

SUPREME COURT OF INDIA

Mumbai International Airport Pvt. Ltd.

Vs.

Regency Convention Centra & Hotels

C.A.No.4900 of 2010

(R V Raveendran and K.S.Radhakrishnan JJ.)

06.07.2010

JUDGEMENT

R.V.Raveendran, J.

1. Leave granted. Heard the learned counsel.

2. The Airport Authority of India (second respondent herein, AAI for short) established under the Airports Authority of India Act, 1994 ('Act' for short) to be responsible for the development, operation and maintenance of airports in India. The Government of India took a policy decision to amend the Act by Amendment Act 43 of 2003 enabling the AAI to lease the airport premises, to private operators with prior approval of the Central Government and assign its functions to its lessees except air traffic services and watch and ward. In pursuance of the policy of the government in this behalf, the AAI decided to entrust the work of modernisation and upgradation of the Mumbai Airport to a private operator, to serve the sharply increasing volume of passengers and for better utilisation of the Airport. AAI initiated a competitive bidding process in that behalf. In the information memorandum that was issued to the prospective bidders it was represented that the entire airport premises will be included in the transaction including all encroached land but excluding only the following areas : (i) New ATC tower; (ii) AAI staff colony; (iii) Hotel Leela Venture, and (iv) All retail fuel outlets outside the airport operational boundary.

3. Pursuant to the competitive bidding process, the Chhtrapati Shivaji International Airport, Mumbai was handed over to the appellant for operation, maintenance, development and expansion into a world class airport under an agreement dated 4.4.2006. In pursuance of it, AAI entered into a lease deed dated 26.4.2006 leasing the Mumbai airport to the appellant on "as is where is" basis for a period of 30 years. The subject matter of the lease was described as "all the land (along with any buildings, constructions or immovable assets, if any, thereon) which is described, delineated and shown in Schedule I hereto, other than (i) any lands (along with any buildings, constructions or immovable assets, if any, thereon) granted to any third party under any existing lease(s), constituting the Airport on the date hereof; and (ii)

any and all of the carved out assets". Schedule I to the lease deed, instead of giving a detailed description of the demised property, referred to the map demarcating the demised premises annexed to the lease deed by way of description of the demised premises. The map annexed as Schedule I was the "plan showing the demised premises, indicating carved out assets and lands vested with IAF and Navy". The carved out assets were : (1) new ATC tower; (2) & (2A) the NAD staff colony of AAI; (3) land leased to Hotel Leela Venture; (4) all retail fuel outlets which were outside the airport operational boundary; and (5) convention centre. The map also contains a note below the list of carved out assets, reading as under: "A: The parcel of land measuring 31,000 sq.mts. is currently not made a part of the lease deed but may become part of the demised premises subject to the court verdict".

4. According to the appellant the said parcel measuring 31,000 sq.m. was also part of the airport that was to be handed over by AAI to appellant but it could not be included in view of a pending case (Suit No.6846 of 1999 on the file of the Bombay High Court) filed by the first respondent wherein the High Court had made an interim order dated 2.5.2001, relevant portion of which is extracted below:

“The Defendant Airport Authority should also separately demarcate an area of 31000 sq. meters for which the plaintiff is making a claim in this suit. After the land is so demarcated, a copy of the plan would be handed over to the Plaintiff through their advocate. The learned Counsel further states that the land admeasuring 31000 sq. meters, which would be separately demarcated will not be alienated, sold and transferred and no third party interest in that land would be created by the Defendants Airport Authority without seeking leave of this Court. He further states that the Defendant No.1 would use the 31,000 sq. meters of land only for its own purpose as far as possible without raising any permanent construction on that land, and if it becomes necessary for the Defendant No.1 to raise any permanent construction on that land, the work of construction would not be started without giving two weeks notice to the Plaintiff, after the building plan is finally sanction by the Planning Authority.”

