

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CR No.8943 of 2017

Date of decision : 20.12.2019

Varinder Kumar

.... Petitioner

Versus

Nirmal Singh

.... Respondent

Before: Hon'ble Mr. Justice B.S. Walia.

Present: Mr. Rajiv Joshi, Advocate for the petitioner.
Respondent proceeded against ex parte.

B.S. Walia, J.

[1] Revision petition has been filed under Article 227 of the Constitution of India challenging order dated 26.10.2017 passed by the learned Civil Judge (Jr. Div.), Jalandhar dismissing the application filed by the petitioner under Order 1 Rule 10 CPC for impleadment of Mohinder Singh s/o Joginder Singh, r/o 14, Hardyal Nagar, Jalandhar (hereinafter referred to as Mohinder Singh), subsequent vendee of the disputed property as a defendant.

[2] Brief facts of the case leading to the filing of the revision petition are that the petitioner entered into an agreement to sell dated 19.04.2011 with the respondent for a property measuring 9 marlas and 73 sq. feet for total sale consideration of ₹38,00,000/- and paid earnest money of ₹5,00,000/- at the time of execution of agreement to sell. The sale deed was to be executed on or before 26.10.2011 on payment of the balance sale consideration at the time of execution of sale deed. On failure of the respondent to do the needful, the petitioner filed a suit for possession by way

of specific performance of agreement to sell dated 19.04.2011 against the

respondent/defendant. The respondent/defendant filed a written statement admitting the execution of the agreement to sell but denying his unwillingness on the appointed date to execute the sale deed. However, at the time of cross-examination of the respondent/defendant on a specific query put to him, the respondent disclosed that he had already sold the property on 22.02.2012 to Mohinder Singh. Immediately thereupon, the petitioner/plaintiff moved an application under Order 1 Rule 10 CPC for impleadment of the subsequent vendee of the disputed property i.e. Mohinder Singh so as to avoid multiplicity of litigation and in order to enable an effective decree to be passed in his favour. However, vide order dated 26.10.2017 the learned Civil Judge (Jr. Div.), Jalandhar dismissed the application filed by the petitioner/plaintiff under Order 1 Rule 10 CPC for impleadment of Mohinder Singh i.e. subsequent vendee of the disputed property as defendant.

[3] That order dated 26.10.2017 passed by the learned Civil Judge (Jr. Div.), Jalandhar has been challenged on the ground that the subsequent vendee of the disputed property is a necessary as well as proper party and his impleadment is essential as no effective decree can be passed in his absence, his presence is necessary to enable the Court to effectively and completely adjudicate upon and settle the questions involved in the suit. Besides, the decree even if passed in favour of the petitioner/plaintiff would be impossible to execute in the absence of the subsequent purchaser who had purchased the property after the agreement to sell between the parties.

Secondly, that the learned Civil Court had failed to appreciate that the object and intention of the legislature in inserting Order 1 Rule 10 CPC was to avoid and to avert multiplicity of litigation.

Thirdly, Hon'ble the Supreme Court in case reported as 2005 (6) SCC 733 had held that a transferee of the property which was the subject matter of the contract, had a direct interest in the subject matter of the suit for specific performance of agreement to sell and as such, the purchaser of the suit property subsequent to the execution of agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract.

Fourthly, Hon'ble the Supreme Court in Papallu Mohanarao's case held that "it is for the plaintiff in a suit to identify the parties in a suit against whom he has any grievance and to implead them as defendants in the suit for necessary relief." In case, the efforts made by the petitioner/plaintiff to implead the subsequent transferee as defendant in the suit for specific performance were thwarted, the petitioner would have to institute another suit against the subsequent transferee in the event of the suit being decreed, which was against the very purport of enactment of Order 1 Rule 10 CPC.

[4] Despite service, none appeared on behalf of the respondent. Consequently, vide order dated 25.04.2019, respondent was proceeded against ex parte.

[5] I have considered the submissions of learned counsel for the petitioner.

