

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION 611 OF 2009

Sou. Neelatai Dilip Shinde

... Petitioner.

V/s.

Balasaheb Ganapati Varekar & Ors.

... Respondents.

Mr. Vijay Killedar, Advocate for the Petitioner.

Mr. Surel S. Shah, Advocate a/w. Swaroop Karade for
Respondent -1.

CORAM : ROHIT B.DEO, J.

DATE : JULY 29, 2022

PC :

1. By the impugned order dated 01.03.2008 passed in Regular Civil Suit 141 of 2006 which is instituted for partition and declaration that the relinquishment deed purportedly executed by the petitioner-plaintiff is illegal and void, the application preferred by respondent 1 under Order 1 Rule 10 of the Code of Civil Procedure, 1908 (Code) is allowed on the premise that the respondent - third party holds an agreement for sale executed in his favour by the father of the petitioner-plaintiff and the defendants 2 to 5.

2. The short question involved is whether the respondent 1- third party is necessary or proper party to the suit.

3. The learned trial Judge was persuaded to allow application under Order 1 Rule 10 on the premise that the third party has instituted special civil suit 315 of 2004 for specific performance. The learned trial Judge reasoned that the filing of the suit for specific performance itself indicates that the third party has some interest in the property.

4. In my considered view, the learned Judge fell in serious error in assuming that the third party has share and interest in the suit property.

5. The interest which entitles a person to intervene in a civil action must be a direct and legal interest. It is trite law that an agreement for sale, in contradistinction with completed conveyance does not create any share or interest in the property. This court has in plathora of decisions held that third party is not entitled to seek impleadment in a suit for partition on the basis of an

agreement of sale which may have been executed by the members of the family. The only option available for the third party is to prosecute the suit for specific performance, which in the present case has been done, and if there is a crystallized right in his favour, in view of the decree of specific performance, to assert rights on the basis of such decree to the extent of the share of his vendor(s).

6. I have considered a similar issue in writ petition 6355 of 2019 vide order dated 06.06.2022 thus :

“7. Section 54 of the Transfer of Property Act, 1882 clearly spells out that the Agreement of Sale per se does not create any interest in the property which is the subject matter of the agreement. Axiomatically, a person in whose favour, there is an agreement of sale purportedly executed by a party to the suit cannot be heard claiming right to participate in the suit on the premise that the Agreement for Sale creates interest in the property.

*8. An identical situation fell for consideration in **Shrikrishna Purushottam Gaidhani Vs. Gajanan Mahadev Gaidhani & Ors.** Writ Petition 6159 of 2008 which is decided by a learned Single Judge by judgment dated 3.8.2009. In the suit for partition and separate possession, third parties invoked the provisions of Order I*

Rule 10(2) of the Code on the basis of the Agreement of Sale executed in his favour by some of the defendants. It would be apposite to note the articulation in paragraph 7 of the said decision which reads thus :-

“7. I have carefully considered the submissions. As stated earlier, the suit filed by the petitioner is for partition and separate possession of the alleged share of the petitioner in the suit immoveable properties. The respondent no.14 is claiming on the basis of the agreement for sale executed in his favour by some of the defendants. Admittedly, there is no conveyance executed in favour of the respondent no.14. In view of section 54 of the Transfer of Property Act, 1882, as of today, the respondent no.14 has no interest in the suit property as agreement for sale does not create any interest in the property subject matter of the agreement. Assuming that there is an agreement for sale executed by some of the defendants in favour of the 14th respondent and assuming that he is entitled to enforce the said agreement, at the most he will be entitled to claim the property which maybe allotted to the share of his vendors at the time of effecting partition. The learned Trial Judge, however, observed that in absence of the respondent no.14 an executable decree cannot be passed. The learned trial Judge has completely ignored that there is no sale deed executed in favour of the respondent no.14. Considering the nature of the prayers made in the suit, the observation of the trial Judge that executable decree cannot be passed was completely erroneous. Only on the basis of an agreement for sale executed by some of the defendants having undivided share in the suit

properties, the respondent no.14 does not become either a necessary or a proper party to the suit for partition and separate possession filed by the petitioner."

9. The well entrenched principle is that the plaintiff is dominus litis which latin expression means that the plaintiff is the master of the suit. The plaintiff cannot be compelled to wage a legal battle against a person, against the plaintiff's Will. The exception would be if the compulsion of law would necessitate the presence of third party, either as necessary party or proper party. A distinction between the plaintiff seeking addition of third party, and either, third party of the defendant invoking the provisions of Order I Rule 10 (2) of the Code, will also have to be borne in mind.

10. In **Gurmit Singh Bhatia Vs. Kiran Kant Robinson & Ors., 2019 SAR (Civil) 908**, the Apex Court considered the submission that the subsequent purchasers claiming title under vendor of the plaintiff are necessary parties to the suit and can claim impleadment on the basis of title acquired albeit during pendency of the suit. The decision in **Robin Ramjibhai Patel vs. Anandibai Rama @ Rajaram Pawar, (2018) 15 SCC 614** and the decision of this Court in **Shri Swastik Developers vs. Saket Kumar Jain, 2014 (2) Mh.L.J. 968** was distinguished in **Gurmit Singh Bhatia** by observing that in the factual matrix involved in the said decision, it was the plaintiff, who submitted an application to implead third parties/ subsequent purchasers and that position will be different when the plaintiff submits an application to implead the subsequent purchaser as a party and when the plaintiff opposes such an application for impleadment.

11. *In the present case, the plaintiff is opposing the impleadment. Respondent 15 and 16-third parties preferred an application seeking impleadment on the premise that the Agreement of Sale clothes them with the status of necessary and at any rate, proper parties. The plaintiff, who is the dominus litis, is opposing the impleadment. The short question which is required to be answered, is whether the third parties are necessary or proper parties.*

12. *I have already held that the third parties do not have any share or interest in the subject matter of the suit. The Agreement of Sale does not create any interest in the property. A necessary party would be a party, in whose absence, no effective decree can be passed. A proper party, would be a party, in whose absence, an effective order can be passed but whose presence is necessary for complete and final decision on the questions involved in the proceedings.*

13. *In the factual matrix, the suit is brought for partition and possession. The third parties, who claim to hold an Agreement of Sale executed qua the suit property by defendant 1 are neither necessary parties nor a proper parties considering the question involved. Perhaps, the situation may be different if the plaintiff as dominus litis seeks impleadment of third parties. I need not go deeper in the said question since the plaintiff is opposing impleadment of third parties, which he is well entitled to do. The third parties have no direct interest or legal interest in the lis.*

7. The order impugned is unsustainable and is set aside.

8. The learned trial Judge is requested to expedite the hearing of the suit.

9. Petition is allowed in the aforesaid terms.

(ROHIT B. DEO, J.)

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