

CIVIL REVISION
Present:

The Hon'ble Mr. Justice **Prasenjit Mandal**

Judgement On: August 20, 2010.
C.O. No.2985 of 2008

Shew Prasad Jaiswal (dead) and others.

Versus

Mihir Kr. Sarkar (dead) and others.

Points:

Addition of party: Suit for specific performance of contract-
Third party came in possession after the suit was dismissed for
default but before restoration of the suit- Third party whether
can be added in the suit-Code of Civil Procedure,1908 O 1 R 10

Facts:

Plaintiff entered into a contract to construct building in the
plot at Salt Lake with condition with condition that he will get
two floors and the defendant will get one floor. Plaintiff made
part construction in the premises. He filed the suit for specific
performance of contract after construction of two floors. The
suit was dismissed for default. Before the suit was restored the
defendant with the help of third part constructed the second floor
and put him in possession in the second floor. Plaintiff filed
application for addition of the third party. Trial Court rejected
the application.

Held:

The suit has arisen out of agreements for specific performance of contract. So, all the disputes and differences between the parties are limited to the parties to the agreement and not to a third party. Mr. Chandan Dey is none but may be an agent of the defendant. The defendant might have constructed the second floor of the premises with the help of Chandan Dey. But he had acted as an agent of the defendant and in no other capacity. So, whatever the reliefs, rights and contentions between the defendant and Chandan Dey exist, such rights, contentions or disputes are to be solved between them and for that reason he should not have impleaded as party in the suit for specific performance of contract filed by the plaintiff. Para 11

Cases cited:

AIR 1954 SC 75, (2005) 11 SCC 403; Terai Tea Co. Pvt. Ltd. Vs. Kumkum Mittal & ors., AIR 1994 Cal 191; AIR 2005 SC 2209; AIR 1990 Delhi 60; (1995) 3 SCC 147; (2008) 3 ICC 494

For the Petitioners: Mr. Bidyut Banerjee,
Ms. Shila Sarkar.

For the Opposite parties: Mr. Saptangsu Basu,
Mr. Ayan Banerjee.

Prasenjit Mandal, J.: This application is at the instance of the plaintiff and is directed against the order no.101 dated August 4, 2008 passed by the learned Civil Judge (Senior Division), Second

Court, Barasat District - North 24 Parganas in Title Suit No.232 of 1991 thereby rejecting an application under Order 1 Rule 10(2) of the Code of Civil Procedure.

2. The short fact necessary for the purpose of this application is that the plaintiff/petitioner instituted the Title Suit No.232 of 1991 before the learned Assistant District Judge, Second Court at Barasat [at present, the learned Civil Judge (Senior Division), Second Court at Barasat] for specific performance of contract and mandatory injunction directing the defendant/opposite party to obtain requisite permission / certificate from the concerned authority including the Governor of the State of West Bengal and the Salt Lake Authority for grant of lease in favour of the plaintiff/petitioner of the ground floor and the second floor of the suit premises, as described in the schedule of the plaint. The plaintiff also prayed for an alternative decree of Rs.3,00,000/- and injunction restraining the defendant, his men and agents from interfering with the possession and occupation of the enjoyment of the ground floor and second floor of the premises. The defendant/opposite party got the said land at Salt Lake on lease for a period of 999 years and he entered into an agreement with the plaintiff that the plaintiff would construct a building on the said plot of land on the ground floor and first floor which would be leased out by the defendant to the plaintiff for a terms of 990 years as per terms and agreement executed by an

indenture dated January 14, 1987. As per terms, the plaintiff was to construct the ground floor, first floor and second floor of the premises at his own cost and after construction of the first floor, the defendant/opposite party will take charge of the same and go on using and occupying the same on his own right till the construction of the second floor. After construction, it was also decided that the defendant/opposite party would occupy the first floor instead of second floor and the plaintiff would occupy the ground floor and the second floor and the defendant was to take necessary permission from the concerned authority to obtain permission for construction of the second floor. So, the suit was filed. In that suit, the defendant is contesting by filing a written statement denying all the contentions made in the plaint. The plaintiff became seriously ill during the pendency of the suit at the stage of peremptory hearing and he could not contact his lawyer and for that reason, the suit was dismissed for default on April 10, 1996.

