

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION 9042 OF 2016

Mr. Mahendra G. Rathor and Anr. ..Petitioners

V/s.

Smt. Laxmibai Maruti Pawar & Ors. ..Respondents

Mr. Rohan Sawant with M/s. Dhawani Bokaria i/b M/s.
Purnanand & Co. for the Petitioners.

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CORAM : ROHIT B. DEO, J.

DATE : 8 JUNE 2022

P.C.

1. The Petitioners are the Plaintiffs in Special Civil Suit 255 of 2014 instituted against Respondents 1 to 6 for specific performance of agreement in relation to land situated at village Shirgaon, Taluka Ambarnath, District Thane.

2. The challenge in the petition is to the order dated 01.02.2016 rendered by the learned Trial Court whereby application preferred under Order I Rule 10 of the Code of Civil Procedure, 1908 ('Code') by the third parties Respondents 7 and 8, is allowed.

3. I have heard Mr. Rohan Sawant on behalf of the Petitioners-Plaintiffs. None appeared on behalf of the contesting

Respondents. In order dated 21.02.2022 this Court (Coram : Nitin W. Sambre, J.) stipulated in paragraph 9 that on the next date of hearing, the petition shall be finally decided. It appears that though served the contesting Respondents did not appear even on the next date of hearing which was 28.03.2022. In view of the earlier order passed by the learned Judge (Coram: Nitin W. Sambre, J), I have heard the petition finally, although, the contesting Respondents have not appeared even today.

4. The short submission of the learned counsel is that the plaintiff is the *dominus litis* and cannot be compelled to wage a legal battle against a third party, against his wish. It is further submitted that assuming that the third parties hold agreement of sale *qua* some or entire portion of the subject matter of the suit, in view of the provisions of Section 54 of the Transfer of Property Act, no right or interest is created in the property, and therefore, the third parties are neither necessary nor proper parties to the suit for specific performance.

5. The learned Trial Court was swayed by the submissions that impleadment of the third parties is necessary in order to finally determine the controversy and avoid multiplicity of litigation. The learned Trial Judge has clearly erred in assuming that the third parties are necessary parties.

6. An identical situation fell for consideration in ***Shrikrishna Purushottam Gaidhani Vs. Gajanan Mahadev Gaidhani & Ors.*** in 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 immovable 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 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."

7. 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.

8. 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.

9. 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.

10. In the present case, the plaintiff is opposing the impleadment. Respondent 7 and 8-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.

11. 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.

12. In my considered view, the order impugned is unsustainable in law and is set aside.

13. The petition is allowed in terms of prayer clause (a), which reads thus:

“(a) That this Hon’ble Court be pleased to issue a writ, order or direction of Certiorari or a writ, order or direction in the nature of Certiorari or any appropriate writ, order or direction under Article 227 of the Constitution of India and call for record and proceedings of the Special Civil Suit 255 of 2014 pending on the file of the Hon’ble Court of Civil Judge (Senior Division), at Kalyan and after examining the legality and propriety, the impugned order dated 01.02.2016 passed by the learned Judge on Application being Exhibit 13 filed in Special Civil Suit 255 of 2014 being Exhibit F hereto be quashed and set aside;

(ROHIT B. DEO, J.)