



**IN THE JUDICATURE OF HIGH COURT AT BOMBAY
BENCH AT AURANGABAD**

918 WRIT PETITION NO. 12762 OF 2022

Sachin Mahendra Patel And Others

VERSUS

Azhar Shaikh Mazhar And Others

...

Advocate for the Petitioner : Mr. Shah Subodh P.

Advocate for Respondent No.1 : Mr. Vinesh Solshe h/f Mr. Patil Mahesh
Haibatrao

...

CORAM : R. M. JOSHI, J.

Dated : July 10, 2024

PER COURT :-

1. Heard by consent finally at stage of admission.
2. This Court by order dated 19/12/2022 issued notice to respondent no.1 i.e. original plaintiff in Special Civil Suit No.51/2016. Learned Counsel for the petitioners submits that the other respondents are not likely to be affected by any order passed in this petition. Considering the fact that this petition takes exception to the joining of the petitioner as a party at the instance of respondent No.1/ plaintiff, no prejudice will cause to them if they are not heard in this petition. In any case, any order passed herein would not be adverse to their interest, hence petition is proceeded further in absence of respondent Nos.2 to 12.
3. Petitioners who are added as party defendant in Special Civil Suit No.51/2016 by order dated 06/10/2022 has filed this petition.
4. It is contention of the petitioners that the original suit filed by the plaintiff against defendant was essentially for recovery of money and in

alternative specific performance of the contract i.e. development agreement for purchase of the plots for Rs.75/- per square feet is sought. The petitioners are purchasers of the suit plots covered by the said development agreement and their sale deeds are executed on 07/02/2017 and 27/02/2017 respectively.

5. Plaintiff has filed application Exhibit 26 for joining petitioners as party defendant to the suit with averment that the suit is filed for specific performance of contract and in alternative for recovery of sum of Rs.13,49,431.50. This application came to be allowed by learned Trial Court after considering the response of the proposed defendants. Learned Trial Court has held that the transaction in question have occurred during the pendency of this suit, and therefore, the petitioners are necessary party to the suit. Except for this, this Court finds no other reason being recorded by the learned Trial Court in order to allow the application.

6. Learned Counsel for the petitioners has drawn attention of this Court to the plaint wherein there is specific pleading with regard to the recovery of the amount from the defendants and prayer being made in alternate to seek the purchase of the plots for Rs.75/- per square feet as agreed in development agreement dated 22/01/2009. It is his submission that exactly contrary stand is taken in the application

Exhibit 26 whereas it is claimed that the suit is for specific performance of the contract and alternatively for monetary relief is claimed. He also drew attention of the Court to the fact that no injunction application was filed by the plaintiff against the defendants preventing him from effecting transfer of the properties covered by the development agreement. On the contrary, application was moved for attachment before Judgment and such order is obtained. Accordign to him, transactions in question of the petitioners are prior to passing of such order of attachment of the suit properties. It is his further submission that considering the fact that since year 2016 no steps were taken by the plaintiff against the defendants for restraining him from creating third party interest and as there is no prohibition in the development agreement to that effect, the bona fide purchasers of the suit property cannot be added as defendants herein.

7. The Counsel for the petitioners has also drawn attention of the Court to the agreement arrived at between plaintiff and defendant on 09/06/2016 that is immediately after filing of the suit on 30/04/2016. It is his contention that though such agreement was entered into wherein it was agreed by the defendant for mutating the 7/12 extract in favour of the plaintiff, however no such entries were taken in the revenue record. It is his contention that petitioner being third party

were not having knowledge of this agreement and in absence of any entry on 7/12 extract, there would be for not to enter into a transaction.

8. Learned Counsel for the plaintiff on the other hand submits that the development agreement indicates that in case the amount agreed was not paid, alternatively it was open for the plaintiff to purchase the plots for Rs.75/- per square feet. It is his further contention that after considering prima facie case of the plaintiff the order of attachment of the suit property was passed which indicates that the order passed by the Trial Court directing joining of the petitioners as parties need not be interfered with.

9. Learned Trial Court has allowed the application only on the ground of lis pendens as the transaction in question is during the pendency of this suit. It is trite that transaction during suit is not invalid ipso facto but is always subject to the outcome of the suit. Merely because the transaction in question has taken place during the pendency of the suit, the petitioners would not become proper or necessary party thereto. Here in this case the suit is essentially filed for recovery of money and in the alternative for specific performance of the development agreement. Thus dominant prayer is for recovery of money. It is also pertinent to note that though suit is filed in the year

2016, no order of injunction is sought against the defendant restraining him from creating third party interest in the suit properties. Prima facie perusal of the agreement also does not also show that there was any embargo for the defendant from entering into a sale transaction in respect of those properties against consideration. Having regard to all these facts coupled with the belated stage of filing of the application in the year 2022, the Trial Court was not justified in allowing the application and directing the petitioner to be joined as defendants to the suit.

10. Learned Counsel for respondent no.1 has sought to canvas that in any case the effect of Section 52 of the Transfer of Property Act would not get eliminated even in case of non-joinder of present petitioners as party to the suit. This aspect would be open for the Trial Court to consider. Suffice it to say that the petitioners have made out the case for causing interference in the impugned order.

11. Hence, impugned order is set aside.

12. The amendment carried out to the plaint joining petitioners as defendants, is struck out.

13. Petition is allowed in above terms.

(R. M. JOSHI, J.)

vj gawade/-.