

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL (L) NO. 83 OF 2019

IN

CHAMBER SUMMONS NO. 1280 OF 2018

IN

SUIT NO. 461 OF 2010

WITH

NOTICE OF MOTION (L) NO. 272 OF 2019

1. Ashok Dashrath Rana
Adults, Mumbai inhabitants residing at
B-Wing, 408, Lilac Bldg., Jahagir
Enclave Kanakia, Mira Road (East)
Thakur Complex.

...Appellant

Versus

1. Edit II Production
Binaifer Sanjay Kohli
Adult, Mumbai inhabitant, residing at
1101, Ocean View, 11th floor Deccan
Society, Union Park, Khar (West)
Mumbai – 52
2. Standerd Chartered Bank
Having its branch at 65-F, Vitthal Bhai
Patel Road, Santacruz(W), Mumbai-54
3. Shoeb Mohammed Taj Mohammed
Shaikh
Adults, Mumbai inhabitant, residing at,
Gaurav residency, Phase-II, row house
no.4-a, on the ground floor situated At
near mayo's bungalow, Beverly park,
Kanakiya, Mira Road (E), Thane,
At present imprisoned at Arthur Rd.
Central Prison,
65-F, Vitthal Bhai Patel Road,
Santacruz (W), Mumbai – 400 054

(Ori. Plaintiff)

4. Mumtaj Shoeb Shaikh
Adults, Mumbai inhabitant, Residing at,
Gaurav residency, Phase-II, row house
no.4-a on the ground floor situated at
near mayo's bungalow, Beverly park,
Kanakkiya, Mira Road (E), Dist - Thane
5. Asif Rafique Shaikh
Adult, Mumbai inhabitant, Residing at
Adrash building flat no.3, first floor
chheda enclave, Mira Road, District
Thane.

...Respondents

Mr. Amrut Joshi, I/b Mr. Vinay Bhorge, for the Appellant.
Mr. Rohaan Cama, for the Respondent no.1.

**CORAM: R. M. BORDE &
N. J. JAMADAR, JJ.**

RESERVED ON: 24th April, 2019.

PRONOUNCED ON: 4th June, 2019.

JUDGMENT:- (PER : N. J. JAMADAR, J.)

1. This appeal is directed against a common order dated 18th January, 2019 passed by the learned Single Judge in a Chamber Summons No.1280 of 2018 alongwith an application on the praecipe, whereby the Chamber Summons taken out by the Appellant herein for impleading him as a party Defendant to Suit No.461 of 2010, instituted by Respondent no.1 herein against Respondent nos.2 to 5, came to be disposed of as infructuous.

2. Having regard to the limited nature of controversy, with the consent of the Counsels for the parties, heard finally at the stage of admission itself.

3. For the sake of convenience and clarity, the parties are hereinafter referred to in the capacity in which they are arrayed in the suit before the learned Single Judge.

4. Shorn of unnecessary details, the background facts necessary for determination of this appeal can be summarised as under:

The Plaintiff, Edit II Productions, instituted a suit bearing No.461 of 2010, against Defendant nos.1 to 4, for recovery of a sum of Rs.3,00,43,514/- (Rs. Three crore forty-three thousand five hundred fourteen) along with interest at the rate of 18% p.a., plus damages, with the allegations that Defendant no.2 Mr. Shoeb Mohammed, who was working as Chief Accountant with the Plaintiff, committed criminal breach of trust and, *inter alia*, forged 433 cheques in connivance with his wife - defendant no.3, and his brother-in-law - defendant no.4, and siphoned off a huge amount from the account of the Plaintiff. It is further alleged that Defendant no.2, out of the said amount, which was siphoned off, purchased 16 properties, mostly in the name of Defendant no.3, including Flat No.B/02, Ground Floor, 'B' wing, Kohinoor Apartment, Mira Road (East), Taluka & District Thane (hereinafter referred to as the 'disputed property'). In

the said suit, the Plaintiff took out a Notice of Motion for appointment of Court Receiver. Eventually, the Court Receiver came to be appointed in respect of the disputed property as well.

5. Mr. Ashok Rana, the applicant – appellant was found to be in possession of the disputed property. The applicant – appellant claimed to have surrendered the possession of the disputed property to the Court Receiver. The applicant, thereafter, took out the Chamber Summons seeking impleadment as a party - Defendant no.5, to the above numbered suit. The applicant avers that Defendant no.2 had executed an agreement for sale of disputed property on 2nd July, 2004 in his favour. In terms of the said agreement, Defendant no.2 had agreed to sell the disputed property to the applicant for a valuable consideration of Rs.5,00,000/-. The applicant did part with the consideration, and has since been put in possession of the disputed property. However, the said agreement was not registered. Hence, on 7th March, 2011, Defendant no.2, through his Power of Attorney Mrs. Mumtaj Shaikh, executed a registered Deed of Confirmation and thereby sold the disputed property to the applicant. On the strength of these documents the Applicant claimed to be

a bonafide purchaser for value of the disputed property. Thus, the Applicant sought impleadment as a party Defendant.

