

Andreza

IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 100 OF 2023

Fabrica Da Igreja De Vasco, Thr. Its Attorney
Mr. Romald Colaco, 55 years of age, r/o.
H.No. 269, Nr. Laxmi Niwas, Belabai, Vasco, ... Petitioner
Mormugao, Having office at St. Andrew's
Church Complex, Vasco-da-Gama, Goa
403802.

V e r s u s

1. M/s. Paul Dias & Sons, A Partnership firm
Thr. Its Managing Partner William Dias with
office at 10, Khalap Mansion, Vasco da Gama,
Goa. Legal heirs of Deceased Petitioner

1(a) Mrs. Glendora Rebecca Dias (widow)

1(b) Ms. Tatum Arabella Dias (Daughter)

1(c) Mr. Dulan Vincent Dias (Son),
All residing at 6, Colaco Building, Mangor
Hill, Vasco da Gama, Goa 403 802.

2. Fabrica de Igreja de St. John Baptista da
Paroquia of Benaulim, through its President,
Fr. Francis X. Pereira, Benaulim, Salcete,
Goa, 403 716.

3. Mr. Xec Ashfaq, M/s. Foto Mohammed
Studio, Flat No.28, First Floor, St. Pelegia ...Respondents
Building, Fr. Jose Vaz Road, Vasco-da-Gama,
Goa.

Mr. A. D. Bhobe, Advocate with *Mr. Shailesh Henriques and
Ms. Shaizeen Shaikh, Advocates for the Petitioner.*

Ms. Flavia Mesquita, Advocate for the Respondent No. 1.

CORAM: M. S. KARNIK, J
DATED: 21st MARCH 2023

JUDGMENT

1. Heard Mr. Bhobe, learned Counsel for the Petitioner and Ms. Mesquita, learned Counsel for the Respondent No.1

2. The challenge in this Petition filed under Article 227 of the Constitution of India, is to an Order dated 24.01.2023 passed on the application dated 09.01.2023 at Exhibit D-185.

3. The Petitioner is the original Defendant No.3. The Respondent No.1- Original Plaintiff instituted a suit on 14.01.2008 against the Respondent No. 2/Original Defendant No.1 and the Respondent No.3/Original Defendant No. 2 seeking declaration that the Respondent No.1 has a right to obtain on lease the suit premises consisting of flat no.2-B located on the first floor of St. Pelegia Building, Vasco da Gama from Respondent No. 2/original Defendant No.2; that the lease deed dated 24.03.1999 in respect of the suit premises executed by Respondent No.2/Original Defendant No.1 in favour of Respondent No.3/original Defendant No.2 be declared null and void and the Respondent No.2 be commanded to execute lease deed in favour of Respondent No.1 by delivering possession of the suit premises to the Respondent No.1 and further for injunction. The Defendant No.1 is the landlord. The Plaintiff is a lessee in respect of FlatNo.2-A. The Plaintiff's case is that instead of leasing Flat No.2-B in his favour, the Defendant No.1 in violation of the lease agreement,

leased Flat No.2-B in favour of Defendant No.2. Hence, the suit that the lease Flat No.2- in favour of Defendant No.2 is null and void.

4. The Defendant No.1 filed written statement dated 12.03.2008 opposing the suit. The Defendant No.1 also filed a counter claim seeking a decree that the Defendant No.1 is entitled to recover possession of flat no.2A and that the Plaintiff having failed and neglected to quit and vacate the flat no.2A, be ordered to deliver the vacant possession of the same to the Defendant No.1.

5. The Defendant No.2 filed his written statement on 03.04.2008 as also to the counter claim filed by the Defendant No.1 praying that the Suit of the Plaintiff be dismissed and the counter claim of the Defendant No.1 in terms of prayer clause (d) be granted.

