the right to claim the transferor's interest in the division of the suit property or

5 CHS55-15 dated 22 June 2017

whether these documents can be relied on due to insufficiency of stamp, etc. are all matters of trial. This Court may not decide them finally at this stage.

11. Accordingly, the chamber summons is allowed in terms of prayer clauses (a) and (b). Mr. Godbole applies for stay of this order. On his application, the Plaintiffs are permitted to carry out the amendment only after four weeks, but within five weeks.

(S.C. GUPTE, J.)