IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1385 OF 2012
IN
SUIT NO.2457 OF 2011

M/s Lakshmi Construction ... Applicant/Org. Plaintiff

In the matter between :

M/s Lakshmi Construction ... Plaintiff
Versus
Pushp Kamal Co-operative Housing Society Limited ... Defendant
And
M/s Kamla Homes and Life Styles Pvt. Ltd. ... Respondent

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Mr. Zal Andhyarujina a/w Ms. Tejas Shah I/b Lilani Shah And Co. for the Applicant/Plaintiff.
Mr. Sanjay Jain a/w M/s Sarika Mehtra I/b L.J. Law for the Defendant.
Dr. Birendra Saraf a/w Ms. Nita Solanki and Ms. Sangita Rathod I/b M/s Kiran Jain & Co. for the Respondent.

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CORAM : S.C.GUPTE, J.

ORDER RESERVED ON : 30 JUNE 2017
ORDER PRONOUNCED ON : 22 JANUARY 2018.

ORDER :

. By this Chamber Summons the Plaintiff seeks impleadment of a third party and amendment of the plaint so as to incorporate averments and prayers against the party.

2 The suit is for specific performance of an agreement for sale of immovable property, being a plot of land at Santacruz in Mumbai, together with a building standing thereon ("suit property"). The Plaintiff is an agreement purchaser and developer of the suit property, whilst the Defendant is a co-operative housing society which owns the suit property and is claimed to be the vendor of the Plaintiff. The agreement is said to have been contained in what is described as 'offer letter dated 25 December 2009' between the Plaintiff and the Defendant and concluded on 31 March 2010. It is the case of the Plaintiff firm that at the hearing of its application for interim reliefs, it learnt about about a redevelopment agreement entered into by the Defendant with the Respondent herein on 8 November 2012. The Plaintiff submits that this agreement has been entered into with a *mala fide* intention and is only an attempt to defeat and delay the rights and claims of the Plaintiff forming part of the present suit. The Plaintiff proposes to challenge the redevelopment agreement as being null and void and of no effect on the Plaintiff's rights. The present Chamber Summons accordingly prays for impleadment of the Respondent so as to claim appropriate reliefs against it.

3 The Chamber Summons is opposed both by the Defendant and the Respondent on the ground that the Respondent is neither a necessary nor a proper property to the suit. It is submitted that the Respondent not being a party to the suit agreement for sale and having acquired an independent right to the suit property under a separate contract with the Defendant, is not concerned with the dispute as between the Plaintiff and the Defendant under the suit agreement for sale. It is submitted that if this Chamber Summons is allowed, it would completely alter the nature and character of

the suit, namely, from a specific performance suit to a suit for a declaration in respect of rights of a third party.

4 Dr. Saraf and Mr. Jain, learned Counsel for the Respondent and the Defendant, respectively, rely on several judgments to buttress their submissions. Relying on the Supreme Court judgment in the case of **Bharat Karsondas Thakkar Vs. Kiran Construction Co**.[1], learned Counsel submit that in a specific performance suit, a stranger to the agreement for sale cannot be added as a party. It is submitted that the only parties that can be added to a specific performance suit are parties to the agreement (Sec.15(a) of the Specific Relief Act) and persons claiming under them by a subsequent title (Sec. 19 of the Specific Relief Act); the scope of a specific performance suit could not be enlarged to convert the same into a suit for title and possession. Learned Counsel also rely on judgments of the Supreme Court in **Kasturi Vs. Iyyamperumal**[2], **Ramesh Chandra Pattnaik Vs. Pushpendra Kumari**[3]**Vidur Impex And Traders Pvt Ltd. Vs. Tosh Apartments Pvt. Ltd.**[4], **Anil Kumar Singh Vs. Shivnath Mishra**[5]. Learned Counsel also cite Division Bench decisions of our Court in **Yusuf Mohammed Lakdawala Vs. Sudhakar K. Bokhade & Richie Rich Resorts Ltd.**[6], **Gurucharansigh Nathasingh Chawla Vs. Raja Constructions Co.**[7] and **Shri Swastik Developers Vs. Saket Kumar Jain**[8], in support. Besides these judgments, learned Counsel rely on several decisions of learned Single Judges of our Court, where subsequent transferees or agreement