6. In the meantime and during the pendency of the suit, the Defendant sold the suit property by registered Sale Deed dated 22.04.2021 to the Petitioner-Defendant No.3. On 09.06.2022, the Respondent No.1 filed an application under Order 1 Rule 10(2) of CPC seeking impleadment/addition of party and for striking out the Defendant no.1 from the array of Defendants, which application was marked as Exhibit D-150. By the application Exhibit D-150, the Plaintiff, *inter alia* stated that pursuant to the Sale Deed in favour of the Defendant No.3, the Defendant No.3 ceased to have any right or

interest in the suit property/suit flat as the ownership vests in the Defendant No.3 and hence, the relief and the claim of the Plaintiff would lie against the Defendant No.3. It is averred that the Petitioner-Defendant No.3 was a necessary party to the proceedings as in his absence the suit would be incompetent. On the basis of the said plea, the Plaintiff sought for deletion of the Defendant No.1 and for substitution of the Defendant No.3.

7. By an Order dated 04.07.2022, the learned trial Judge allowed the application dated 09.06.2022 at Exhibit D-150 filed by the Plaintiff to the extent of joinder of the Petitioner herein as Defendant No.3. The learned Judge observed that the Defendant No.1 cannot be deleted in view of the counter claim of the Defendant No.1 wherein the Plaintiff was a party Defendant. The Petitioner was thus arrayed as Defendant No. 3 in the suit. The Petitioner-Defendant No.3 filed the written statement on 15.09.2022.

8. On 09.01.2023, the Plaintiff filed an application captioned as '*Application for disallowing the Defendant No.3 from leading evidence*' which was marked as Exhibit D-185. The Plaintiff contended that the Defendant No.1 had closed his evidence on 30.09.2022 by making an endorsement to that effect; that the Petitioner-Defendant No.3 who was the transferee *pendent lite* was seeking to lead evidence; that when the Defendant No.1, who was the

original owner of the suit flat, had given up the right to lead evidence, the Petitioner-Defendant No.3 who is the transferee *pendent lite* does not get any right to lead evidence as he steps into the shoes of the Defendant No.1. On the basis of the said contention, the Plaintiff prayed that the affidavit in evidence filed by the Defendant No.3 be discarded.

9. A reply came to be filed by the Petitioner-Defendant No.3 opposing the said application *inter alia* on the ground that the Petitioner-Defendant No.3 had filed an independent written statement; that the Defendant No.2 was cross examined at length by the Plaintiff and Defendant No.1 and thereafter by the Defendant No.3. The Trial Court by the impugned Order allowed the application at Exhibit D-185 thereby disallowing the Defendant No.3 from leading evidence. The Trial Court while relying upon the decision of the Apex Court in the case of **Dhanna Singh vs. Baljinder Kaur**¹, observed thus :

“.....Apart from doctrine of *lis pendens*, under Section 52 of the Transfer of Property Act, the subsequent purchaser does not get any right to lead any evidence, as he stepped into the shoes of the first defendant.”

10. Shri Bhobe, learned Counsel for the Petitioner urged that the decision in **Dhanna Singh vs. Baljinder Kaur** (supra) will have

¹ (1997) 5 SCC 476

no application in the facts of the present case. It is submitted that it was at the instance of the Plaintiff that the Defendant No.3 was impleaded as a necessary party. It is submitted that it is not as if the Petitioner-Defendant No.3 had made an application for impleadment being a transferee *pendent lite*. It is further submitted that the Defendant No.1 was examined pursuant to the impleadment of the Defendant No.3 and Defendant No.3 was allowed to file the written statement. Learned Counsel submitted that the Defendant No.2 was permitted to be cross examined at length by the Plaintiff, the Defendant No.1 and Defendant No.3. It is further submitted that the Defendant No.1 having lost interest in the property, did not choose to lead any evidence. It is submitted that though Defendant No.3 has stepped into the shoes of the Defendant No.1, but from the frame of the application Exhibit D-150 made by the Plaintiff and the tenor of the Order passed thereon by the Trial Court, it is obvious that the Defendant No.3 is impleaded as a party Defendant No. 3 in an independent capacity and, therefore, in such circumstances, the Defendants' right to lead evidence cannot be curtailed. Learned Counsel relied upon the decision of the Supreme Court in the case of **Amit Kumar Shaw & Anr. vs Farida Khatoon & Anr.**² and that of the High Court of Madras in the case of **V. Damodaran &**

² (2005) 11 SCC 403

Ors. vs. Thulasirama Reddy & Ors.³ in support of his submissions.

