

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

WRIT PETITION NO.7828 OF 2012

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1. Shailendra s/o Bhaskarrao Salunkhe,
age 42 years, Occ. Construction Work.
2. Vijay s/o Pralhad Patil,
age 52 years, Occ. Construction Work,

Both R/o of P.R.Construction,
Opposite Deopur Church, Dhule,
District Dhule.

Petitioners.

VERSUS

1. The Municipal Corporation,
City of Dhule,
Through its Commissioner.
2. Town Planner,
Municipal Corporation,
City of Dhule, District Dhule.
3. Deepak s/o Hari Kakuste,
age 33 years, Occ. Agriculturist,
R/o. 126, Adarsh Colony, Deopur,
Dist. Dhule.

Respondents.

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Mr. P.R.Patil , Advocate for the petitioners.
Mr. Mukul Kulkarni, Advocate for the Resp.Nos.1 and 2
Mr. K.C.Sant, Advocate for Respondent No.3.

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CORAM : V. K. JADHAV, J.

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DATE OF RESERVING THE JUDGMENT : 01.10.2015.
DATE OF PRONOUNCING THE JUDGMENT :07.10.2015.

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JUDGMENT :-

1. Rule. Rule made returnable forthwith. By consent of

parties, petition is taken up for final hearing at admission stage.

2. By this petition, the petitioners are challenging the impugned order dated 31.7.2012 passed by the learned 3rd Jt. Civil Judge (J.D.), Dhule below Exh.26 in RCS No.308/2012, thereby directing the petitioners/plaintiffs to add respondent No.3 - Deepak Hari Kakuste, as defendant No.3.

3. Brief facts giving rise to the present writ petition are as follows :-

The petitioners are the original plaintiffs in Regular Civil Suit No.308/2012 pending on the file of 3rd Jt. Civil Judge, Junior Division, Dhule. The suit is instituted for the relief of declaration and decree of perpetual injunction against the Municipal Corporation, Dhule, in respect of the suit property i.e plot No.17 ad-measuring 5060 sq.ft. situated in Survey No.62/1 within the limits of village Valavadi, Deopur, Dhule, District Dhule. The petitioners/plaintiffs desired to construct the suit property and therefore, submitted an application to the Respondent-Municipal Corporation, Dhule, for permission. On scrutiny of the proposal, required permission was granted to the petitioners/plaintiffs. Respondent No.3 - Deepak had filed

complaints with Respondent Municipal Corporation, Dhule against the construction raised by the petitioners/plaintiffs pursuant to the said permission. Even, respondent No.3 Deepak sent a legal notice to the petitioners/plaintiffs and the same was replied by the petitioners/plaintiffs immediately. Furthermore, respondent No.3 Deepak had also filed a Regular Civil Suit No.264/2011 before the Civil Judge (S.D.), Dhule, praying therein for a declaration to the effect that the construction made by the plaintiffs is contrary to the lay out and a decree for mandatory injunction. In the month of December, 2011, the Respondent - Municipal Corporation had also issued a notice to the petitioners/plaintiffs about the illegal construction carried out by them contrary to the permission granted. In the month of January, the plaintiffs replied to the said notice, however, on 9.2.2012 the Respondent-Municipal Corporation proposed action of demolition of the said construction and therefore, the petitioners/plaintiffs constrained to file Regular Civil Suit No.308/2012, as aforesaid.

4. On 4.5.2012, Respondent No.3 – Deepak Kakuste had filed an application Exh.26 to join him as a party-defendant in Regular Civil Suit No.308/2012 instituted by the petitioners/plaintiffs. The learned Civil Judge, J.D. Dhule,

by its impugned order dated 31.7.2012, allowed the said application Exh.26 and directed the petitioners/plaintiffs to add respondent No.3 Deepak Hari Kakuste, as party defendant No.3 in the said Regular Civil Suit No.308/2012. Hence, this Writ Petition.