[6] Hon'ble the Supreme Court in **Durga Prasad and another vs Deep Chand and others, 1954 AIR (SC) 75** while considering a case involving a suit for specific performance brought by prior purchaser transferee against his vendor and subsequent purchaser held that proper form of the decree was to direct specific performance of the contract between the vendor and the prior transferee and to direct the subsequent transferee to join in the conveyance so as to pass on the title which resided in him, to the prior

transferee. Hon'ble the Supreme Court further held that the subsequent transferee did not join in any special covenants made between the prior transferee and its vendor and all that he did, was to pass on his title to the prior transferee. Relevant extract (i.e. para Nos.40 to 42) of the decision of Durga Prasad's case (Supra) are reproduced as under :-

*“40. First, 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 only 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 him to convey to the plaintiff unless steps are taken to re-vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C.J. adopted the other course in - **Kali Charan v. Janak Deo, AIR 1932 Allahabad 694**. He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complications between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.*

41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser alone to the plaintiff. It is true that would have the effect of vesting the title to the property in

the plaintiff but it might be inequitable to compel the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varied by altering or omitting such terms the court will be remaking the contract, a thing it has no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

*42. In our opinion, the 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. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in - **Kafiladdin v. Samiraddin** , **AIR 1931 Calcutta 67** and appears to be the English practice. See *Fry on Specific Performance*, 6th Edn. page 90, Paragraph 207; also- **Potter v. Sanders, (1846) 67 ER 1057**. We direct accordingly.*

[7] The decision of Hon'ble the Supreme Court in Durga Prasad's case (Supra) was followed by a Division Bench of Hon'ble the Patna High Court in case titled as **Rukmini Devi vs Pawan Kumar Gupta, 1979 AIR (Patna) 88** by holding that in a suit for specific performance of contract, decree must direct the original vendor and subsequent purchaser to execute the sale deed in favour of the petitioner (prior purchaser) and if a subsequent purchaser had not been directed to execute the sale deed in favour of the petitioner (prior purchaser), the decree could not be executed against him.

Likewise, Hon'ble the Madras High Court in **Vimala Ammal vs C. Suseela and others, 1991 AIR (Madras) 209** held that in a suit for specific performance, subsequent purchaser is a necessary party and a decree obtained without impleading the subsequent purchaser is a nullity and cannot be executed against such subsequent purchaser. Relevant extract (i.e. para Nos.7 and 8) of the decision of Vimala Ammal's case (Supra) are reproduced as under:-

“7. On the other hand, learned counsel for the appellant distinguished the said decision rendered in AIR 1968 Mad 388, on the footing that, in the said case subsequent purchaser was a party in the specific performance suit. In the present case the appellant-subsequent purchaser was not a party in the above said specific performance suit in O.S.3244 of 1983. Learned counsel also relied on the decision in Chinne Vasgan v. Alamalu, 1975 1 Mad LJ 263 which held that a subsequent purchaser with the knowledge of prior agreement to sell to another, was a necessary party in the suit by the latter for specific performance and that the decree should direct both the owner and the subsequent purchaser to execute conveyance in favour of the agreement holder. The following determination in the said decision are significant:

'But if the purchase by the third party was with the knowledge of the agreement to sell, he will hold the property subject to the obligation under S.91 of the Indian Trust Act, 1892. This section provides that where a person acquires property with notice that another person has entered into an existing contract affecting that property of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give