11. Ms. Mesquita, learned Counsel for the Respondent No.1, on the other hand, argued in support of the impugned Order. It is submitted that the decision of the Supreme Court in **Dhanna Singh vs. Baljinder Kaur** (supra) squarely applies to the facts of the present case. It is submitted that as rightly observed by the Trial Court, the Defendant No.3 having stepped into the shoes of Defendant No.1 as transferee *pendent lite*, the Defendant No. 3 cannot claim a better right than that of the predecessor in title. It is submitted that if the Defendant No.1 has given up his right to lead evidence, it is then not open for the Defendant No.3 to adduce evidence, the position being well settled by the Supreme Court. It is submitted that in terms of Section 52 of the Transfer of Property Act, the subsequent purchaser i.e. Defendant No.3 does not get any right to lead evidence. It is moreover submitted that in the written statement filed by the Defendant No.3, no fresh plea has been raised by the Defendant No.3 and, therefore, there are hardly any facts in the written statement which would justify the need for leading evidence by the Defendant No.3. The learned Counsel, apart from relying on the decision in **Dhanna Singh vs. Baljinder Kaur** (supra), relied upon the decision of the Supreme Court in the case of

³ 2011(3) MWN (Civil) 214

Guruswamy Nadar vs. P. Lakshmi Ammal (D) through LR's & Ors.⁴ in support of her submission that as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of *lis pendens* is evolved so that the litigation may finally terminate without intervention of a third party. It is submitted that if the request of the Petitioner to lead evidence is to be accepted, then there would be no end to litigation as in a given case, pursuant to the transfer made during the pendency of the proceedings. According to her, every subsequent purchaser will claim a right to adduce evidence. It is submitted that knowing fully well that the suit property is under litigation, the Defendant No.3 took the risk of entering into a sale transaction with the Defendant No.1 and, therefore, it hardly will make any difference if the Defendant No.3 has been impleaded at the instance of the Plaintiff or at his instance in view of the settled proposition of law. Reliance is also placed on the decision of the Punjab and Haryana High Court in the case of **Sukhdev Singh & Ors. vs. Mohan Singh & Ors.**⁵, in support of the submissions advanced on behalf of Respondent No.1. Learned Counsel then placed reliance on the decision of the Punjab and Haryana High Court in the case of **Jaswinder Singh & Ors. vs.**

⁴ 2008 (5) SCC 796

⁵ 2011 DGLS (P&H) 3105

Sohan Singh & Ors.⁶, to submit that the subsequent transferee even though he obtained transfer without notice of original contract, cannot set up any right against the Plaintiff. A reference is also made to the decision of this Court in **Manoihar Yadaoraoji Belge & Ors. vs. KamlabaiManohar Rat & Ors.**⁷

12. Heard learned Counsel at length.

13. Admittedly, the Defendant No.3 purchased the suit property from the Defendant No.1 during the pendency of the suit. The law so far as the rights of the transferee *pendent lite* to lead evidence being the representative in interest is well settled. The transferee steps into the shoes of the transferor. Section 52 of the Transfer of Property Act, which has a direct bearing on the issue involved, reads thus :

“Section 52 - Transfer of property pending suit relating thereto.—During the [pendency] in any Court having authority within the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by the Central Government] [* * *] of [any] suit or proceedings which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under

⁶ 2004 DGLS (P&H) 166

⁷ 2013 (2) Mh.L.J. 312

the authority of the Court and on such terms as it may impose.

Explanation.—For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

14. Learned Counsel for the Respondent placed emphasis on the decision of the Supreme Court in the case of **Dhanna Singh vs. Baljinder Kaur** (supra). To appreciate the controversy, it would be profitable to reproduce the decision which reads thus :

“1. Leave granted.