3. The plaintiff filed an application under Order 9 Rule 9 of the C.P.C. and that application was allowed with order of restoration of the suit in 2006. Previously, there was an order of injunction directing the parties to maintain status quo in respect of the suit property. After revival of the suit, such order of status quo was to be in force automatically, but by way of abandoned precaution, the plaintiff filed another application

for temporary injunction and that was granted. But, in the meantime, during the period of dismissal of the suit and pending of the misc. case under Order 9 Rule 9 of the C.P.C., the defendant constructed the second floor with the help of one third party, namely, Chandan Dey and he is in occupation of that third floor. In order to avoid further complication in the matter, the plaintiff has wanted to incorporate the name of the Chandan Dey in the suit as defendant no.2 and that application was dismissed on contest by the impugned order. Being aggrieved, the plaintiff has preferred this application.

4. Mr. Banerjee, learned Advocate appearing on behalf of the petitioner, submits that the suit is for specific performance of contract and so in order to avoid further complication, the plaintiff has wanted to make addition of party in the suit. Since the defendant had constructed the second floor of the premises with the help of Chandan Dey, he has become a necessary party in the suit to settle the dispute between the parties once for all. He submits that though the suit was at the stage of peremptory hearing, under the circumstances stated above, addition of party can be made at any time. Thus, he has referred to the decision reported in AIR 1954 SC 75, (2005) 11 SCC 403 para 9 & 10. He has submitted that 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.

5. Mr. Banerjee has also referred to the decision of Terai Tea Co. Pvt. Ltd. Vs. Kumkum Mittal & ors. reported in AIR 1994 Cal 191 para 35 & 36 and thus he has submitted that the power of the 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. A person having no interest in the property may be added in the suit provided it is necessary to avoid the possibility of a multiplicity of the judicial proceedings. Therefore, Chandan Dey should be added as party.

6. Mr. Banerjee has also referred to the decision reported in AIR 2005 SC 2209 and AIR 1990 Delhi page 60 to show that in order to avoid multiplicity of proceedings and effectual and complete adjudication, the court may direct the plaintiff to add any party as defendant. So the order impugned cannot be sustained. It must be set aside.

7. On the other hand, Mr. Basu, learned Advocate appearing on behalf of the opposite party, submits that actually Chandan Dey is a third party in relation to the agreement between the plaintiff and the defendant. As such, in a suit for specific performance of contract such a third party should not be added and if he is added there would be complication of the suit and there would be delay

in the disposal of the same. In support of his contention Mr. Basu has relied on (1995) 3 SCC 147 para 7, 9 & 10 and (2008) 3 ICC 494 para 23 wherein it has been clearly stated that with regard to a suit for specific performance of contract only parties to the agreement are the necessary parties. Mr. Basu also submits that one of the main relief being one for recovery of money, such a decree could well be passed without implication of a third person provided the plaintiff proves the plaint case.

8. Therefore, the short question involved in this application is whether the learned Trial Judge was justified in dismissing the application under Order 1 Rule 10(2) of the C.P.C.

9. After hearing the learned counsel for the parties and on going through the materials on record, I find that the plaintiff/petitioner filed the suit for specific performance of contract with the following reliefs:-