1 AIR 2008 SC 2134
2 (2005) 6 SCC 733
3 (2008) 10 SCC 708
4 (2012) 8 SCC 384
5 (1995) 3 SCC 147
6 Appeal No.460/08 in Ch.Summons No.56/08 in S.No.1248/07
7 Appeal No.138/97 Ch.Summons No.239/96 in S.1711/94
8 2014(2) Mh.L.J. 968

purchasers were not allowed to be joined as parties to specific performance suits.

5 Some of the decisions of learned Single Judges of our Court may suggest a dichotomy as noted by D.G. Karnik, J in **Mahendra J. Velinkikar Vs. Vaishali Sharad Kulkarn**i[9], whilst referring the matter to a larger bench. No decision of larger bench on this reference is brought to my notice. There is, however, a division bench decision of this Court in the case of **Shri Swastik Developers** (supra) which takes a view that whenever in a suit for specific performance a subsequent purchaser is sought to be joined, the true test is whether the purchaser claims title under the vendor of the Plaintiff or independent of, or adverse to, such vendor. In the former case a joinder would be permissible, whereas in the latter it would not. This judgment, in my opinion, puts to rest any controversy that may have been earlier noticed on this point.

6 If we have to consider the ratio of decided cases, we must, in the first place, acknowledge that there are different categories of applications for joinder of what are loosely termed as third party purchasers or transferees in specific performance suits. There are applications by plaintiffs and applications by third party purchasers or transferees. Then, there may be third parties who may be purchasers having either a prior or a subsequent title and there may be third parties who are simply agreement purchasers or transferees. In each of these different cases the answer may be different, but it is not difficult to find that answer, since the principle involved is always the same.

9 Ch.Summ.1358/11 in S.1496/87

7 Any application for impleadment, whether coming from a plaintiff or a third party, must satisfy either the requirements of Order 1 Rule 10 or of Order 22 Rules 3, 4 or 10. Whereas Rule 10 of Order 1 provides for the power of the court to order joinder of any party as a plaintiff or a defendant generally, Order 22 Rules 3, 4 and 10 pertain to joinders in particular cases, namely, joinder of legal representatives of the deceased plaintiff (O.22 R.3) or of the deceased defendant (O.22 R.4) or of a person to, or upon, whom any interest during the pendency of a suit comes, or devolves, by reason of any assignment, creation or devolution (O.22 R.10). The case of a legal representative presents no difficulty. If the right to sue survives, or may be asserted, by or against such legal representative, he may be joined under Order 22 Rule 3 or Order 22 Rule 4, as the case may be. One does not even have to go to Order 1 Rule 10 for claiming such joinder, though it may be permissible to apply for such joinder even on the principle of that provision. A subsequent purchaser holding interest in the property in a specific performance suit may, however, come in either by the route of Order 22 Rule 10 or Order 1 Rule 10 of CPC. If the purchaser claims under an assignment of the interest in the suit, he may have an option to apply for joinder under both provisions. If he claims as a purchaser of the suit property (as opposed to the interest in the suit), either upon completed purchase or as an agreement purchaser, he must come in by way of an application under Order 1 Rule 10 alone.

8 As far as applications for joinder in suits for specific performance under Order 1 Rule 10 are concerned, the principle of law is authoritatively stated by the Supreme Court in its judgments in **Lala Durga Prasad Vs.**

Deep Chand[10], **Kasturi Vs. Iyyamperumal** (supra) and **Bharat Karasondas Thakkar** (supra).