2. This appeal by special leave arises from the order of the Single Judge of the Punjab and Haryana High Court, made on May 22, 1996 in C.R. No.4333/1995.

3. The undisputed facts are that the respondents filed a suit for permanent injunction with the following prayer:

"It is, therefore, prayed that a decree for permanent injunction restraining the defendants from raising any construction over any specific portion of the property detailed in the heading of the plaint, and also restraining the defendants from filling any part of the property by sand and also restraining the defendants from alienating any specific portion of the property and also restraining the defendants from transferring the possession of the property without the same being

partitioned between the parties to the suit may kindly be passed in favour of the plaintiffs against the defendants with costs and any other relief which the Hon'ble Court may deem fit be also granted."

4. Pending the suit, though several opportunities were given, no evidence was adduced by the defendant. The court passed an order on September 22, 1995 foreclosing the evidence of the defendant on the statement of the counsel that the first defendant was not willing to lead any evidence. An application for impleadment was filed earlier by the appellant who is a subsequent purchaser from the first defendant. After impleadment, he filed application for adduction of evidence which was rejected. Thus this appeal.

5. The undisputed fact is that in the plaint the plaintiff-respondent had already sought for a relief of injunction of alienation, yet the alienation came to be made. Apart from the doctrine of lis Pendense under Section 52 of the T.P. Act, the subsequent purchaser does not get any right to lead to any evidence, as he stepped into the shoes of the first defendant, who had given up the right to lead evidence. In view of these circumstances, he does not get any right to lead any evidence.

6. The appeal is accordingly, dismissed. No costs."

15. Their Lordships thus held that the subsequent purchaser does not get any right to lead any evidence, as he stepped into the shoes of the first Defendant, who had given up the right to lead evidence. In the context of Section 52, Their Lordships in the case of **Guruswamy Nadar vs. P. Lakshmi Ammal** (supra) observed thus :

“Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of *lis pendens* has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end.”

16. The Punjab and Haryana High Court in **Jaswinder Singh & Ors. vs. Sohan Singh & Ors.** (supra) and this Court in **Manoihar Yadaoraaji Belge & Ors. vs. Kamlabai Manohar Rat & Ors** (supra) cited by the learned Counsel for the Respondent No.1, relied on the decision in **Dhanna Singh vs. Baljinder Kaur** (supra).

17. In the context of the present controversy, it would also be profitable to refer to the decision of the Supreme Court in the case of **Amit Kumar Shaw & Anr vs Farida Khatoon & Anr.** (supra). Their Lordships in paragraphs 15 and 16 while considering the question of application of doctrine of *lis pendens* observed thus :

“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, whether 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 XXII 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. (emphasis mine)

18. The High Court of Madras had an occasion to deal with an issue somewhat similar to the one that arises for consideration in the present Petition in the case of **V. Damodaran & Ors. vs. Thulasirama Reddy & Ors.**(supra). Paragraph 13 to 20, which are relevant reads thus :

13. A mere poring over and perusal of those judgments would unambiguously and unequivocally highlight and spotlight the fact that no doubt a learned single Judge of this Court at one point of time felt that there are two lines of judgments, one to the effect that a *pendente lite* purchaser is having a right to get impleaded in the suit and contest the matter on merits and another to the effect that a *pendente lite* purchaser is alien to the proceedings and he is bound by the decision. This case in view of its peculiar factual scenario has not got itself caught in the cross fire of such conflicting views.

14. Here it is quite obvious and axiomatic that the purchasers never filed any application to get themselves impleaded as parties to the proceedings; whereas, admittedly the plaintiffs took steps to implead them; Of course, according to them even though the appellants/defendants had no legs to stand in the legal proceedings in the suit, yet the plaintiffs wanted to avoid future unnecessary litigation and with that motive such impleadment resulted. However, there is nothing on record to indicate and exemplify that the Court while allowing the I.A. for impleadment passed any order to the effect that the appellants/defendants here, were added in the suit only for the limited purpose of naming them as

formal parties so as to avoid future litigation. The plaintiffs wrongly assumed as though the course adopted by them, was the line of least resistance, forgetting for the moment that they cannot approbate and reprobate.