"a) Specific performance of the contract, mentioned in paragraph 2 of the plaint, by the defendant including permission from the Governor to the State of West Bengal and/or Slat Lake Authority execution and registration of the Deed of Lease and doing all acts and things in relation thereto and in default an officer or officers to be appointed by this learned Court with a direction to specifically perform the same within such time as to this learned Court may deem fit and proper;

b) Mandatory injunction directing the defendant to apply for and obtain the requisite permission

certificate or certificates from the concerned authorities including the Governor of the State of West Bengal and the Salt Lake Authority for granting of the lease in favour of the plaintiff in respect of the ground and second floor as shown in the sanctioned plan annexed hereto of the building at the premises No.BJ-15 Sector II Salt Lake City, Calcutta-700 091 mentioned in schedule to the plaint and to do all acts and things in relation thereto;

c) i) Alternatively, decree for

Rs.3,00,000/-;

ii) If necessary, an enquiry into the damages suffered by the plaintiff and a decree for the amount found due on such enquiry;

d) Perpetual injunction restraining the defendant, his servants, agents and assigns from in any way or manner interfering with the possession, occupation, use and enjoyment of the ground and second floor as shown in the sanctioned plan annexed hereto of the premises No. Block: BJ-15, Sector-II, Salt Lake City, Salt Lake, Calcutta-700091 mentioned in schedule to the plaint.

e) Perpetual injunction restraining the defendant his servants, agents and assigns from preventing and/or obstructing the plaintiff from making construction of second floor in or upon the first floor of the suit premises as per sanctioned plan annexed hereto in any way or manner whatsoever.

f) Receiver;

g) Injunction;

h) Attachment before judgment;

i) Costs;

j) Further and other reliefs."

10. Thus, I find that the plaintiff by the prayer c.1. has made alternative prayer for a decree of Rs.3,00,000/- and other reliefs such as permanent injunction, damages, etc. in the suit. So, if the decree of specific performance of contract cannot be granted, the plaintiff alternatively may get the decree for recovery of money, as prayed for. Though such alternative relief has been made in the suit, the first prayer as made in the body of the plaint relating to specific performance of contract and mandatory injunction should be considered first whether those reliefs can be granted to the plaintiff.

11. The suit has arisen out of agreements for specific performance of contract. So, all the disputes and differences between the parties are limited to the parties to the agreement and not to a third party. Mr. Chandan Dey is none but may be an agent of the defendant. The defendant might have constructed the second floor of the premises with the help of Chandan Dey. But he had acted as an agent of the defendant and in no other capacity. So, whatever the reliefs, rights and contentions between the defendant and Chandan Dey exist, such rights, contentions or disputes are to be solved between them and for that reason he should not have impleaded as party in the suit for specific performance of contract filed by the plaintiff. The decisions referred to by Mr. Banerjee are of general in nature to show that

one person may be added as a party in the suit though he has no interest in the property provided by his inclusion, the dispute between the parties might be solved once for all and to avoid further complications. In the instant suit, the suit is at the stage of peremptory hearing and at that stage the application under Order 1 Rule 10(2) of the C.P.C. came up for hearing. If that application is allowed, it will create a hindrance in the matter of disposal of the suit. He would have to give an opportunity to defend the suit by way of giving chance to file a written statement. The plaintiff may seek amendment of the plaint in the respect of Chandan Dey as he wants to implead him as a party in the suit. So, if Chandan Dey is added, several complications are likely to occur.

12. But the question is whether Chandan Dey is at all a necessary party to the suit. The present suit is purely a suit for specific performance of contract and it is purely based on the dispute between the parties to the contract and none else. I have stated earlier that Chandan Dey is none but may be an agent of the defendant and the plaintiff has no concern with him at all. Therefore, in a suit for specific performance of contract in view of the decisions reported in (1995) 3 SCC 147 and (2008) 3 ICC 494, such third party is not at all a necessary party or proper party in a suit for specific performance of contract between the two parties. The lis between the parties, can well be solved

without impleading Chandan Dey as a party to the suit. The decisions referred to by Mr. Banerjee, I hold, are not helpful to the plaintiff in the instant situation. Therefore, I am of the view that the learned Trial Judge has rightly dismissed the application for addition of party.

13. The application is, therefore, devoid of merits. It is, therefore, dismissed.

14. There will be no order as to costs.

15. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.

(Prasenjit Mandal, J.)