

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 5763 OF 2015

Shyam Bihari Sharma

Petitioner

Vs

Municipal Corporation of Greater
Mumbai and Anr.

.. Respondents

Mr. Rohan J. Cama a/w Mr. Gobinda C. Mohanty, i/b. M/s Mohanty
& Associates, Advocates for the petitioner.

Mr. Prasad Bhattacharya, respondent no.2 in-person.

CORAM : R.G.KETKAR,J.

DATE : 09/07/2015

PC:

1. Heard Mr. Rohan Cama, learned counsel for the petitioner and Respondent no.2 in-person at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the Judgment and order dated 24.2.2015 passed by the learned Judge, City Civil Court, Greater Bombay in Chamber Summons No. 2230 of 2014 in L.C.Suit No.1825 of 2013. By that order, the learned trial Judge allowed the Chamber Summons and directed the petitioner, hereinafter referred to as 'plaintiff, to implead respondent no.2 as defendant no.2 in the suit and to make necessary amendment in the Plaint.

3. In support of this Petition, Mr. Cama strenuously contended that respondent no.1, hereinafter referred to as 'defendant no.1-Corporation' has issued notice under section 351 of the Mumbai

Municipal Corporation Act, 1888, (for short, 'Act') on 7.12.2012 alleging change of user. He submitted that the plaintiff is owner and occupier of shop no.2 and 2A, situate at Shree Riddhi Siddhi, 107, Shrikant Kunj, M.M.Patankar.Marg, Kurla (West), Mumbai 400079 (for short, 'suit premises'). He submitted that the plaintiff has instituted suit in April, 2013 challenging the said notice. During the pendency of the suit, respondent no.2, hereinafter referred to as 'defendant no.2, took out Chamber Summons for his impleadment as party defendant. In support of that Chamber summons, defendant no.2 filed affidavit. In paragraph 11, it is averred that defendant no.2 is occupant of the 2nd floor of the suit building Shrikant Kunj on whose compulsory open space and access way in the authorized suit premises the shops have erected and the plaintiff is occupier of the suit shop. In the first place, he submitted that only allegation made in the notice under section 351 is change of user and not encroaching upon compulsory open space and access way by the plaintiff. Secondly, he submitted that defendant no.2 did not produce any material on record to indicate that he is still occupant of the second floor of the suit building. He submitted that, in fact, at room no.11 of Shrikant Kunj, courier was sent by speed post in the name of Akrar Khan and the said courier was received by Akrar Khan on 17.2.2014. He further submitted that defendant no.2 is residing at Dombivali and the suit premises is situate in a

building at Kurla. He further submitted that defendant no. 2 is registered as a voter at Dombivali. In other words, Mr. Cama submitted that no material is produced by defendant no.2 to substantiate his contention that he is a occupant of the second floor where suit premises is situate. He further submitted that since defendant no.2 is not the occupant of the building where the suit premises is situate, he has no locus to participate in the proceedings between the plaintiff and defendant no.1- Corporation. Defendant no.2 is neither a necessary nor a proper party. In support of this submission, he relied upon decision of the Apex Court in the case of Vidur Impex and Traders Private Limited Vs. Tosh Apartments Pvt Ltd (2012) 8 Supreme Court Cases 384.

4. On the other hand, defendant no.2 supported the impugned order. He submitted that earlier the plaintiff had instituted L.C.Suit No. 2267 of 2009 in the City Civil Court Bombay. Pending that suit, defendant no.2 took out Chamber Summons for his impleadment as a party defendant. In that, defendant no.2 contended that the plaintiff was carrying out illegal construction on the ground floor which is going to affect his rights and it may also endanger the building which may cause danger to the life and property of defendant no.2 and his family members who are living in the upper floor as tenants. By order dated 12.7.2010, the trial Court allowed the Chamber Summons.