5. The learned counsel for the petitioners submits that, as a rule, the Court should not add a person as a defendant to a suit when the plaintiff is opposed to such addition. The reason is that, the plaintiff is the *dominus litis* and he is the master of his own suit, he cannot be compelled to fight a person against whom he does not wish to fight and against whom he does not claim any relief. The learned counsel further submits that the only question involved in the suit instituted by the petitioners/plaintiffs was whether the construction of the plaintiffs was in accordance with the permission granted by the Municipal Corporation, Dhule, and in such a situation, respondent No.3 was neither necessary nor proper party to the suit. The learned counsel submits that respondent No.3 had filed a separate suit agitating thereby his individual grievances and only on that basis, he is not a necessary party in the suit which is confined between the petitioners/plaintiffs and the Municipal Corporation, Dhule. The learned counsel further submits

that, the presence of respondent No.3 is not required to adjudicate upon the issues involved in a suit or for the purpose of deciding the real issue involved in the matter. The learned counsel further submits that, respondent no.3 cannot even be called as proper party, because he is not concerned either with the relief of declaration or with the relief of injunction claimed by the petitioners/plaintiffs. No question has been raised about the title in the suit and further respondent No.3 has not alleged any encroachment by the petitioners/plaintiffs. The issues to be decided in the suit are purely in between the petitioners/plaintiffs on one hand and the Municipal Corporation, Dhule on the other hand. The learned counsel further submits that, so far as the allegations made against respondent No.3 in the plaint of the Regular Civil Suit No.308/2012 are concerned, the petitioners/plaintiffs may delete those allegations in the given set of facts and circumstances. The learned counsel further submits that, however, the learned Judge of the Trial Court has wrongly interpreted the provisions of Order 1 Rule 10 (2) of the Code of Civil Procedure, and thus, arrived at erroneous conclusion. The learned counsel further submits that, at the most, both the suits can be consolidated. The learned counsel thus lastly submits that the impugned order is liable to be quashed and set aside and the application

Exh.26 is liable to be rejected by allowing the writ petition.

6. The learned counsel for the petitioners, in support of his submissions, placed reliance on the following judgments :-

1. *Ramesh Hirachand Kundanmal Appellant Vs. Municipal Corporation of Greater Bombay and others, Reported in (1992) 2 Supreme Court Cases 524.*
2. *Dr. Harisha and others. Applicants Vs. Municipal Corporation of Amravati and another Respondents. Reported in [1987 Mah L R 1286].*
3. *Smt. Tulsi Devi and another, Petitioners Vs. Municipal Corporation of Delhi and another, Respondents reported in AIR 1985 Delhi 353.*

7. Mr. Sant, the learned counsel for respondent No.3 submits that, the petitioners/plaintiffs are making construction more than the permissible limits. Therefore, respondent No.3 had filed a complaint with the Municipal Corporation, Dhule to the effect that the petitioners have not left the required margin from the boundary wall and therefore, the easementary right of respondent no.3 i.e. air and light are affected. The learned counsel further submits that, respondent No.3 has filed Regular Civil Suit No.264/2011 earlier to that of the suit instituted by the petitioners/plaintiffs. It was thus for the petitioners/plaintiffs to add respondent No.3 as a party at

the time of filing of Regular Civil Suit No.308/2012. In this backdrop, presence of respondent No.3 is necessary for complete and effectual adjudication of the dispute, though no specific relief is sought against respondent No.3. The learned counsel further submits that, the learned Judge of the trial court has rightly considered the provisions of Order 1 Rule 10 (2) of the Code of Civil Procedure and allowed the application at Exh.26 filed by respondent No.3. Learned counsel further submits that respondent No.3 has already filed a pursis in the Court below to club both the suits and be heard together. The learned counsel thus, submits that Writ Petition is devoid of any merits and therefore, liable to be dismissed with costs.

8. The learned counsel for respondent No.3, in support of his submissions, placed reliance on following judgments :-

1. *Chandrakant Dharma Bhonu, Petitioner Vs. Pandurang Ramchandra Dandekar and another, Respondents. Reported in AIR 2004 Bombay 374.*
2. *M/s. Aliji Monoji and Co., Appellant Vs. Lalji Mauji and others. Respondents. Reported in AIR 1997 Supreme Court 64.*
3. *Sumtibai and others. Vs. Paras Finance Co. Regd. Partnership Firm reported in AIR 2007 Supreme Court 3166.*

4. *Sushil Kaur w/o Sukbhirsingh Chhatwal and others. Applicants Vs. Aurangabad Ginning and Pressing Factory and another respondents, reported in **2012 (2) Mh.L.J. 295.***
5. *Vasant Permanand Muley Appellant Vs. Aurangabad Municipal Council and others. Respondents reported in **2009(4) Mh.L.J. 771.***

9. I have also heard Mr. Mukul Kulkarni, the learned counsel appearing for Respondents No.1 and 2.

10. The learned counsel for the petitioners/plaintiffs submits that the petitioners/plaintiffs are *dominus litis* and therefore, they cannot be forced to join respondent No.3 as party defendant. The learned counsel submits that, respondent No.3 is neither a necessary nor a proper party to the suit, and addition of respondent as party defendant would enlarge the issue in the suit.