15. Adding fuel to the fire, the trial Court with the connivance of the plaintiffs' so to say without any objection from the plaintiffs, allowed the written statement to be filed by the appellants/defendants and issues and additional issues were framed by it and the matter was posted for trial. My mind is redolent and reminiscent of the following maxim: Consensus Tollit Errorem The acquiescence of a party who might take advantage of an error obviates its effect and the relevant portion from Broom's Legal Maxims, Tenth Edition is extracted hereunder for ready reference:

"When applied to the proceedings in an action, waiver may be defined to be the doing something after an irregularity committed, and with a knowledge of such irregularity, where the irregularity might have been corrected before the act was done; and it is essential to distinguish a proceeding which is merely irregular from one which is completely defective and void. In that latter case the proceeding is a nullity, which cannot be waived by any laches or subsequent proceedings of the opposite party.

Where, however, an irregularity has been committed, and where the opposite party knows of the irregularity, it is a fixed rule observed by all the Courts in this country, that he should come in the first instance to avail himself of it, and not allow the other party to proceed to incur expense. "It is not reasonable afterwards to allow the party to complain of that irregularity, of which, if he had availed himself in the first instance, all that expense would have been rendered unnecessary" (e); and therefore, if a party, after any such irregularity has taken place, consents to a proceeding which, by insisting on the irregularity, he might have prevented, he waives all exceptions to the irregularity (f). This is a doctrine long established and well known, and extends so far, that a person may be materially affected in a subsequent criminal prosecution by proceedings to the irregularity of which he has, by his silence, waived objection (g).

It may appear in some measure superfluous to

add, that the consent which cures error in legal proceedings, may be implied as well as expressed: for instance-- where, at the trial of a cause, a proposal was made by the judge in the presence of the counsel on both sides, who made no objection, that the jury should assess the damages contingently, with leave to the plaintiff to move enter a verdict for the amount found by the jury, it was held that both parties were bound by the proposal, and that the plaintiff's counsel was not therefore at liberty to move for a new trial on the ground of misdirection (h), for *qui tacet consentire videtur* (i), the silence of counsel implied their assent to the course adopted by the judge, and "a man who does not speak when he ought shall not be heard when he desires to speak"(k)"

Only at the stage of cross examining P.W.1 the plaintiff got awakened and filed the I.A. so as to prevent the defendants from cross examining P.W.1 and for adducing rebuttal evidence by the newly added parties. No doubt there is no estoppel against law. Not to put too fine a point on it, here the method and manner in which the proceedings went on before the trial Court would pellucidly and palpably make the point clear that the appellants/defendants were added in the suit only for the purpose of giving opportunity to them to litigate on merits.

16. The learned Senior Counsel for the plaintiffs by narrating the relevant facts would submit that absolutely there is no merit in the contentions of the appellants/defendants and that they had no personal knowledge about the benami transaction which emerged between Jayarama Reddy and his brother-in-law Chinnamma Reddy. He would also hasten to add that as of now the appellants/defendants are also having no locus standi to proceed with the matter, because they in turn parted with the entire suit property in favour of various other persons; as such they are having no legal or moral stand to proceed with the matter; if the matter is remanded, then that would amount to prolongation of the litigation. He would also submit that in the long longevity of this litigation, the first respondent/plaintiff has actually

become an octogenarian and he has been litigating for three generations without reaping any fruits and as such he would oppose the move for remanding the matter back to the trial Court for giving opportunity to the appellants.

17. I would also like to hark back to the decision of the Madurai Bench of this Court rendered by me on 14.12.2006 in S.A.No.518 of 1996; certain excerpts from it would run thus:

"27. At this juncture, I may proceed to lay down as a general rule that whenever a party after effecting transfer *pendente lite* simply agrees to the claim of the other side without taking the transferee *pendente lite* into confidence or making adequate provisions to safeguard the interest of such transferee *pendente lite*, such act should be termed as only a collusive act.