6. The Plaintiff resisted the prayer of impleadment. The learned Single Judge, after consideration of the averments in the Affidavit in support of Chamber Summons and the documents annexed thereto and the submissions advanced by the contesting parties was persuaded to dispose of the Chamber Summons as infructuous. The learned Single Judge observed, *inter alia*, that the Applicant, for the first time, staked claim as the full owner of the disputed property as the Applicant had not lodged any such claim before the Court Receiver when an opportunity was specifically given by an order passed by this Court. Secondly, from the case set up by the Applicant that by the Deed of Confirmation, dated 7th March, 2011, the Agreement for Sale allegedly executed on 2nd July, 2004 has been confirmed, it appears that, there is, *prima facie*, no registered conveyance in favour of the Applicant. Thus, the learned Judge disposed of the application reserving the liberty to the Applicant to file such proceedings to establish his title to the disputed property, as

the Applicant may deem fit, and all contentions in that behalf were left expressly open.

7. Being aggrieved by and dissatisfied with the aforesaid order, whereby the claim of the Applicant for impleadment came to be negatived, the Applicant – Appellant has come in appeal.

8. We have heard Mr. Joshi, the learned Counsel for the Appellant and Mr. Cama, the learned Counsel for Respondent no.1 – original Plaintiff at some length.

9. Mr. Joshi, mounted a two-fold challenge to the impugned order. Firstly, according to Mr. Joshi, the learned Single Judge committed an error in rejecting the prayer for impleadment without adverting to the question as to whether the Applicant was a necessary party to the suit. The learned Single Judge was in error in observing that, *prima facie*, there is no registered instrument in favour of the Applicant, without properly analysing the character and import of the registered Deed of Confirmation dated 7th March, 2011, read with the Agreement for Sale dated 2nd July, 2004. Secondly, it was urged with tenacity that the provisions contained in Order I Rule 10(2) provide ample discretion in the Court to direct addition of a party. In the instant case, the

impleadment of the Applicant is absolutely necessary for an effectual and complete adjudication of the dispute between the parties. It would also avoid the multiplicity of proceedings, which the learned Single Judge indirectly promoted by reserving the liberty to take out an appropriate proceedings. Thus, the impugned order is legally unsustainable, urged the learned Counsel for the Appellant.

10. In opposition to this, Mr. Cama would urge that the claim of the Applicant for impleadment as a party Defendant is unsustainable on facts and in law. It was submitted that, the claim of the Applicant that he became owner of the disputed property appears to be a creature of afterthought and unworthy of credence. Mr. Cama further submitted that even otherwise, the application for impleadment does not deserve countenance as the alleged Deed of Confirmation dated 7th March, 2019 came to be executed in teeth of an order passed by the learned Single Judge in Notice of Motion No.543 of 2010 in Suit No.561 of 2010 dated 11th August, 2010, wherein the learned Judge had accepted the statement made in Affidavit sworn by Defendant no.3 that Defendant nos.3 and 4 shall not dispose of or create third party rights in respect of any of the

properties standing in their names. If the Applicant claims to have acquired ownership over the disputed property, on the basis of the instrument executed in flagrant violation of the said undertaking to the Court, then the Applicant is not entitled to be impleaded, as the Court cannot permit its order to be violated with impunity, urged Mr. Cama.

11. To bolster up the aforesaid submission, the learned Counsel for Respondent no.1 placed reliance upon a judgment of this Court in the case of ***Keshrimal Jivji Shah & another vs. Bank of Maharashtra & others***,¹ wherein this Court has, *inter alia*, observed as under:

“.....It is time that we recognise the principle that transfer of immovable property in violation of an order of injunction or prohibition issued by court of law, confers no right, title or interest in the in the transferee, as it is no transfer at all. The transferee cannot be allowed to reap advantage or benefit from such transfer merely because he is not a party to the proceedings in which the order of injunction or other prohibitory direction or restraint came to be issued. It is enough that the transferor is a party and the order was in force. These two conditions being satisfied, the transfer must not be upheld. If this course is not adopted then the tendency to flout orders of courts which is increasing day-by-day can never be curbed.”

