

\$~120(Appellate)

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 1120/2022 & CM APPL. 45291/2022, CM APPL. 45292/2022, CM APPL. 45293/2022

RALIA RAM KAPOOR THROUGH LR SHASHI KAPOOR

..... Petitioner

Through: Mr.Tushar Mahajan, Mr.Rohan Yadav and Mr.Bhaavan Mahajan, Advs.

versus

KIRAN KAPOOR & ORS.

..... Respondents

Through: Mr.Harish Malhotra, Sr. Adv. with Mr.Rajesh Bhatia, Adv. for R-1

CORAM:

HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T (O R A L)

%

18.10.2022

1. Suit 196/1996 (later renumbered as Suit No. 226/2018) was instituted by the petitioner Ralia Ram Kapoor (deceased) ("RRK" hereinafter) through his legal representatives against M/s DLF United Pvt. Ltd. (DLF) as Defendant 1 and Vijay Kapoor, the son of Ralia Ram Kapoor, as Defendant 2. It was averred, in the plaint forming subject matter of Suit 196/1996, that RRK was the owner, and in legal possession of Plot No. S-103, Greater Kailash-II which had been purchased by him from DLF, against payments made between 1959 and 1973. It was further averred in the plaint that though payment against purchase of the aforesaid property was thus made by RRK, a sale deed, dated 11th February 1974 was fraudulently executed by DLF. Fraud in execution of the said sale deed was also alleged in the plaint. The plaint, therefore, sought cancellation of the sale deed dated 11th February 1974 and also sought a direction to DLF to execute a

sale deed in favour of the petitioner, by incorporating the name of the petitioner in place of Defendant 2 Vijay Kapoor.

2. During the pendency of the suit, Respondent 1 Kiran Kapoor, the wife of Vijay Kapoor (Defendant 2 in the suit) moved an application under Order XXII Rule 10 read with Order I Rule 10 and Section 146 of the CPC, seeking to be impleaded in the suit in place of Defendant 2 Vijay Kapoor. The application was predicated on a Gift Deed dated 24th November 2009, whereby Vijay Kapoor was stated to have gifted the suit property to his wife Kiran Kapoor, i.e. the applicant before the learned Civil Judge and Respondent 2 in the present proceedings. Kiran Kapoor therefore, contended that Vijay Kapoor was left with no right, title or interest in the suit property and that she had become the absolute owner thereof.

3. Inasmuch as the gift deed had been executed *pendente lite*, during the currency of Suit 226/2018, Kiran Kapoor sought her impleadment as Defendant 2 in place of Vijay Kapoor, under Order XXII Rule 10 of the CPC.

4. The learned Civil Judge has, *vide* the impugned order dated 13th July 2022, allowed the aforementioned application of Kiran Kapoor under Order XXII Rule 10 read with Order I Rule 10 of the CPC. Reliance has been placed, by the learned Civil Judge, in so holding, on the judgment of the Supreme Court in *Amit Kumar Shaw v. Farida Khatoon*¹ and the judgments of this Court in *Rajwanti Phogat v. Gian*

¹ (2005) 11 SCC 403

Chand Sethi² and Ashok K. Chauhan v. Ch. Financial Services Inc. Panama³.

5. Accordingly, the learned Civil Judge impleaded Kiran Kapoor as an additional defendant in addition to the already existing defendants.

6. This petition, under Article 227 of the Constitution of India, at the instance of the legal representatives of RRM, assails the afore-noted order dated 13th July 2022 passed by the learned Civil Judge insofar as it allows the impleadment of Kiran Kapoor as an additional defendant in Suit 226/2018.

