

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 10521 OF 2013

PRUTHVIRAJ SINH NODHUBHA
JADEJA (D) BY LRS.

...APPELLANT(S)

VERSUS

JAYESHKUMAR CHHAKADDAS
SHAH & ORS.

...RESPONDENT(S)

J U D G M E N T

Deepak Gupta, J.

By means of this appeal, the appellants who are defendants in the suit, have challenged the order of the High Court dated 26.03.2009 whereby the order of the trial court has been set aside and the respondent no. 1 herein has been permitted to be added as plaintiff no. 2 in the suit.

2. One Mafaji Motiji Thakor (for short 'MMT'), who is the father and predecessor-in-interest of respondent nos. 2(A) to 2(D), was the owner of the suit land. He had executed a power of attorney in favour of respondent no. 3, Avnish Raman Lal (for short 'ARL'). It is alleged that on 29.01.2005, ARL exercising his power under the power of attorney, sold the land to Pruthvirajsinh Nodhubha Jadeja (deceased), predecessor-in-interest of the appellants herein. MMT filed a civil suit (No.89 of 2006) against the predecessor-in-interest of the appellants and ARL herein challenging this sale. One of the grounds raised was that no power to sell the property had been vested in favour of ARL in terms of the power of attorney executed by MMT. It appears that during the pendency of the suit, a Court Commissioner was appointed, who reported that MMT continued to be in possession of the land. ARL in his written statement filed in the suit, admitted that the power of attorney did not give him any power to sell the land. He further stated that he had never executed the sale deed in favour of predecessor-in-interest of the appellants.

3. On 23.03.2007, respondent no. 1, Jayeshkumar Chhakaddas Shah (for short 'JCS'), purchased the land from

MMT on payment of Rs.10,00,000/-. This sale deed was registered and, according to JCS, possession was handed over to him by MMT. Further, according to JCS, MMT had given an undertaking in the sale deed that there is no proceeding pending with regard to the suit land. MMT died on 02.06.2007. On 02.07.2007, JCS filed an application under Order I Rule 10, Code of Civil Procedure, 1908 (for short 'CPC') for impleading him as plaintiff no. 2 before the trial court. In this application it was alleged that the legal heirs of MMT, respondent nos. 2(A) to 2(D), were trying to occupy the suit land in collusion with the appellants herein. On 06.07.2007 i.e. after JCS filed the application for impleadment, the legal heirs of MMT executed a registered declaration deed in favour of the appellants confirming the sale deed dated 29.01.2005. On 19.07.2007, the legal heirs of MMT, who had been by then brought on record in the civil suit filed a memo/miscellaneous application, referred to as '*Pursis*' in the orders of the courts below, to unconditionally withdraw the Civil Suit No.89 of 2006.

4. The trial court dismissed the application filed by JCS for impleadment holding that he was not a necessary or proper party

and that fresh cause of action arose in his favour and he could file a separate suit. JCS thereafter filed a petition under Article 227 of the Constitution before the High Court, which was allowed by the High Court mainly on the ground that even if the legal heirs of MMT wanted to withdraw from the suit, they could do so but the rights of JCS, would be vitally affected. Therefore, JCS was entitled to be impleaded as a party in the suit.

5. Shri D.N. Ray, learned counsel for the appellants, submits that in a case like this the substitution could have been ordered only in terms of Order XXII Rule 10 CPC. He further submits that the plaintiff cannot be stopped from withdrawing the plaint nor can any party force the plaintiff to add another plaintiff with him. It is also urged that in case JCS is permitted to be added as plaintiff no. 2, there will be an *inter se* clash of interest between plaintiffs themselves and, therefore, the trial court was right in holding that the plaintiff should file a separate suit to assert his rights. On the other hand, Mr. Huzefa Ahmadi, learned senior counsel appearing for the respondents, submits that though it is true that it would be Order XXII Rule 10 CPC, which is applicable, the substitution must be allowed and the plaintiff,

who has purchased the land from MMT, has a right to be substituted in his place. He further submits that there is no clash between the case of his client and that set up by the original plaintiff MMT. The dispute between the two sides has occurred because of the subsequent actions of the legal heirs of MMT who have colluded with the defendant-appellants.

6. MMT allegedly sold the land to the appellants through his power of attorney on 29.01.2005. Both MMT and his power of attorney denied this fact and, in fact, urged that the power of attorney did not give the right to sell the property. Thereafter, MMT sold the land to JCS. Shri Ahmadi urges that in terms of the amendment made to Section 52 of the Transfer of Property Act, 1882 in the State of Maharashtra, as applicable in the State of Gujarat, every claim for *lis pendens* has to be registered. He urges that MMT had not registered the *lis pendens* and further, in the sale deed, undertook that there are no legal proceedings pending with regard to the suit land. Therefore, JCS is the purchaser for *bona fide* consideration.

7. According to us, the application was wrongly filed under Order I Rule 10 CPC and it should have been filed Order XXII Rule 10 CPC which reads thus:

**“ORDER XXII : DEATH, MARRIAGE AND INSOLVENCY
OF PARTIES**

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10. Procedure in case of assignment before final order in suit.-

(1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

8. It is well settled law that mere non-mentioning of an incorrect provision is not fatal to the application if the power to pass such an order is available with the court.

9. MMT had assigned his rights and interest in the land in favour of JCS. Therefore, JCS as an assignee of the rights of the original plaintiff, had a right to be impleaded as a plaintiff in place of MMT.

10. The next question is what is the effect of the legal heirs of MMT withdrawing the suit. As noted by us above, JCS filed an application for being joined as plaintiff no. 2 in the suit on 02.07.2007. Subsequently, a settlement was arrived at between respondent nos. 2(A) to 2(D) and the appellants on 06.07.2007 and only thereafter on 19.07.2007, the legal heirs of the original plaintiff filed an application for unconditional withdrawal of the suit.

11. The trial court was seized of both the applications together. The trial court should have, in our opinion, not dismissed the application filed by JCS. We may note that the so called settlement agreement clearly shows that respondent nos. 2(A) to 2(D) had not received any amount from the appellants. There was no transfer of interest in favour of the appellants by this document. All that the respondent nos. 2(A) to 2(D) said was that they stood by the sale deed executed by their father through the power of attorney in favour of the appellants. On the other hand, JCS claimed that MMT had sold the land for Rs.10,00,000/-, payment of which was made by cheque. It is thus obvious that JCS had a vital interest in the suit and had a right to continue

the suit. We are *prima facie* of the view that JCS need not even challenge the so called settlement because that settlement does not, in any way, create any title, right or interest in the suit parties. Therefore, we hold that JCS had a vital interest in the suit. The issue whether MMT had authorised respondent no. 3 to sell the land and whether respondent no. 3 had actually sold the land, can only be decided in this suit and not in any fresh suit filed by JCS. We are, therefore, clearly of the view that JCS is entitled to continue the suit despite respondent nos. 2(A) to 2(D) having compromised the matter and withdrawn from the suit. Their withdrawal can have no impact on the rights of JCS.

12. In view of the above discussion, we dismiss the appeal. Interim order dated 06.07.2009 stands vacated. Pending application(s), if any, stand(s) disposed of.

.....**J.**
(Deepak Gupta)

.....**J.**
(Aniruddha Bose)

New Delhi
October 04, 2019