9. As for the statement of law in **Lala Durga Prasad**'s case, I may simply quote the following observations of this Court in **Vasant Shankar Walanj Vs. Iris Fernandes**[11] :

> "15. The position of a third party subsequent purchaser in a suit for specific performance as between the purchaser plaintiff and the defendant vendor is considered by the Supreme Court in the context of the form of decree that may be suitably passed in favour of such plaintiff in the case of **Lala Durga Prasad** (supra). The Supreme Court in that case noted the practice of the courts in India which had not been uniform. The Supreme Court noted three distinct lines of thought that emerged from Indian cases. According to one point of view, the proper form of decree was to declare the subsequent purchase void as against the plaintiff and direct conveyance by the vendoer alone. The second line of thought considered that both vendor and vendee should join a conveyance in favour of the plaintiff purchaser, whilst the third line would limit execution of the conveyance to the subsequent purchaser alone. In the first line of thought, as noted by the Supreme Court, we reach the position that the title to the property has validly passed from the vendor and resides in the subsequent transferee. The sale to him is not void but voidable at the option of the earlier 'contractor'. As the title no longer rests in the vendor it would be illogical from a conveyancing point of view to compel the vendor to convey to the plaintiff unless steps are taken to re-vest the title in him either by concellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. In the next line of cases, conveyance is directed to be executed by the subsequent purchaser alone on the footing that the title now only resides in him. In the opinion of the Supreme Court, however, proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff."

10 AIR 1954 SC 75

11 Ch.Summons No.616/14 in S.160/08

It is important to note that **Lala Durga Prasad**'s case was an application for joinder by the plaintiff. It was for the plaintiff to choose a proper form of relief and make averments and seek prayers accordingly.

10 As far as an application for joinder in a specific performance suit by a third party is concerned, the correct principle to be applied is roundly stated by the Supreme Court in the case of **Kasturi Vs. Iyyamperumal** (supra). That case is a leading authority on the jurisdiction of the Court under Rule 10 of Order 1 to join third parties in a suit for specific performance. The Supreme Court in **Kasturi**'s case held that the question of jurisdiction of the court to invoke Order 1 Rule 10 of CPC to add a party who was not originally joined by the plaintiff would not arise "*unless a party proposed to be added has direct and legal interest in the controversy involved in the suit.*" When is a person legally interested in the controversy in the suit ? It is only "*if he can satisfy the court that it may lead to result that will affect him legally*." As far as parties, who are necessary parties in a specific performance suit, are concerned, the Supreme Court noted as follows :

> "Para-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 or without 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."

The Supreme Court then considered the matter from the standpoint of Section 19 of the Specific Relief Act and after considering carefully clauses (a) to (e) of Section 19, held as follows :

> "9. ....We are of the view that the persons seeking addition in the suit for specific performance of the contract for sale who were not claiming under the vendor but they were claiming adverse to the title of the vendor do not fall in any of the categories enumerated in sub-section (a) to (e) of Section 19 of the Specific Relief Act."

The Supreme Court, then, considered who was a proper party in a suit for specific performance of a contract for sale in the following words :

> "11. ....For deciding the question who is a proper party in a suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all."

It is important to remember that **Kasturi**'s case was decided on an application made by a third party applicant. It was on the basis of a claim of independent title and possession set up by such third party that joinder had been applied for. The application was rejected by the Supreme Court on the basis of the aforesaid statement of law.

11 Coming now to the case of **Bharat Karsondas Thakkar** (supra), that was a case where the plaintiff had claimed specific performance of an agreement for sale of property against two parties. The Plaintiff's case was that in pursuance of a development agreement between these two parties (original vendor and original developer), the development rights and beneficial interest to the land thereunder was transferred to the plaintiff. A subsequent termination of the original development agreement was challenged by the plaintiff, who claimed specific performance thereof. The plaintiff thereafter applied for joinder of a third party who, though claiming through the original vendor, was claiming under an agreement for sale executed by the vendor prior to the original development agreement. The plaintiff wanted to challenge the title and right of this third party to the suit property. The Supreme Court did not countenance that application, holding that such challenge "*completely changed the nature and character of the suit from being a suit for specific performance of an agreement to one for declaration of title and possession followed by a prayer for specific performance of an agreement for sale entered into between its assignee and the vendors of the assignee*." The third party, who was the appellant before the Supreme Court, was not allowed to be joined, the court holding as follows :