(emphasis supplied)

5. In pursuance of the lease of the airport in its favour, the appellant claims to have undertaken several developmental activities to make it a world class airport. The appellant alleges that it was expecting that the litigation initiated by the first respondent would end and it would be able to get the said 31,000 sq.m. land also as it was in dire need of land for developing the airport. According to the appellant, the Mumbai airport is surrounded by developed (constructed) areas with very limited opportunities to acquire any land and the site constraints limit the possibilities for development and therefore it was necessary to make optimum use of the existing land in the airport for the purpose of modernisation and upgradation; and therefore, the disputed land which was lying idle, was required for modernisation. It therefore filed an application seeking impleadment as an additional defendant in the pending suit filed by the first respondent against AAI, contending that its

interest was likely to be directly affected if any relief is granted to the first respondent-plaintiff in the suit. The appellant alleged that the Information Memorandum proposing to privatise the management did not exclude the area which was the subject-matter of the suit; and that the suit plot could not however be leased to the appellant in view of the interim order in the pending suit of the first respondent. The appellant therefore claimed that it had, or would have, an interest in the suit land; and at all events, it was interested in acquiring it by lease depending upon the decision in the suit and therefore it was a necessary party and in any event a proper party.

6. The said application was resisted by the first respondent inter alia on the ground that the appellant did not have any interest in the suit property and therefore the appellant was neither a necessary party nor a proper party to the suit. It was also contended that AAI itself being a substantial shareholder, having 26% share in the appellant company, would protect the interest of the appellant by contesting the suit and therefore appellant was not a necessary party. AAI has also filed a response to appellant's application for impleadment raising two contentions : (i) any impleadment at that stage of the suit would delay the recording of evidence and final hearing thereby seriously affecting the interests of AAI; and (ii) the suit plot measuring 31000 sq.m. was not leased to the appellant.

7. A learned Single Judge dismissed the appellant's application by order dated 1.4.2008. The learned Single Judge was of the view that as the appellant was yet to acquire any interest in the suit land and as the pending suit by the first respondent was for specific performance of an agreement which was a distinct earlier transaction between the first respondent and AAI to which the appellant was not a party, and as the first respondent was not a party to the arrangement between AAI and the appellant, the court cannot permit impleadment of appellant with reference to some future right which may accrue in future, after the decision in the suit. The appeal filed by the appellant was also dismissed by a Division Bench by order dated 25.8.2008. The Division Bench held that the appellant did not make out that he was a necessary party and the application merely disclosed that he was only claiming to be a proper party; that the appellant's claim was not based on a present demise but a future expectation based on spes successionis; and that therefore, the impleadment of appellant either as a necessary party or proper party or formal party was not warranted. The said order is challenged in this appeal by special leave. The question for consideration is whether the appellant is a necessary or proper party to the suit for specific performance filed by the first respondent.

8. The general rule in regard to impleadment of parties is that the plaintiff in a suit, being dominus litis, may choose the persons against whom he wishes to litigate and cannot be compelled to sue a person against whom he does not seek any relief. Consequently, a person who is not a party has no right to be impleaded against the wishes of the plaintiff. But this general rule is subject to the provisions of Order I Rule 10(2) of Code of Civil Procedure ('Code' for short), which provides for impleadment of proper or necessary parties. The said sub-rule is extracted below:

“Court may strike out or add parties.

(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

The said provision makes it clear that a court may, at any stage of the proceedings (including suits for specific performance), either upon or even without any application, and on such terms as may appear to it to be just, direct that any of the following persons may be added as a party: (a) any person who ought to have been joined as plaintiff or defendant, but not added; or (b) any person whose presence before the court may be necessary in order to enable the court to effectively and completely adjudicate upon and settle the question involved in the suit. In short, the court is given the discretion to add as a party, any person who is found to be a necessary party or proper party. A `necessary party' is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a `necessary party' is not impleaded, the suit itself is liable to be dismissed. A `proper party' is a party who, though not a necessary party, is a person whose presence would enable the court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the court has no jurisdiction to implead him, against the wishes of the plaintiff. The fact that a person is likely to secure a right/interest in a suit property, after the suit is decided against the plaintiff, will not make such person a necessary party or a proper party to the suit for specific performance.”

9. The learned counsel for the appellants relied upon the following observations of a two-Judge Bench of this Court in *Sumtibai v. Paras Finance Co.*¹ to contend that a person need not have any subsisting right or interest in the suit property for being impleaded as a defendant, and that even a person who is likely to acquire an interest therein in future, in appropriate cases, is entitled to be impleaded as a party:

“Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in *Kasturi v. Iyyamperuma*². He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute. Obviously, a busybody or interloper with no semblance of title cannot be impleaded

in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute.....It cannot be laid down as an absolute proposition that whenever a suit for specific performance is filed by A against B, a third party C can never be impleaded in that suit.

If C can show a fair semblance of title or interest he can certainly file an application for impleadment.”