11. The petitioners/plaintiffs have instituted a suit for declaration that, the notice dated 28.12.2011 issued by the Municipal Corporation, Dhule is an ex-parte and illegal notice and for a decree of perpetual injunction against the Municipal Corporation, Dhule with regard to the construction raised on the suit property owned by the petitioners/plaintiffs.

12. On careful perusal of the written statement submitted by the Municipal Corporation, Dhule in Regular Civil Suit No.308/2012, instituted by the petitioners/plaintiffs, it appears that, the Respondent Municipal Corporation, Dhule has come with the pleadings that the officers of the Corporation visited the construction site and found that the petitioners/plaintiffs have carried out the construction measuring 342.78 sq. meters illegally without permission and by exceeding the limits of the permission granted by the Corporation. Respondent No.3 contends that the petitioners have not kept required space from the boundary wall and therefore, the easementary rights such as air and light of respondent No.3 are affected. It would not be out of place to repeat here that, respondent No.3 has instituted an independent suit bearing Regular Civil Suit No.264/2011 against the petitioners/plaintiffs and the same is pending. Thus, looking from this angle, by any stretch of imagination, it cannot be said that respondent No.3 is really concerned with the controversy raised by the petitioners/plaintiffs in the suit instituted against the Municipal Corporation, Dhule. In other words, it cannot be said that, said controversy cannot be decided except his presence and participation in the suit. Furthermore, respondent No.3 even cannot be called as a proper party, because, he is not concerned either

with the relief of declaration or with the relief of injunction claimed by the petitioners/plaintiffs against the respondent Municipal Corporation in said suit. It is also not disputed that, the question of right to property is not involved in the suit instituted by the petitioners/plaintiffs, nor respondent no.3 alleged any encroachment over the portion of the property owned by him.

13. In the case of **Ramesh Hirachand Kundanmal** (supra), the Apex Court after considering the scope of Order 1 Rule 10 of the Code of Civil Procedure and discussing the various case laws on this point, in paragraph No.18 of the judgment, made following observations :-

“18. The courts below have assumed that the subject matter of the litigation is the structure erected by the respondent or in other words the service station which has been allowed to be operated upon by the plaintiff under the terms of the dealership agreement. The notice does not relate to that structure but is in relation to the two chattels stated to have been erected by the present appellant unauthorizedly. According to the appellant these chattels/structures are movables on wheels and plates where servicing and/or repairs are done and used for storing implements of the mechanics. Respondent 2 has no interest in these chattels and the demolition of the same in pursuance to the notice is not a matter which affects the legal rights of the respondent. The courts below, therefore, failed to note that

respondent 2 has no direct interest in the subject matter of the litigation and the addition of the respondent would result in causing serious prejudice to the appellant and the substitution or the addition of a new cause of action would only widen the issue which is required to be adjudicated and settled. The joining of the party would embarrass the plaintiff and issues not germane to the suit would be required to be raised. The mere fact that a fresh litigation can be avoided is no ground to invoke the power under the rule in such cases.”

14. In the case in hand, so far as the suit instituted by the petitioners/plaintiffs is concerned, respondent No.3 has no direct interest in the subject matter of the litigation and his addition in the suit would result in causing serious prejudice to the petitioners/plaintiffs. It also appears that addition of a new cause of action in the form of affecting the easementary rights of respondent No.3 would only widen issue which is required to be adjudicated and settled. There is no question of avoiding fresh litigation since respondent No.3 has already instituted a suit against the petitioners/plaintiffs and the Municipal Corporation, Dhule.

15. In a case of Dr. Harisha (supra), this Court (Nagpur Bench), in paragraph No.19 of the judgment, made the following observations :-

“19. The sum and substance of what has been said so far is that scope of the litigation before the trial Court is very much limited that the non-applicant No. 2 can hardly come into picture. The Issues to be decided in that suit are purely the issues in between the plaintiffs on the one hand and the Municipal Corporation on the other. No right to property is put in dispute. No relief has been claimed which will either directly or indirectly affect any parties except the parties before the Court. Even assuming for the time being that there may be a remote possibility of the non-applicant No.2 being affected, he cannot, even by any stretch of imagination be called as a necessary party.”