> "Admittedly, the appellant herein is a third party to the agreement and does not, therefore, fall within the category of "parties to the agreement". The appellant also does not come within the ambit of Section 19 of the said Act, which provides for relief against parties and persons claiming under them by subsequent title. This aspect of the matter has been dealt with in detail in **Kasturi**'s case (supra). While holding that the scope of a suit for specific performance could not be enlarged to convert the same into a suit for title and possession, their Lordships observed that a third party or a stranger to the contract could not be added so as to convert a suit of one character into a suit of a different character."

12 The statement of law in **Bharat Karsondas Thakkar** is explained by a Division Bench of our Court in **Shri Swastik Developers**' case in the following words :

> "In allowing an application for impleadment under Order 1, Rule 10 of the Code of Civil Procedure, 1908, the Court is required to consider whether the proposed addition is of a party who is either necessary or proper. Now, in a suit for specific performance, when a subsequent purchaser is sought to be impleaded, the true test that has to be applied by the Court is to determine whether the purchaser claims title under the vendor of the Plaintiff or whether, contrariwise, he claims a title independent of or adverse to the title of the vendor. Impleadment is permissible where the party which is proposed to be joined claims under the vendor of the Plaintiff and under a subsequent agreement. This is to be distinguished from a case where a title adverse to or independent of the vendor is sought to be asserted. In the former case, it is but necessary to join the subsequent purchaser in order to ensure that when a decree is passed by the Court at the trial of the suit, the subsequent purchaser is directed to join in completing the title which is to be conferred upon the Plaintiff."

13 Our Court in **Bina Coatings Private Limted Vs. Madhuri Milap Joshi**[12] was concerned with the plaintiff's application for joinder of a third

12 Ch.Summons No.1051/11 in S.3056/10

party agreement purchaser from his vendor, the defendant, in a specific performance suit. After considering the dicta in **Kasturi**'s case, this is what our Court had to say :

> "7. In my view the ratio of this judgment would clearly apply to the case on hand. Here a third party is making a claim (a) through the vendor against whom the right for specific performance is claimed by the Plaintiff, and (b) in respect of the property which is the subject matter of such right of specific performance. It is the case of the Plaintiff that the vendor has done some act in breach of an obligation owed by him to the Plaintiff, i.e. to specifically perform their inter se contract, then surely the Plaintiff has a cause of action to challenge such act and join the third party whose alleged right arises out of such act. The right to relief arises against the third party in respect of the same cause of action, namely, the breach of an obligation owed by the vendor to the Plaintiff. To put it differently, the alleged right of the third party, which is sought to be challenged, arises out of this very breach. If such act had taken place prior to the suit, surely the Plaintiff could have arraigned the third party and challenged the agreement between the vendor and the third party. This is not a case where the third party claims independently and adversely to the vendor as as in the case of **Kasturi** (supra). Here the third party claims through the vendor. Any decree that may be passed in the suit against the vendor necessarily binds the third party who claims through the vendor and affects the third party's alleged right. Similarly, the assertion of the third party's alleged right directly affects the effectiveness of the decree in a suit as originally framed. That is one more reason why the third party can and ought to be joined as a party in the instant case."

14 It is important to remember that in **Bina Coatings** (supra), the application for impleadment of the third party agreement purchaser, who claimed from the defendant, was made by the plaintiff whilst seeking specific performance of his agreement for sale from the defendant vendor. The plaintiff not only wanted the third party to be bound by the decree that may be passed against the defendant, but also claimed a right to relief

against the third party itself by impugning the transaction entered into by the defendant with the third party, which the plaintiff claimed to be in breach of the obligations owed to him by the defendant and which arose under the same contract of which he sought specific performance. The plaintiff as *dominus litis* can choose his remedy and join such parties as he may want to claim relief against. It would be an entirely different position, however, if the third party agreement purchaser were to apply to the court for impleadment on the basis of his agreement with the plaintiff's vendor, i.e. the defendant. He would in such a case be contesting the plaintiff's right to the relief of specific performance, relying presumably on his own agreement with the plaintiff's vendor. His cause in that case is clearly foreign to the subject matter of the suit as between the plaintiff and the vendor defendant. Any remedy that the third party may have against the plaintiff or the latter's vendor, would have to be agitated in a separate action by the third party. His presence is neither necessary for passing of a decree in the plaintiff's suit nor recommended for an effective or complete adjudication of the rights of the parties to the suit.