Aggrieved by that decision, the plaintiff instituted Civil Revision Application No.518 of 2010 which was also dismissed on 29.9.2010. He further submitted that L.C.Suit No. 2267 of 2009 was instituted by the plaintiff. In that suit, defendant no.2 appeared and contested the suit by filing Written Statement. The learned trial Judge dismissed the suit on 20.4.2012. Aggrieved by that decision, the plaintiff preferred First Appeal in this Court wherein defendant no.2 was also impleaded as respondent no.3. Defendant no.3 filed affidavit in reply dated 29.8.2013 in Civil Application No. 2001 of 2012. The plaintiff, however, withdrew Appeal on 30.8.2012.

5. Apart from that, he submitted that defendant no.2 instituted Writ Petition (L) No.2047 of 2012 in this Court. Petition was disposed of on 28.8.2012 wherein it was observed that defendant no.2 claims to be a tenant in building called Shrikant Kunj at Kurla (West). This Court permitted defendant no.2 to file a fresh representation before the Assistant Municipal Commissioner, "L" Ward. Though it is not on record, defendant no.2 states that in pursuance of that order, he had made representation to the authority of the Corporation in September, 2012. He submitted that the learned trial Judge in the impugned order has recorded that the change of user is bound to affect directly or indirectly on the right of defendant no.2 pertaining to enjoyment of tenement. Though defendant no.2 is not a

necessary party but definitely he can be considered as a proper party as his presence would enable the Court to completely, effectively and properly adjudicate upon the matter. He, therefore, submitted that no case is made out for invocation of powers under section 227 of the Constitution of India.

6. I have considered the submissions advanced by the learned counsel for the petitioner and respondent no.2. I have also perused the material on record. As noted earlier, the plaintiff had instituted L.C. Suit No.2267 of 2009 in the City Civil Court challenging the notice issued by the Corporation under section 55 of the Maharashtra Regional and Town Planning Act, 1966 alleging that the plaintiff had made unauthorised construction in shop no.2 and 2A. During the pendency of the suit, defendant no.2 took out Chamber Summons for his impleadment as party defendant no.3. Defendant no.3 had made a complaint to the Corporation on the basis of which the Corporation had issued notice under section 55 of the Act. By order dated 12.7.2010, Chamber Summons was allowed by the trial Court. C.R.A. No.518 of 2010 was dismissed by this Court on 29.9.2010. In paragraph 3 of that order, it was observed by this Court thus :

“2. Plaintiff is son of one of the co-owners as well as tenant of the owners of the building. Plaintiff filed a suit against the Municipal corporation restraining it from taking any action of demolition without following the due process of law. Respondent no.3, who was not a defendant to the suit took out chamber summons for being impleaded as a party. According to him plaintiff was making construction on the

ground floor, which is going to affect his rights and also it may endanger the building, which may cause danger to the life and property of the respondent no.3 and his family members, who are living in the upper floor as tenants. Therefore, he wanted to intervene. The trial Court allowed the Chamber Summons."

7. It is also material to note that L.C.Suit No.2267 of 2009 was instituted by the plaintiff. In that suit, defendant no.2 appeared and contested suit by filing Written Statement. Defendant no.2 also examined himself at Exh.42 and also produced documents in the trial Court. The suit was dismissed. Aggrieved by that decision, the plaintiff preferred First Appeal in this Court and took out Civil Application for interim relief. Defendant no.2 filed affidavit in reply dated 29.8.2012 which was taken on record. The plaintiff, however, thereafter withdrew First appeal.