10. The learned counsel for the first respondent on the other hand submitted that the decision in *Sumtibai* is not be good law in view of an earlier decision of a three-Judge Bench decision of this Court in *Kasturi v. Iyyamperumal*³. In *Kasturi*, this Court reiterated the position that necessary parties and proper parties can alone seek to be impleaded as parties to a suit for specific performance. This Court held that necessary parties are those persons in whose absence no decree can be passed by the court or those persons against whom there is a right to some relief in respect of the controversy involved in the proceedings; and that proper parties are those whose presence before the court would be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit although 1 no relief in the suit was claimed against such person. Referring to suits for specific performance, this Court held that the following persons are to be considered as necessary parties: (i) the parties to the contract which is sought to be enforced or their legal representatives; (ii) a transferee of the property which is the subject matter of the contract. This Court also explained that a person who has a direct interest in the subject matter of the suit for specific performance of an agreement of sale may be impleaded as a proper party, on his application under Order 1 Rule CPC. This Court concluded that a purchaser of the suit property subsequent to the suit agreement would be a necessary party as he would be affected if he had purchased it with or without notice of the contract, but a person who claims a title adverse to that of the defendant-vendor will not be a necessary party. The first respondent contended that *Kasturi* held that a person claiming a title adverse to the title of defendant-vendor, could not be impleaded, but effect of *Sumtibai* would be that such a person could be impleaded; and that therefore, the decision in *Sumtibai* is contrary to the larger bench decision in *Kasturi*.

11. On a careful consideration, we find that there is no conflict between the two decisions. The two decisions were dealing with different situations requiring application of different facets of sub-rule (2) of Rule 10 of Order 1. This is made clear in *Sumtibai* itself. It was observed that every judgment must be governed and qualified by the particular facts of the case in which such expressions are to be found; that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision and that even a single significant detail may alter the entire aspect; that there is always peril in treating the words of a judgment as though they were words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. The decisions in *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater*

*Bombay*⁴ and *Anil Kumar Singh v. Shivnath Mishra*⁵ also explain in what circumstances persons may be added as parties.

12. Let us consider the scope and ambit of Order I of Rule 10(2) CPC regarding striking out or adding parties. The said sub-rule is not about the right of a non-party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding. The discretion under the sub-rule can be exercised either suo moto or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice. This Court in *Ramji Dayawala & Sons (P) Ltd. vs. Invest Import*⁶, reiterated the classic definition of 'discretion' by Lord Mansfield in *R. vs. Wilkes*⁷, that 'discretion' when applied to courts of justice, means sound discretion guided by law.

“It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, 'but legal and regular'. We may now give some illustrations regarding exercise of discretion under the said Sub-Rule.

12.1) If a plaintiff makes an application for impleading a person as a defendant on the ground that he is a necessary party, the court may implead him having regard to the provisions of Rules 9 and 10(2) of Order I. If the claim against such a person is barred by limitation, it may refuse to add him as a party and even dismiss the suit for non-joinder of a necessary party.

12.2) If the owner of a tenanted property enters into an agreement for sale of such property without physical possession, in a suit for specific performance by the purchaser, the tenant would not be a necessary party.

But if the suit for specific performance is filed with an additional prayer for delivery of physical possession from the tenant in possession, then the tenant will be a necessary party in so far as the prayer for actual possession.

12.3) If a person makes an application for being impleaded contending that he is a necessary party, and if the court finds that he is a necessary party, it can implead him. If the plaintiff opposes such impleadment, then instead of impleading such a party, who is found to be a necessary party, the court may proceed to dismiss the suit by holding that the applicant was a necessary party and in his absence the plaintiff was not entitled to any relief in the suit.

12.4) If an application is made by a plaintiff for impleading someone as a proper party, subject to limitation, bonfides etc., the court will normally implead him, if he is

found to be a proper party. On the other hand, if a non-party makes an application seeking impleadment as a proper party and court finds him to be a proper party, the court may direct his addition as a defendant; but if the court finds that his addition will alter the nature of the suit or introduce a new cause of action, it may dismiss the application even if he is found to be a proper party, if it does not want to widen the scope of the specific performance suit; or the court may direct such applicant to be impleaded as a proper party, either unconditionally or subject to terms. For example, if `D' claiming to be a co-owner of a suit property, enters into an agreement for sale of his share in favour of `P' representing that he is the co-owner with half share, and `P' files a suit for specific performance of the said agreement of sale in respect of the undivided half share, the court may permit the other co-owner who contends that `D' has only one-fourth share, to be impleaded as an additional defendant as a proper party, and may examine the issue whether the plaintiff is entitled to specific performance of the agreement in respect of half a share or only one-fourth share; alternatively the court may refuse to implead the other co-owner and leave open the question in regard to the extent of share of the vendor-defendant to be decided in an independent proceeding by the other co-owner, or the plaintiff;

