

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8122 OF 2017

MEENANATH ASARAM DEHADRAY
VERSUS
VITHAL RAJARAM PHULPAGAR AND OTHERS

...
Advocate for Petitioner : Mr. Mahesh R. Sonwane
Advocate for Respondent No. 1: Mr. A.D. Soman

.....
[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 17th AUGUST, 2022

ORDER :

1. The petitioner is aggrieved by the order passed by the learned Ad-hoc District Judge-3, Ahmednagar, below Exhibit-34 in Regular Civil Appeal No. 249/2011, thereby rejecting the application filed by the petitioner for impleading him as a party respondent in the said appeal.

2. Regular Civil Suit No. 97/1983 was filed by respondent Nos. 2 to 4 and 5 against the respondent No. 1 and sister Vatsala Kathavate for partition and separate possession of the ancestral properties. The suit came to be decreed on 13.01.1987 against the original defendants no. 1 and 2. It was declared that plaintiffs and defendants No. 1 and 2 have 1/3rd share each in the suit land. The 1/3rd share was directed

to be partitioned from the suit land and after partition, the plaintiffs and defendants were directed to be put in separate possession of their share. According to the petitioner this judgment has become final and nobody has questioned it.

3. Thereafter, respondent No. 1 son of original defendant No. 1 filed Regular Civil Suit No. 178/1997 claiming declaration that the judgment and decree passed in Regular Civil Suit No. 97/1983 is null and void and is not binding on him and mother of defendants no. 1 to 4 relinquished their share in favour of his father/defendant No. 1. This suit came to be dismissed on merit by order dated 03.01.2008. Respondent No. 1 challenged the dismissal by filing Regular Civil Appeal No. 249/2011, wherein the Appellate Court has granted stay to the execution of the judgment and decree passed in Regular Civil Suit No. 97/1983.

4. The petitioner purchased the share of Vatsala/original defendant No. 2 by way of registered sale deed dated 17.05.2013. According to the petitioner, the appeal filed by respondent No. 1 is pending for taking steps and no steps so far have been taken in the appeal. The petitioner filed execution petition bearing No. 16/2012 for execution of the decreed passed

in Regular Civil Suit No. 97/1983. By order dated 12.07.2013, the Appellate Court stayed the execution of Regular Darkhast No. 16/12 filed by the petitioner.

5. The petitioner then moved application Exhibit-34 seeking impleadment as respondent in Regular Civil Appeal No. 249/2011. Said application was resisted by respondent No. 1. The Appellate Court has rejected the application on the ground that if the vendor and third party (petitioner) succeeds in the suit, then third party will get share under the sale deed. Sale deed of the applicant will be good and he will derive title and possession subject to the result of this appeal. In such circumstances, third party has no independent right than the right of his predecessor in title, therefore, third party is not necessary party for deciding the appeal. The petitioner is aggrieved by this order.

6. Heard the learned advocate for the petitioner and learned advocate for the respondents. Perused the documents placed on record.

7. The petitioner claims to have stepped in the shoes of his vendor Vatsala. Vatsala expired on 27.10.2013 and

according to the petitioner, no steps are taken for bringing legal heirs of deceased Vatsala on record in the appeal. Admittedly, the decree in Regular Civil Suit No. 97/1983 is challenged by respondent No. 1 belatedly after more than 14 years by filing Regular Civil Suit No. 178/1997. According to the petitioner the appeal is pending for taking steps. It is not in dispute that the petitioner has filed execution petition seeking execution of the judgment and decree passed in Regular Civil Suit No. 97/1983. In view of death of Vatsala on 27.10.2013, there is nobody to take care of her interest in the proceeding. As has been already observed that since the petitioner has stepped in the shoes of Vatsala, he is required to be impleaded as party in the present appeal.

8. The learned advocate for the petitioner was justified in relying on Thomson Press (India) Ltd. vs. Nanak Builders and Investors P. Ltd. And Others [(2013) 5 SCC 397], wherein it is held:

"53. 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:

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).

54. 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.

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."

9. In Yogesh s/o Balaji Misar Vs. Keshav Vistari Sontakke & ors.[2014 (5) Mh.L.J. 53], co-ordinate bench of this Court has allowed the impleadment of subsequent purchaser on the ground that he has stepped into the shoes of plaintiff and needs to be provided an opportunity to prosecute or contest the suit, so as to settle all questions involved in the suit.

Both these ruling support the case of the petitioner.

10. The learned advocate for the respondent by placing reliance on Veena w/o Dr. Jayantilal Waghela vs. Chairman, Nagpur Improvement Trust and others [2015 (4) Mh.L.J. 824], strenuously opposed the petition. In the said case, the Court after considering the principle underlying section 52 of the Transfer of Property Act has held "*if the property transferred pendente lite, is allotted entirely to some other party or parties to the suit or if the transferor is held to have no right or title to convey that property, the transferee will not have any title to the property. Petitioner admitted that her sale deed was executed during the pendency of the partition suit and the suit was*

decided. Her sale deed was subject to the final decision in the partition suit and she is not entitled to claim otherwise on the basis of that sale deed subjected to the doctrine of lis pendense as mentioned above."

11. In the case in hand, admittedly, the vendor of the petitioner, Vatsala, being sister of plaintiffs and original defendant No. 1 had share in the ancestral property and the petitioner has purchased the said share. Since the petitioner has stepped in the shoes of Vatsala, who is no more, no prejudice will be caused to the respondent No. 1 if the petitioner is allowed to be impleaded as party respondent in the appeal. In that view of the matter, the writ petition succeeds.

12. The impugned order passed by learned Ad-hoc District Judge-3, Ahmednagar, below Exhibit-34 in Regular Civil Appeal No. 249/2011, is hereby quashed and set aside.

13. Application Exhibit-34 is allowed. No costs.

[NITIN B. SURYAWANSHI, J.]