7. Mr. Tushar Mahajan, learned Counsel for the petitioner has vociferously opposed the impugned order. He submits that the entire exercise of the execution of the gift deed and the filing of the application by Kiran Kapoor seeking impleadment in the suit, was orchestrated and *malafide*. He draws attention in this context, to the gap of time that had ensued between filing of the suit in 1996, execution of the gift deed on 24th November 2009 and filing of the application by Kiran Kapoor under Order XXII Rule 10 of the CPC on 22nd January 2018. In such circumstances, Mr. Mahajan submits that the *bonafides* of the gift deed as well as of the application filed by Kiran Kapoor become clearly suspect. Where such transfer of the suit property *pendente lite* is not bonafide, Mr. Mahajan submits, relying on the judgment of the Supreme Court in ***Bibi Zubaida Khatoon v.***

² 2018 SCC OnLine Del 12829

³ 2016 SCC OnLine Del 2263

*Nabi Hassan Saheb*⁴ that the transferee *pendente lite* is not entitled to be impleaded in the suit. For this purpose, Mr. Mahajan has also placed reliance on the judgment of the Supreme Court in *Sarvinder Singh v. Dalip Singh*⁵ emphasising para 5 in the said decision.

8. Apropos the judgment of the Supreme Court in *Amit Kumar Shaw*¹, on which the learned Civil Judge relies, Mr. Mahajan submits that in a later decision in *Vidur Impex & Traders (P) Ltd. v. Tosh Apartments (P) Ltd.*⁶, a two Judge Bench of the Supreme Court had noted that there appeared to be diverse views by various Benches on the issue of whether a transferee *pendente lite* of the suit property was entitled to be impleaded as a party in the proceedings and, after noting the diversity of views on the issue, postulated certain guidelines, contained in paras 41.1 to 41.6 of the report. Applying these guidelines, submits Mr. Mahajan, the impleadment of Kiran Kapoor as an additional defendant in Suit 226/2018, cannot be said to be justified.

Analysis

9. I have considered the submissions advanced by Mr. Mahajan and perused the record. Having done so, I regret my inability to agree with the contentions of Mr. Mahajan. In my view, no case for interference with the impugned order dated 13th July 2022, passed by the learned Civil Judge in Suit 226/2018, can be said to exist.

⁴ (2004) 1 SCC 191

⁵ (1996) 5 SCC 539

⁶ (2012) 8 SCC 384

10. The facts of the present case eerily mirror the facts in *Amit Kumar Shaw*¹. In that case, the issue in controversy related to a suit property over which one Fakir Mohammad claimed perfection of title by adverse possession. By an appellate order dated 25th June 1992, the suit was remanded for re-hearing to the Trial Court. Aggrieved thereby, Fakir Mohammad approached the First Appellate Court.

11. During the pendency of the appeal, two of the properties forming subject matter of controversy were assigned in favour of Amit Kumar Shaw and the other appellants before the Supreme Court. By a deed of assignment dated 15th December 1995, Birendra Nath Dey, who had a leasehold interest in one of the suit properties, assigned his interest in favour of the appellants before the Supreme Court, who would, for the sake of convenience, be referred to, hereinafter, as “AKS etc”. Kalyani Dey, the owner of another of the property forming subject matter of the suit transferred the property in favour of AKS etc. on 15th December 1995.

12. AKS etc. contended that it was only after the said transfer had taken place and efforts were made to mutate, in the municipal records, the name of AKS etc. in respect of the suit property, that they came to know of the pending suit. As in the present case, AKS etc also moved applications under Order I Rule 10 read with Order XXII Rule 10 of the CPC and Section 52 of the Transfer of Property Act, 1882, seeking substitution in the suit in place of Birendra Nath Dey and Kalyani Dey.

13. The applications for substitution were rejected by the High

Court, against which AKS etc appealed to the Supreme Court. Among the questions of law which were framed by the Supreme Court in the said case were the following:

“(1) Whether on a combined reading of Order 1 Rule 10, Order 22 Rule 10 of the Code of Civil Procedure, 1908 and Section 52 of the Transfer of Property Act, 1882, an application for substitution by a subsequent transferee can be rejected and he be non-suited altogether?”