15 This is explained by the Supreme Court in the case of **Ramesh Chandra Pattnaik Vs. Pushpendra Kumari**[13]. That was a suit for specific performance of an agreement for sale. The trial court allowed the application of a third party agreement purchaser, who claimed that he had entered into a subsequent agreement for sale with the defendant, i.e. the plaintiff's vendor. The plaintiff unsuccessfully challenged that order before the High Court. The Supreme Court allowed the plaintiff's appeal, holding as follows :

13 (2008) 10 SCC 708

> "5. It is not in dispute that the petitioner filed suit in the year 1979 for specific performance of the alleged agreement of sale dated 10-4-1977. In that suit, the only scope of enquiry would be as to whether the said agreement was, in fact, executed between the petitioner and Respondent No.1.
>
> 6. Respondent 10 is alleged to have entered into an agreement with Respondent 1 on 15-11-1984 for sale of the property, which is the subject-matter of the suit filed by the petitioner. In respect of such an agreement, Respondent 10, could have filed a suit for specific performance but, as stated by the learned counsel appearing for the parties, no such suit has been filed. In our opinion Respondent 10 was not at all a necessary party for determination of the genuineness or otherwise of the agreement of sale which is said to have been entered into between the petitioner and Respondent 1."

16 The result of the forgoing discussion may now be summed up as follows :

(i) A third party purchaser who claims a subsequent title from the plaintiff's vendor can always be joined, both at the instance of himself and the plaintiff, under Order 1 Rule 10 as a necessary party to a suit for specific performance between the plaintiff and his (i.e. the plaintiff's) vendor ;

(ii) A third party purchaser who claims a prior title from the plaintiff's vendor may not be joined, whether at the instance of the plaintiff or the purchaser, if the contest involves a challenge to the title or possession of such third party purchaser ;

(iii) An agreement purchaser from the plaintiff's vendor may be joined on the application of the plaintiff if it is the plaintiff's case that he has right to relief against the purchaser arising out of, or in furtherance of, the same cause of action against the original defendant, namely, the breach of an obligation owed by the original defendant to the plaintiff under the suit agreement for sale ;

> (iv) An agreement purchaser from the plaintiff's vendor may not be joined on his (i.e. the purchaser's) own application, since his presence for the purpose of enforcing, or protecting, his rights under a rival agreement is foreign to the plaintiff's cause of action in the suit, namely, specific performance of the plaintiff's agreement for sale with the defendant vendor.

17 In the present case, the third party who is sought to be joined by the Plaintiff is an agreement purchaser from the Plaintiff's vendor, i.e. the Defendant. The Plaintiff claims that the Defendant's agreement with this third party ("the offending agreement") is in breach of the obligation owed by the Defendant to the Plaintiff to perform the suit agreement for sale. The Plaintiff avers that the offending agreement is null and void and not binding on the Plaintiff. The Plaintiff apprehends that taking advantage of the offending agreement, the third party may wrongfully deal with the suit property or create further rights prejudicially to the Plaintiff. The Plaintiff, accordingly, proposes to seek reliefs against this third party. In the premises, having regard to the law discussed above, the Plaintiff firm is clearly within its rights to implead the third party, i.e. the Respondent herein, so as to claim appropriate reliefs against the latter. The Plaintiff's case falls under category (iii) referred to above.

18 The Chamber Summons is, in the premises, made absolute in terms of prayer clause -(a). Costs to be costs in the cause.

19 The amendment to be carried out after six weeks.

(S.C. GUPTE, J.)