(emphasis supplied)

12. Mr. Joshi, the learned Counsel for the Appellant joined the issue by canvassing a submission that in every case, where there is a transfer of the subject property in violation

1 2004 (Bom.) 831.

of an order of injunction, the transferee cannot be deprived of the opportunity to defend the claim of being a bonafide purchaser for value without notice, without enquiring into the fundamental facts as to whether the transferee was aware of the pendency of the proceedings and/or the injunction order. To lend support to this submission, Mr. Joshi placed a strong reliance upon a judgment of the Supreme Court in the case of **Savitri Devi vs. District Judge, Gorakhpur and others.**²

13. In the case of **Savitri Devi** (supra), one of the Defendants had transferred his share in the suit properties by executing three registered Sale Deeds in favour of Respondent nos.3 to 5 therein. When an application for impleadment was preferred by Respondent nos.3 to 5 therein, objection to their impleadment was taken on the premise that the said transfers were in breach, contempt and disregard of the order of injunction. The Trial Court had allowed the application for impleadment. The Appellant had unsuccessfully challenged the said order before the District Judge and the High Court. Ultimately the Appellant approached the Supreme Court. The order of the Trial Court

2 (1999) 2 Supreme Court Cases 577.

to implead the transferees was upheld by the Supreme Court also holding, *inter alia*, as under:

“8.The plea raised by Respondents 3 to 5 that they were bon fide transferees for value in good faith may have to be decided before it can be held that the sales in their favour created no interest in the property. The aforesaid questions have to be decided by the Court either in the suit or in the application filed by Respondents 3 to 5 for impleadment in the suit. If the application for impleadment is thrown out without a decision on the aforesaid questions, Respondents 3 to 5 will certainly come up with a separate suit to enforce their alleged rights which means a multiplicity of proceedings. In such circumstances, it cannot be said that Respondents 3 to 5 are neither necessary nor proper parties to the suit.”

9. Order I Rule 10 CPC enables the court to add any person as a party at any stage of the proceedings if the person whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. Avoidance of a multiplicity of proceedings is also one of the objects of the said provision in the Code.”

(emphasis supplied)

14. Mr. Joshi placed reliance on another judgment of the Supreme Court in the case of ***Pankajbhai Rameshbhai Zalavadiya vs. Jethabhai Kalabhai Zalavadiay (deceased) Through LRs and others,***³ wherein the legal representatives of a Defendant, who had died before the institution of the suit, were permitted to be added as party Defendants by invoking the provisions contained in Order I Rule 10(2) of the Code. The Supreme Court, observed that the expression, “to settle all questions involved” used in Order I Rule 10(2) of the Code ought to receive a liberal

3 (2017) 9 Supreme Court Cases 700.

consideration. The observations of the Court in paragraph 17 are instructive. They read as under:

“17. The expression “to settle all questions involved” used in Order I Rule 10(2) of the Code is susceptible to a liberal and wide interpretation, so as to adjudicate all the questions pertaining to the subject-matter thereof. Parliament in its wisdom while framing this rule must be held to have thought that all material questions common to the parties to the suit and to the third parties should be tried once for all. The Court is clothed with the power to secure the aforesaid result with judicious discretion to add parties, including third parties. There cannot be any dispute that the party impleaded must have a direct interest in the subject-matter of litigation. In a suit seeking cancellation of sale deed, as mentioned supra, a person who has purchased the property and whose rights are likely to be affected pursuant to the judgment in the suit is a necessary party, and he has to be added. If such purchaser has expired, his legal representatives are necessary parties.”

(emphasis supplied)

15. In the light of the aforesaid rival submissions and the exposition of law on which reliance has been placed by the respective Counsels, the crucial question that wrenches to the fore is, whether the Applicant is a necessary party to the suit, and the learned Single Judge ought to have permitted the Applicant to be impleaded as a party - defendant to the suit.

16. In this context the first and foremost principle which governs the power of the Court is, the question of addition of parties under Order 1 Rule 10(2) is not one of initial jurisdiction of Court, but of a judicial discretion which has to be exercised keeping in view all the facts and circumstances

of a particular case (Razia Begum vs. Anwar Begum, AIR 1958 SC 886). The learned Single Judge refused to exercise the discretion to add the applicant as a party - defendant.

17. In this backdrop, it is necessary to note that the scope of interference by the Division Bench, in the Letters Patent Appeal, with an order passed by the learned Single Judge in exercise of discretionary jurisdiction, is limited. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of ***Wander Ltd. and another vs. Antox India P. Ltd.***⁴, wherein the scope of interference by the Appellate Court in an appeal against the exercise of discretion by the Single Judge was expounded as under:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not

justify interference with the trial court's exercise of discretion.”