(3) Whether the High Court has not committed serious error while concluding that the presence of the appellants is not necessary in order to decide the appeal and there is no merit in the application for addition of party though the application was made by the appellants for substitution of their names in place and stead of contesting Defendant 10, who sold the suit property to the appellants?

14. Dealing with the aforesaid issues, in the backdrop of the facts before it, the Supreme Court observed and held as under:

“8. On a combined reading of Order 1 Rule 10, Order 22 Rule 10 of the Code of Civil Procedure and Section 52 of the Transfer of Property Act, can an application for substitution by a subsequent transferee be rejected and the subsequent purchaser be non-suited altogether is the prime question for consideration in these appeals.

9. *The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the court at any stage of the proceedings. Under this rule, a person may be added as a party to a suit in the following two cases:*

- (1) *when he ought to have been joined as plaintiff or defendant, and is not joined so, or*
- (2) *when, without his presence, the questions in the suit cannot be completely decided*

10. *The power of a court to add a party to a proceeding*

cannot depend solely on the question whether he has interest in the suit property. The question is whether the right of a person may be affected if he is not added as a party. Such right, however, will necessarily include an enforceable legal right.

11. *The application under Order 22 Rule 10 can be made to the appellate court even though the devolution of interest occurred when the case was pending in the trial court. In the instant case, the suit was decreed in favour of Fakir Mohammad by judgment and decree dated 3-11-1989. The suit was contested by two sets of defendants, one set of defendants was Birendra Nath Dey and Kalyani Dey and the other set of defendants was Jagat Mohan Das alone. The appeals were preferred by the parties. Both the appeals were heard and by a common judgment and order dated 25-6-1992, the said appeals were allowed and the judgment and decree passed by the Munsif was set aside. By a deed of assignment dated 15-12-1995, the said Birendra Nath Dey assigned his leasehold right in respect of 132-A, Circular Garden Reach Road, presently known as 132-A, Karl Marx Sarani, Kolkata in favour of the appellants. By a deed of sale executed on 15-12-1995, duly registered with the Additional Registrar of Assurances, Calcutta, Kalyani Dey sold the property being No. 132-B of the above address to the other appellant. The second appeals filed by the parties were pending on the file of the High Court at Calcutta. The appellants had no knowledge of the second appeals. Thereafter on verification, the appellants came to know of the pendency of the appeals which necessitated them to file the applications for substitution in the second appeals. In the meanwhile, the appellants filed the applications before the municipal authorities for mutation of their names in respect of the property on 24-12-2002 and the municipal authority informed the appellants that they were not in a position to mutate the names of the appellants of the property in question because of the pendency of the two second appeals before the High Court at Calcutta. Thereafter the appellants engaged an advocate to find out whether any such appeals have been filed by the parties. The advocate so engaged informed the appellants that two appeals being SAs Nos. 631 and 632 of 1993 were filed by Fakir Mohammad, Farida Khatoon and others, respondents herein. It was also informed that the said appeals were admitted by the High Court but the impugned judgment and*

order was neither prayed for stay nor stayed. *Therefore, it was also submitted by the appellants that since the appellants have become the absolute owners of the property, their interest will be highly prejudiced and they will be vitally affected, if any order is passed by the High Court without hearing the appellants in the matter. Therefore, they prayed that the appellants are to be substituted in place and stead of the present respondents, since they have no existing and subsisting right, title or interest in the property.*

12. *Under Order 22 Rule 10, no detailed inquiry at the stage of granting leave is contemplated. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit by or against the person on whom the interest has devolved by assignment or devolution. The question about the existence and validity of the assignment or devolution can be considered at the final hearing of the proceedings. The court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing the suit.*

13. *In this connection, the provisions of Section 52 of the Transfer of Property Act, 1882 which has been extracted above may be noted.*