28. The question may arise as to how the other party to the litigation who was not a party to the transfer *pendente lite* could be imputed with knowledge and ultimately with collusive state of mind. Normal course of occurrences alone is the sole test. The transferor *pendente lite* invariably does make the transfer with some specific purposes and more specifically as against the opposite side in the litigation and if such a person all of a sudden turns turtle by having a volte fact and submits to the claim of his enemy in the litigative battle that is the opposite party, naturally the role of the opposite party could rightly be inferred in it and ultimately, bringing about a non-adjudicatory judgment."

18. Even though the facts and circumstances of that case are different from the factual scenario of this case, yet I had the opportunity of referring to the doctrine of *lis pendens* and also the duty of the seller of the property *pendente lite*.

19. The factual circumstances in this case would display and demonstrate that the original defendants did not file any written statement and they did not contest the matter; so to say, after initially contesting the injunction application, they left the matter holus bolus. They did not choose to safeguard the interest of the purchasers *pendente lite*, namely the appellants herein. It is not a case where the vendor's *pendente lite*, contested the matter and

that the subsequent purchasers *pendente lite* are trying to improve upon the case of their vendors by filing additional written statement or by adducing more evidence etc. But this is a singularly singular case in which the plaintiffs themselves added the purchasers *pendente lite* and allowed them to file written statement and whereupon the issues were framed by the trial Court and only thereafter the plaintiffs did choose to file the said I.A. for preventing the appellants/defendants, so to say the purchasers *pendente lite* from cross-examining P.W.1 and adducing rebuttal evidence.

20. The decisions of the Hon'ble Apex Court reported in **Raj Kumar vs. Sardari Lal & others, 2004 (1) CTC 549** and **Amit Kumar Shaw & anr. vs. Farida Khatoon & anr. 2005 (4) CTC 47 (SC): AIR 2005 SC 2209**, supra would, in my considered view, come to the rescue of the appellants herein. The said decisions would unambiguously and unequivocally highlight and spotlight that such purchasers *pendente lite* are having a right to contest the matter on merits even after getting the ex parte decree and judgment set aside as against their vendor. In fact here the plaintiffs themselves paved the way for the purchasers *pendente lite* to contest the matter on merits and in such a case I am of the considered view that the decision cited on the side of the plaintiffs would not in any way prevent the appellants/defendants from contesting the matter on merits. The trial Court went off on a tangent and decided the lis, without referring to all the relevant precedents and the factual circumstances; and it simply prevented the defendants from contesting the matter on merits. There is no quick fix and also there are no two ways about it, in disposing the matter without adhering to the maxim "*audi alteram partem* No man shall be condemned unheard." No doubt, I am fully aware of the fact that this is a long pending matter and in such a case if the matter is remitted back to the trial Court, it would take further time for the litigation to get concluded. The first

appellate Court being the last Court of facts, on considering the facts and circumstances of the case could have given opportunity to cross examine the plaintiffs' witness and also could have given opportunity to the defendants concerned to adduce evidence, but it failed to do so. Hence, remanding the matter to the first appellate Court which happened to be the last Court of facts would to some extent curtail further time of the litigation and with that intention I would like remand the matter back to the first appellate Court with the following direction:

The first appellate Court shall give due opportunity to the appellants/defendants to cross examine P.W.1 and also give further opportunity to the plaintiffs to adduce additional evidence both oral and documentary, if any. The defendants also shall be given opportunity to adduce oral and documentary evidence. Endeavour shall be taken by the appellate Court to see that the entire process is completed on day to day basis and judgment delivered on merits within a period of two months from the date of receipt of the records.”