16. In the case in hand, respondent No.3 had nothing to do with the notice issued by the Municipal Corporation on the petitioners/plaintiffs with regard to demolition of the construction on the suit property. It is purely a dispute between the petitioners/plaintiffs on one hand and the Municipal Corporation, Dhule on the other. Even assuming that, respondent No.3 is indirectly or remotely affected, he cannot acquire a status of necessary party to the litigation. Respondent No.3 has already persuaded a remedy by filing a separate suit, so far as his alleged infringement of easementary right is concerned.

17. So far as the case of **Chandrakant Dharma Bhonu** (supra), relied upon by the learned counsel for respondent

No.3 is concerned, the petitioner and first respondent in the case cited are the ad-joining land owners. Process of initiating action against first respondent was initiated on the complaint of the petitioner drawing attention of the Municipal Corporation that first respondent was in a process of carrying out an unauthorized construction. Main grievance of the petitioner is that the area of the ground floor has been extended far beyond its original dimension and that a first floor was constructed which was never in existence at any point of time in the past. The petitioner has specifically made a grievance of the fact that between the structure of the petitioner and first respondent, there was a vacant land in the past which was used by the petitioner and by his forefathers. Petitioner was, in the circumstances, directly aggrieved by the conduct of the first respondent in having allegedly increased area of the ground floor and by constructing an unauthorized first floor thereon. On the backdrop of these facts, the Principal Seat of this Court has observed that the action of carrying out an allegedly unauthorized construction and the alleged encroachment by the first respondent directly affects the rights of the petitioner and accordingly held that the learned judge of the Trial Court was not justified in coming to the conclusion that the petitioner was neither a necessary party nor a proper

party. The facts of the case cited are altogether different and cannot be made applicable to the facts and circumstances of the present case.

18. In a case of M/s Aliji Manoji (supra) relied upon by the learned counsel for respondent No.3, it is held that, in a suit for perpetual injunction restraining the Municipal Corporation from demolition of the demise building, the landlord is a proper party. It is held that land lord has direct and substantial interest in the demise building before the demolition and in the event of its demolition, his rights should materially be affected.

19. In a case of **Sushil Kaur w/o Sukhbirsing Chhatwal** (supra) relied upon by the learned counsel for respondent No.3, this Court has observed that, respondent No.1 in the case cited, has substantial interest in the suit property and therefore, for effectual and complete adjudication of the proceedings, respondent No. 1 is required to be added as party in the appeal.

20. In a case of **Vasant Paramanand Muley** (supra) relied upon by the learned counsel for respondent No.3, effect of addition of a party, after period of limitation, is considered.

The suit was dismissed for non joinder of the necessary party and the scope of Order 1 Rule 10 of C.P.C. and the provisions of Section 21 of the Limitation Act, is considered by the Court in different context.

21. In view of the above discussion, I am of the considered opinion that respondent No.3 is not a necessary or proper party to be added as a defendant in the suit instituted by the petitioners/plaintiffs.

22. The learned counsel for the petitioners/plaintiffs has made a statement that the petitioners would delete the part of the pleadings consisting of certain allegations against respondent No.3 in Regular Civil Suit No.308/2012. The petitioners/plaintiffs are thus at liberty to file an appropriate application before the trial court in this regard and the trial court may consider it in the light of the observations made in this petition.

23. Respondent No.3 has already filed a pursis for consolidation of the suit instituted by the petitioners/plaintiffs i.e. Regular Civil Suit No.308/2012 and the suit instituted by respondent No.3 i.e. Regular Civil Suit No.264/2011. The learned counsel for the

petitioners/plaintiffs has also no objection for the same.

24. In view of the above discussion, I proceed to pass the following order.

ORDER

- I. The Writ Petition is hereby allowed.
- II. The impugned order dated 31.7.2012 passed by the learned 3rd Jt. Civil Judge (J.D.), Dhule, below Exh.26 in Regular Civil Suit No.308/2012, is hereby quashed and set aside.
- III. The application at Exh.26 in Regular Civil Suit No.308/2012 is hereby rejected.
- IV. It is hereby directed that, Regular Civil Suit No.308/2012 (Shailendra Bhaskarrao Salunkhe and another Vs. The Municipal Corporation, Dhule and others) and Regular Civil Suit No.264/2011 (Deepak Hari Kakuste- Vs. Shri Shailendra Bhaskarrao Salunkhe and others) be consolidated.
- V. Rule is accordingly made absolute in the above terms. Writ Petition is disposed of.
- VI. In the circumstances, there shall be no order as to costs.

(V.K. JADHAV, J.)

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