

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

PRACHI
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NANDIWADEKAR

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WRIT PETITION NO.6355 OF 2019

1. Jagannath Khanderao Kedar)
age -61 years, Occ. Agriculture)
R/at Umrle, Taluka -Dindori)
District Nashik.)

2. Indumati Khanderao Kedar @)
Indumati Laxman Mankar,)
Age 58 years, Occ. Agriculture)
R/at. Makhamalabad, Taluka Nashik.)
District Nashik.)

.. Petitioners

Versus

1. Gopinath Bhimaji Kedar)
@Gopinath Bhagwant Mohite)
Age. 60 years, Occ. Agriculture,)
R/at Flat No.11 & 12, Ram Co.op)
Housing Society Ltd.S. No.719 & 720A,)
Advait Colony, Canada Corner,)
Nashik)

2. Smt. Kamlabai Baburao Kedar)
(Died on 25/8/2017))

3. Madan Baburao Kedar)
Age 53 years, Occ. Agriculture &)
Business.)

4. Shankar Baburao Kedar)
Age 50 years, Occ. Agriculture &)
Business.)

5. Vaishali Baburao Kedar @)
Sau. Vaishali Ramesh Sanap)
Age 48 years, Occ. Agriculture &)
Household, No.2 to 5,)
R/at Umrle, Taluka Dindori,)

- District Nashik.)
6. Sau. Kalpana Gopinath Kedar,)
Age. 58 years, Occ. Agriculture,)
R/at Flat No.11 & 12, Ram Co.op)
Housing Society Ltd. S. No.719 & 720A,))
Advait Colony, Canada Corner,)
Nashik.)
7. Sau. Shobha Madan Kedar)
Age 53 years, Occ. Agriculture)
8. Sau. Sunanda Shankar Kedar)
Age 43 years, Occ. Agriculture)
9. Vishal Madan Kedar)
Age 23 years, Occ. Agriculture)
10. Kaivalya Shankar Kedar)
Age 24 years, Occ. Agriculture)
11. Prashant Jagannath Kedar)
Age 31 years, Occ. Agriculture)
12. Kiran Jagannath Kedar)
Age 29 years, Occ. Agriculture)
13. Ramchandra Mahadu Kedar)
Age 53 years, Occ. Agriculture,)
No.7 to 13 R/at Umrade Budruk,)
Taluka Dindori, District Nashik)
14. Sanjay Namdev Aavhad)
Age 43 years, Occ. Agriculture,)
R/at. S.T. Colony, Gangapur Road,)
Nashik.)
15. Yuvraj Dayaram Kapase,)
Age 56 years Occ. Agriculture & Business))
R/at. 3 Bagul Building, New Pandit Colony,))
Nashik)
16. Sau. Smita Ashok Sonawane)

Age 58 years, occ. Household,)
R/at. Tarakutir Bunglow, Mahatma Nagar)
Nashik.) .. Respondents

Mr.Girish R. Agrawal for the petitioners.
Mr.Ajinkya Jaibhave i/by Mr.Saurabh Raut for respondents 15 & 16.

CORAM : ROHIT B. DEO, J.
DATED : 6th JUNE 2022

Oral Judgment :-

. This petition emanates from Special Civil Suit 574 of 2015 which is brought by the petitioners/plaintiffs for partition and separate possession.

2. In the suit for partition and separate possession, the respondents 1 to 14 are arrayed as the defendants. Respondents 15 and 16, who are not parties to the suit preferred an application dated 26.10.2018 invoking the provisions of Order I Rule 10 of the Civil Procedure Code, 1908 ("Code") on the premise that the defendant Shri Gopinath Bhimaji Kedar had entered into an Agreement of Sale dated 15.7.2013 in their favour qua agricultural land admeasuring 4.67 H.R. assigned Gat 48 at Mouje Waghad, Taluka Dindori, District Nashik. Respondents 15 and 16 claimed to be necessary parties to the suit.

3. The learned trial Judge allowed the application preferred under Order 1 Rule 10 of the Code vide order dated 11.1.2019 on the premise that respondents 15 and 16 have interest in the suit property in view of the Agreement of Sale dated 15.7.2013 executed in their favour by defendant 1, and such interest shall be affected by adjudication in the suit. It is this order which is impugned herein.

4. I have heard the learned counsel Mr.Girish Agrawal on behalf of the plaintiffs and the learned counsel Mr.Ajinkya Jaibhave on behalf of respondents 15 and 16-third parties.

5. It would not be necessary to make an elaborate reference to pleadings. Suffice it to note, that it is common ground that the Agreement of Sale dated 15.7.2013 which is purportedly executed by defendant 1 in favour of the third parties prior to institution of the suit for partition has not fructified into conveyance.

6. The learned trial Judge has assumed that the third parties have share or interest in the suit property. The learned trial Judge clearly erred in labouring under such assumption.

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 persence 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.

14. In ***Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Greater Bombay & Ors., (1992) 2 SCC 524***, the Apex Court has enunciated that a person is not a necessary party merely because he has relevant evidence to give on some of the questions involved or that he has an interest in the correct solution of some questions involved. The third parties claim to have an Agreement of Sale executed in their favour by defendant 1. The right of third parties to enforce the agreement is restricted to defendant 1 and the property which may fall to his share in view of the final adjudication in the partition suit. The third party may, if permissible in law, proceed on the basis of the Agreement of Sale, against the portion of the suit property which may be allotted to the defendant 1, in the partition suit.

15. The learned counsel for the third parties Mr.Ajinkya Jaibhave has relied on certain decisions to buttress the submission that the third parties can be brought on record as defendants. None of the

decisions which are pressed in service deal with locus or status of the holder of an agreement. The decisions consider the right of the purchaser of the property to impleadment in the suit. Illustratively the decision in ***Rama Bapu Khakal and Anr. Vs. Narayan Govinda Khakal & Ors., 2017 (4) ABR 826*** considers the right of the alienee pendente lite to participate in the proceedings.

16. The said decision and the other decisions which consider similar situation do not take the case of third parties any further since third parties have no interest in the property and merely hold an Agreement of Sale and not Conveyance Deed as would transfer title and create share and interest in the property in favour of third parties.

17. In my considered view, the learned trial Court committed serious error in allowing the application (Exhibit- 83) by the order impugned herein. The order impugned is quashed. Application at Exhibit 83 in Special Civil Suit 574 of 2015 stands rejected.

18. The learned trial Court is requested to decide the suit as expeditiously as possible and in any event within the next twelve months.

19. The petition is allowed in aforesaid terms. No order as to costs.

ROHIT B. DEO, J.