19. The law as regards the right of subsequent purchaser to adduce evidence has been crystalised by the Hon'ble Supreme Court in the case of **Dhanna Singh vs. Baljinder Kaur** (supra). The decision in **Amit Kumar Shaw & Anr. vs Farida Khatoon & Anr.** (supra) and that of the High Court of Madras come close to the facts of the present case. In my considered opinion, the decision in **Dhanna Singh vs. Baljinder Kaur** (supra) can be distinguished on facts.

20. In the present case, it is the Plaintiff who had filed an application for impleadment of the Petitioner as a necessary party to the suit and deletion of Defendant No.1. Even before the evidence of

Defendant No.1 was adduced, the Plaintiff filed the application for impleadment of Petitioner/Defendant No.3. The Plaintiff contended that as the interest in the property of Defendant No.1 has been purchased by the Petitioner, the Petitioner be substituted in place of Defendant No.1. The Trial Court was however of the opinion that the Petitioner be added as Defendant No.3 as there was counter claim of the Defendant No.1 seeking a relief that the Lease Deed executed between the Defendant No. 1 and the Plaintiff be declared as null and void and, therefore, the name of the Defendant No.1 cannot be struck off. Thus, the Defendant No. 1 continued to be party-Defendant and Defendant No.3 came to be added as a necessary party, all this at the instance of the Plaintiff.

21. It is pertinent to note that present is a case where the Defendant No.1 has filed a counter claim against the Plaintiff for recovery of the possession on determination of the lease. As indicated earlier, Plaintiff filed a suit against the Defendant No.1 and Defendant No.2 for the relief that the lease executed by the Defendant No.1 in favour of Defendant No.2 in respect of Shop No. 2-A is illegal. Not only was the Defendant No.3 impleaded at the instance of the Plaintiff, but there was no objection from the Plaintiff to the Defendant No.3 filing an independent written statement. The evidence of Defendant Nos. 1 and 2 was yet to be adduced. It was at

this stage that the Defendant No.3 was impleaded and permitted to file a Written statement.

22. The Defendant No.1 refused to lead evidence in the matter and closed his evidence on 30.09.2022 by making an endorsement to that effect on the Court file. Thereafter, the Defendant No.2 was examined by the Plaintiff. The Defendant No.2 was also examined by the Defendant No.1 and the Defendant No.3. It is then that the Defendant No. 3 sought to lead evidence in the matter. It is at this stage, an application was made by the Plaintiff to the effect that as the Defendant No.1 and the original Plaintiff had given up the right to lead evidence, the Defendant No.3 who is a transferee *pendent lite* does not get any right to lead evidence as he stepped into the shoes of the Defendant No.1. This application is allowed by the impugned Order.

23. The Supreme Court in **Amit Kumar Shaw & Anr vs Farida Khatoon & Anr.** (supra) observed that a transferee *pendent lite* to the extent he has acquired interest from the Defendant is vitally interested in the litigation, whether 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. It is to be borne in mind that it was at the instance of the Plaintiff that the Petitioner is joined as a necessary party at a stage when the evidence of Defendant No.1

was yet to be adduced. It is after the impleadment of the Defendant No.3 that the Defendant No.1 chose not to lead evidence. The Defendant No.3 was allowed to file written statement and examine Defendant No.2. In such facts, there is no justification to curtail the right of Defendant No.3 to lead evidence. A party who has been permitted to file written statement and examine witnesses, at the stage of leading his evidence, cannot be precluded from doing so on the plea that he has stepped into the shoes of Defendant No.1 who has given up the right to lead evidence. It is also pertinent to note that Defendant No.1 has filed a counter claim. Filing of the counter claim was the reason why the trial Court did not permit deletion of Defendant No.1 though such deletion was specifically prayed for by the Plaintiff. It is therefore, in these facts, I am of the considered opinion that the decision of the Hon'ble Supreme Court in **Dhanna Singh vs. Baljinder Kaur** (supra), is distinguishable. In my opinion, the Trial Court committed an error in allowing the application Exhibit D-185.

24. The Petition is allowed. The impugned Order of the Trial Court is set aside. Application Exhibit-185 stands rejected. No order as to costs.

M. S. KARNIK, J