alternatively the court may implead him but subject to the term that the dispute, if any, between the impleaded co-owner and the original defendant in regard to the extent of the share will not be the subject matter of the suit for specific performance, and that it will decide in the suit, only the issues relating to specific performance, that is whether the defendant executed the agreement/contract and whether such contract should be specifically enforced. In other words, the court has the discretion to either to allow or reject an application of a person claiming to be a proper party, depending upon the facts and circumstances and no person has a right to insist that he should be impleaded as a party, merely because he is a proper party.”

13. If the principles relating to impleadment, are kept in view, then the purported divergence in the two decisions will be found to be non-existent. The observations in Kasturi and Sumtibai are with reference to the facts and circumstances of the respective case. In Kasturi, this Court held that in suits for specific performance, only the parties to the contract or any legal representative of a party to the contract, or a transferee from a party to the contract are necessary parties. In Sumtibai, this Court held that a person having semblance of a title can be considered as a proper party. Sumtibai did not lay down any proposition that anyone claiming to have any semblance of title is a necessary party. Nor did Kasturi lay down that no one, other than the parties to the contract and their legal representatives/transferees, can be impleaded even as a proper party.

14. On a careful examination of the facts of this case, we find that the appellant is neither a necessary party nor a proper party. As noticed above, the appellant is neither a purchaser nor the lessee of the suit property and has no right, title or interest therein. First respondent - plaintiff in the suit has not sought any relief against the appellant. The presence of the appellant is not necessary for passing an effective decree in the suit for specific performance.

Nor is its presence necessary for complete and effective adjudication of the matters in issue in the suit for specific performance filed by the first respondent-plaintiff against AAI.

“A person who expects to get a lease from the defendant in a suit for specific performance in the event of the suit being dismissed, cannot be said to be a person having some semblance of title, in the property in dispute.”

15. Learned counsel for the appellants contended that in view of section 12A of the Act when AAI granted a lease of the premises of an airport, to carry out any of its functions enumerated in section 12 of the said Act, the lessee who has been so assigned any function of AAI, shall have the powers of AAI, necessary for the performance of such functions in terms of the lease. Learned counsel for the appellant submitted that in view of this provision, it should be deemed that the appellant has stepped into the shoes of AAI so far as the Airport premises are concerned. This contention has no merit. The appellant as lessee may certainly have the powers of AAI necessary for performance of the functions that have been assigned to them. What has been assigned is the function of operation, management and development agreement with reference to the area that been demised. Obviously the appellant as lessee of the Airport cannot step into the shoes of AAI for performance of any functions with reference to an area which has not been demised or leased to it.

16. Learned counsel for the appellant contended that Mumbai airport being one of the premier airports in India with a very high and ever increasing passenger traffic, needs to modernise and develop every inch of the airport land; that the suit land was a part of the airport land and that for the pendency of first respondent's suit within an interim order, AAI would have included the suit land also in the lease in its favour. It was submitted that therefore a note was made in the lease that the land measuring 31000 sq.m. was not being made a part of the lease but may become part of the demised premises subject to the court verdict. This does not in any way help the appellant to claim a right to be impleaded. If the interim order in the suit filed by the first respondent came in the way 1 of granting the lease of the suit land, it is clear that the suit land was not leased to appellant. The fact that if AAI succeeded in the suit, the suit land may also be leased to the appellant is not sufficient to hold that the appellant has any right, interest or a semblance of right or interest in the suit property. When appellant is neither claiming any right or remedy against the first respondent and when first respondent is not claiming any right or remedy against the appellant, in a suit for specific performance by the first respondent against AAI, the appellant cannot be a party. The allegation that the land is crucial for a premier airport or in public interest, are not relevant to the issue.

17. In the result, the appeal is dismissed.

¹2007 (10) SCC 82

²2005(6) SCC 733

³2005 (6) SCC 733

⁴1992 (2) SCC 524

⁵1995 (3) SCC 147

⁶1981 (1) SCC 80
⁷1770 (98) ER 327