14. *An alienee pendente lite is bound by the final decree that may be passed in the suit. Such an alienee can be brought on record both under this rule as also under Order 1 Rule 10. Since under the doctrine of lis pendens a decree passed in the suit during the pendency of which a transfer is made binds the transferee, his application to be brought on record should ordinarily be allowed.*

15. *Section 52 of the Transfer of Property Act is an expression of the principle “pending a litigation nothing new should be introduced”. It provides that pendente lite, neither party to the litigation, in which any right to immovable property is in question, can alienate or otherwise deal with such property so as to affect his appointment. This section is based on equity and good conscience and is intended to protect the parties to litigation against alienations by their opponent during the pendency of the suit. In order to constitute a lis pendens, the following elements must be present:*

1. *There must be a suit or proceeding pending in a court of competent jurisdiction.*
2. *The suit or proceeding must not be collusive.*
3. *The litigation must be one in which right to immovable property is directly and specifically in question.*
4. *There must be a transfer of or otherwise dealing with the property in dispute by any party to the litigation.*
5. *Such transfer must affect the rights of the other party that may ultimately accrue under the terms of the decree or order.*

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 his predecessor-in-interest is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case.

17. In the instant case, the applications for substitution were filed by the respective appellants in the second appeals

which are still pending on the file of the High Court though it was filed in the year 1993. The appellants have properly, sufficiently and satisfactorily explained the delay in approaching the Court. We see bona fides in their explanation in not coming to the Court at the earliest point of time. Therefore, the appellants who are transferees pendente lite should be made as parties to the pending second appeals as prayed for by them. In our opinion, the High Court has committed serious error in not ordering the applications for substitution filed by the appellants. In our view, the presence of the appellants is absolutely necessary in order to decide the appeals on merits. Since the High Court has committed error by rejecting the appellants' applications for substitution treating the same as additional parties and thereby rendering the appellants non-suited, we have no hesitation in setting aside the said orders and permit the appellants to come on record by way of substitution as prayed for. The High Court proceeded on a wrong premise that the appellants had made the application for addition of party whereas the application under consideration was for substitution as the owner had sold the suit property to the appellants and had no interest in the pending litigation.”

(Emphasis supplied)

15. A reading of the aforesaid decision makes it clear that, ordinarily, a transferee *pendente lite* of the suit property is a necessary or, at the least, a proper party in the suit and is, therefore, required to be impleaded therein. Even so, the Supreme Court has, in the afore-extracted passages from *Amit Kumar Shaw*¹, carved out exceptions from the said principle. Such impleadment would not be required where the court *in seisin* of the suit was not a court of competent jurisdiction, or where the suit was collusive, or where the right to immovable property was not directly and specifically in question in the litigation, or where the person seeking impleadment would not be affected by the outcome of the suit.

16. ***Bibi Zubaida Khatoon***⁴, on which Mr. Mahajan relies, does not lay down the law in any manner which could be said to be at variance with the position of law enunciated in ***Amit Kumar Shaw***¹. Rather, in para 9 of the report in ***Bibi Zubaida Khatoon***⁴, the Supreme Court has reiterated the position that, ordinarily, a transferee *pendente lite* is required to be impleaded as a party in the suit to enable such transferee to protect his interest. The twin considerations which operated in the reckoning of the Supreme Court to hold otherwise in the facts before it were that the suit was long pending and, *prima facie*, the action of alienation did not appear to be bonafide.

17. The principles enunciated in ***Vidur Impex***⁶, also cited by Mr. Mahajan, are more or less to the same effect. A transferee *pendente lite*, who is the beneficiary of a bonafide instrument of transfer of the suit property is ordinarily required to be impleaded in the suit so that he could protect his interest. Where, however, the Court finds that the instrument of transfer is an oblique attempt at protracting proceedings or is otherwise lacking in bonafides, the Court could justifiably refuse to implead the transferee.