*effect to the contract. Thus the obligation of holding as a trustee, is only to the extent necessary to give effect to the contract. It does not affect the passing of the title. In other words even where Section 91 of the Act applicable the transaction of sale is not made void, but the subsequent purchaser is under an obligation to convey the property to the agreement holder as and when he establishes his rights., The agreement holder can acquire title to the property only if a proper conveyance is executed by the subsequent purchaser as well These principles clearly show that the subsequent purchaser is a necessary party in a suit for specific performance and the decree should direct both the owner and the subsequent purchaser to execute the conveyance in favour of the agreement holder'. (Underlines are mine). This Court in the above said 1975 1 MLJ 263 Chnnevannan v. Alamelu (supra) relied on **Durga Prasad v. Deepchand, AIR 1954 Supreme Court 75** and **Appa Rao v. Upendra, AIR 1953 Madras 409**. In **Rakesh Chandra v. Chuni Lal, AIR 1971 SC 1238** and **Dwarika Prasad v. Harikant Prasad, AIR 1973 Supreme Court 655** also, it was held that in the above situation, the title resided in THE SUBSEQUENT PURCHASER and he had also to necessarily join in the conveyance. So where the appellant subsequent purchaser is a necessary party, unless he is impleaded and decree is got as indicated earlier in the above said decision, the title remained with the subsequent purchaser. Therefore, E.A. No. 4250 of 1985 should have been allowed as prayed for.*

8. No doubt the learned counsel for the first respondent contends that the execution Court cannot go beyond the decree. But this contention has no merit. First of all, the appellant was not a party to the suit at

*all. That apart, the decree is a nullity since the necessary party was not impleaded. Necessary parties are parties who "ought to have been joined" under Order 1, Rule 10(2), C.P.C. that is, parties necessary to the constitution of the suit without whom no decree at all can be passed. (Vide - **Kishan Prasad v. Har Narain Singh, (1911) 33 All 272 (PC)**). It is settled law that a decree which is a nullity can be challenged even at the execution stage."*

[8] A perusal of decision of Hon'ble the Supreme Court in Durga Prasad's case (Supra) as followed by Hon'ble the Patna High Court in Rukmini Devi's case (Supra) as also in Vimala Ammal's case (Supra) reveals that in case of suit for specific performance by a prior purchaser against his vendor, the subsequent purchaser from the vendor is a necessary and proper party and that the proper form of decree in such a suit would be 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 resided in him to the plaintiff. Hon'ble the Madras High Court has gone to the extent of ordering redelivery of possession to the subsequent purchaser in the absence of such subsequent purchaser having been a party to the civil suit. It, therefore, transpires that in the absence of the subsequent purchaser being impleaded as a party to the suit by the petitioners/plaintiffs against the vendor, no effective decree can be passed. Therefore, it is essential to implead the subsequent purchaser as a party to the suit.

[9] Accordingly, in the light of the position noted above, I find merit in the plea of learned counsel for the petitioner for impleadment of Mohinder Singh as a necessary party in order to convey title to the petitioner

(Supra) and that in the absence of impleadment of said Mohinder Singh as a party/defendant to the suit, no effective decree can be passed for directing the possession which had passed from the vendor i.e. respondent/defendant to said Mohinder Singh to be conveyed by Mohinder Singh to the petitioner/plaintiff. Therefore, for the purpose of conveying the title to the petitioner/plaintiff, the presence of said Mohinder Singh is essential for an effective decree to be passed. Accordingly, the impugned order is set aside.

Having arrived at the aforementioned conclusion that Mohinder Singh is a necessary and proper party for the passing of an effective decree, it follows that the plaint has to be amended in terms of Order 1 Rule 10 CPC. As a consequence of the setting aside of the impugned order and allowing the impleadment of Mohinder Singh as respondent/defendant No.2, the plaint is required to be amended so as to incorporate necessary changes and amended copy of the plaint is to be served on the defendants.

[10] Since, impugned order dated 26.10.2017 passed by the learned Civil Judge (Jr. Div.), Jalandhar has been set aside and application under Order 1 Rules 10 CPC allowed, therefore, in exercise of the powers under Order 1 Rule 10 (2) CPC, Mohinder Singh is impleaded as respondent/defendant No.2. Appropriate amendment would be made in terms of Order 1 Rule 10 (4) CPC.

[11] Revision petition allowed in the aforementioned terms.

[12] Needless to mention, the learned trial Court shall proceed in the matter in accordance with law and decide the suit as expeditiously as possible.

(B.S. Walia)
Judge

20.12.2019
amit