8. Mr. Cama submitted that earlier litigation is wholly irrelevant as present defendant no.2 is not now occupant of the building where the suit premises is situate. He relied upon the communication sent by Speed Post at the address of room no.11 where defendant no.2 claims to be residing. The speed post was sent to one Akar Khan who also received that letter on 17.2.2014. Mr. Cama further submitted that defendant no.2 is resident of Dombivli as is evident from letter dated 15.2.2005 addressed by him to the Assistant Assessor and Collector, Assessment Department, "L" Ward. Relying upon these circumstances, Mr Cama submitted that as on date defendant

no.2 is not residing in the suit premises. I do not find any merit in this submission. In the first place, in view of previous round of litigation referred herein above, the plaintiff ought to have brought on record positively as to who is occupying room no. 11 where defendant no.2 claims to be residing. Secondly, the plaintiff did not produce any material on record as regards who is occupying room no.11. Mere relying upon communication sent through speed post and letter dated 15.2.2005 will not lead to infer that defendant no.2 is not residing in room no.11. Thirdly, perusal of the order dated 28.8.2012 passed by the Division Bench of this Court in Writ Petition (L) No.2047 of 2012 shows that this Court, after hearing both sides, observed that defendant no.2 claims to be a tenant in the building called Shrikant Kunj where the suit premises is situate. This Court permitted defendant no.2 to make representation before the Assistant Municipal Commissioner. In pursuance thereof, defendant no.2 made representation in September, 2012. Notice was issued by the Corporation on 7.12.2012. Fourthly, the learned trial Judge in paragraph 7 of the impugned order observed that the Corporation has issued notice under section 351 alleging change of user. The change of user will definitely affect directly or indirectly on the rights of defendant no.2 pertaining to enjoyment of tenement. The learned trial Judge, therefore, held that presence of defendant no.2 would help to decide the suit

effectively and completely. In the case of of Vidur Impex and Traders Private Limited (supra) in paragraph 41.3 the Apex Court observed thus :

“41.3. “A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues though he may not be a person in favour of or against whom a decree is to be made.”

Order I, Rule 10(2) of C.P.C. lays down that the Court may at any 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.

9. In the case of Aliji Momonji & Co Vs. Lalji Mavji, (1996) 5 Supreme court Cases 379, the Apex Court also dealt with somewhat similar situation. In that case, the appellant-lessee had instituted suit for perpetual injunction against the Corporation from demolishing a portion of the building. The Corporation had issued notice under Section 351 of the Act for demolition of the building on the ground that the appellant had made unauthorised structures. Respondents no. 2 to 6 sought to come

on record under Order 1, Rule 10 contending that they have direct interest in the property. The learned trial Judge and the High Court allowed the Chamber Summons. It is against that order, the plaintiff approached the Apex Court. In paragraph 5 it was observed thus:

“5. The controversy is no longer *res Integra*. It is settled law by catena of decisions of this Court that where the presence of the respondent is necessary for complete and effectual adjudication of the dispute, though no relief is sought, he is a proper party. Necessary party is one without whose presence no effective and complete adjudication of the dispute could be made and no relief granted. The question is : whether the landlord is a necessary or proper party to the suit for perpetual injunction against the Municipal Corporation for demolition of demised building ? The landlord has a direct and substantial interest in the demised building before the demolition of which notice under Section was issued. In the event of its demolition, his rights would materially be affected. His right, title and interest in the property demised to the tenant or licences would be in jeopardy. It may be that the construction which is sought to be demolished by the Municipal Corporation was made with or without the consent of the landlord or the lessor. But the demolition would undoubtedly materially affect the right, title and interest in the property of the landlord. Under those circumstances, the landlord necessarily is a proper party, though the relief is sought for against the Municipal Corporation for perpetual injunction restraining the Municipal Corporation from demolition of the building”

It is no doubt true that in that case respondents no. 2 to 6 claim to be landlords. The Apex Court observed that landlord has a direct and substantial interest in the demised building before the demolition of which notice under section 351 was issued. In the present case also, the learned trial Judge has recorded a finding

that change of user will definitely affect directly or indirectly on the right of defendant no. 2 pertaining to enjoyment of tenement.

10. Applying the tests laid down by the Apex Court in the case of Vidur Impex and Traders Private Limited (supra), I find that the learned trial Judge has committed any error in passing the order. The learned trial Judge has recorded that presence of defendant no.2 is necessary to the proceedings for deciding the suit effectually and completely. In view thereof, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed.

(R.G.KETKAR, J.)