18. There is no reason for this Court, in the present case, to hold, even *prima facie*, that the gift deed dated 24th November 2009 executed by Vijay Kapoor in favour of his wife Kiran Kapoor was lacking in bonafides. Want of bonafides is not to be readily assumed, especially in respect of instruments conveying immoveable property. The only ground that Mr. Mahajan could urge, to support his plea of want of bonafides, was the delay after 24th November 2009, in Kiran Kapoor filing her application for impleadment, which was only on

22nd January 2018. That, however, in my considered opinion, cannot caste any cloud on the bonafides of the gift deed itself. There is no other reason for the Court to assume any want of bonafides in the transfer of the suit property *vide* the gift deed dated 24th November 2009.

19. Insofar as the judgment in *Sarvinder Singh*⁵ is concerned, the case clearly turned on its own facts. It is hardly necessary for the Court to enter into any discussion in that regard, as the distinctive facts on the basis of which the decision was rendered are apparent even from para 5 of the report in the said case, which is reproduced thus:

“5. Having regard to the respective contentions, the question that arises for consideration is whether the respondents are necessary or proper parties to the suit? It cannot be disputed that the foundation for the exclusive right, title and interest in the property, the subject-matter of the suit, is founded upon the registered Will executed by Hira Devi, the mother of the appellant as on 26-5-1952. The trial court noted that in a suit filed on a previous occasion by the appellant, the Will was propounded as basis for an exclusive right, title and interest in the said property. He impleaded Rajender Kaur, one of the daughters of Hira Devi, to the suit along with two other sisters and the suit came to be decreed by the trial court on 29-3-1974. The decree became final. In view of those facts, the necessary conclusion that can be deduced is that the foundation for the relief of declaration in the second suit is the registered Will executed by Hira Devi in favour of the appellant on 26-5-1952. The respondents indisputably cannot challenge the legality or the validity of the Will executed and registered by Hira Devi on 26-5-1952. Though it may be open to the legal heirs of Rajender Kaur, who was a party to the earlier suit, to resist the claim on any legally available or tenable grounds, those grounds are not available to the respondents. Under those circumstances, the respondents cannot, by any stretch of imagination, be said to be either necessary or proper parties to the suit. A necessary

party is one whose presence is absolutely necessary and without whose presence the issue cannot effectually and completely be adjudicated upon and decided between the parties. A proper party is one whose presence would be necessary to effectually and completely adjudicate upon the disputes. In either case the respondents cannot be said to be either necessary or proper parties to the suit in which the primary relief was found on the basis of the registered Will executed by the appellant's mother, Smt Hira Devi. Moreover, admittedly the respondents claimed right, title and interest pursuant to the registered sale deeds said to have been executed by the defendants-heirs of Rajender Kaur on 2-12-1991 and 12-12-1991, pending suit.”

20. The present proceedings have been instituted under Article 227 of the Constitution of India. The scope of jurisdiction of this Court under Article 227 is narrow and circumscribed. The Court is not expected to substitute its subjective satisfaction for the subjective satisfaction of the court below, where the manner of exercise of jurisdiction by the court below is not such as calls for corrective interference in exercise of supervisory jurisdiction. The learned Civil Judge has, after taking into account the law laid down in *Amit Kumar Shaw*¹ as well as the decisions of this Court in *Rajwanti Phogat*² and *Ashok K. Chauhan*³ held that the application of Kiran Kapoor, seeking impleadment in the suit instituted by the petitioner against DLF and Vijay Kapoor was required to be allowed. The petition does not disclose any substantial ground on the basis of which this decision could be upset. It cannot be said to be wanting in propriety insofar as the manner in which the learned Civil Judge has exercised jurisdiction is concerned. The decision is also supported by the view expressed by the Supreme Court in *Amit Kumar Shaw*¹.

21. For all these reasons, this Court is not inclined to interfere with the impugned order.

22. The present petition under Article 227 of the Constitution is therefore bereft of merit and is therefore, dismissed *in limine*. Miscellaneous applications stand disposed of.

C. HARI SHANKAR, J

OCTOBER 18, 2022/kr