18. In the light of aforesaid legal position, we propose to examine whether the learned Single Judge justifiably exercised the discretion not to implead the applicant as a party to the suit. It is trite that under the provisions of Order I Rule 10(2) the Court is empowered to direct that a person be added as a party to the suit if the presence of such person before the Court is necessary in order to enable the Court to adjudicate all the questions involved in the suit effectually and completely. The real test to determine whether a party is a necessary party to the suit is whether in the absence of the person sought to be impleaded as party to the suit, the controversy raised in the suit cannot be effectively and completely adjudicated. On this touchstone, reverting to the facts of the case, it is imperative to note the nature of the claim put-forth by the Applicant.

19. Indisputably in response to the order passed by the learned Single Judge on 22nd September, 2017 and 12th October, 2017, the Applicant Ashok Rana appeared before the Court on 10th November, 2017. On that day, the learned Single Judge directed the Court Receiver to verify the claims of the Applicant and other persons. Those persons were

directed to submit the documents including Leave and Licence Agreement or any other agreement and also submit their monetary claims. It is incontrovertible that the Applicant did appear before the Court Receiver and produce a copy of Leave and Licence Agreement dated 20th March, 2011, executed by Defendant no.2 through Defendant no.3 Mrs. Mumtaj Shaikh, as his constituted attorney. The Court Receiver found that, under the said agreement, the term of which expired on 29th October, 2015, the Applicant had paid a sum of Rs.5,00,000/- to the said Mumtaj Shaikh by way of security deposit.

20. In the Chamber Summons, the Applicant claimed to have acquired interest in the disputed property in pursuance of the agreement for sale dated 2nd July, 2004 and the deed of confirmation registered on 7th March, 2011. These two vital documents were not set up before the Court Receiver. In contrast, an innocuous agreement of Leave and Licence was produced to substantiate the claim of possession over the disputed property. The agreement for sale and its subsequent confirmation were such notorious documents that, ordinarily, the Applicant could not have missed to set them up at the first possible opportunity. Viewed through this prism, the

observations of the learned Single Judge that the Applicant came up with the case of acquisition of title over the disputed property for the first time, by way of Chamber Summons, appear impeccable.

21. Even if we take the case of the Applicant at par and construe it rather generously, then also the Applicant's case is not free from infirmities. Firstly, the agreement for sale allegedly executed on 2nd July, 2004 was, admittedly, not registered. Secondly, the deed of confirmation dated 7th March, 2011, though registered, can, at best, confirm the execution of the agreement for sale. It is not the case that the title to the disputed property came to be conveyed to the Applicant in pursuance of the agreement for sale. At the most, the Applicant has a right to seek the specific performance of the contract. Thirdly, the Deed of Confirmation dated 7th March, 2011 appears to have been executed by Mrs. Mumtaj Shaikh, Defendant no.3 who had sworn an Affidavit on 6th August, 2010, that Defendant nos.3 and 4 shall not dispose and/or create third party rights in respect of any of the properties standing in their names, which statement was accepted by the Court on 11th August, 2010.

22. The aforesaid facts cumulatively indicate that the claim of the Applicant of acquisition of ownership over the disputed property does not qualify as a definite claim based on documents of unimpeachable evidentiary value. On the one hand, the nature of the claim wavered, from being a mere licensee to a bonafide purchaser for value. On the other hand, the claim of having acquired ownership over the disputed property, in the face of the documents i.e. Agreement for Sale dated 2nd July, 2004 and Deed of Confirmation dated 7th March, 2011, is *ex facie* unsustainable. Thus, the pronouncement of the Supreme Court in the case of **Savitri Devi** (supra), on which a strong reliance was placed on behalf of the Appellant, is of no avail to the Appellant, as in the said case the Defendant therein had transferred the subject property by executing the registered sale deeds.

23. At this juncture, the nature of the suit assumes critical significance. If the nature of the suit i.e. recovery of the amount which was allegedly siphoned off by Defendant nos.2 to 4 from the account of the Applicant, is kept in view then the impleadment of the Applicant does not seem to be absolutely warranted for an effectual and complete

adjudication of the dispute between the parties to the suit. The conspectus of the aforesaid consideration is that having regard to the nature of the claim set up by the Applicant, which is in a sense inchoate, the learned Single Judge was justified in rejecting the prayer for impleadment, with liberty to the Applicant to work out his remedies. Thus, no interference is warranted in the impugned order. Resultantly, the appeal fails.

24. The Appeal stands dismissed. However, there shall be no order as to costs.

25. In view of disposal of the appeal, Notice of Motion does not survive and stands disposed of accordingly.

[N. J. JAMADAR, J.]

[R. M. BORDE, J.]