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IN THE HIGH COURT OF JUDICATURE AT MUMBAI  
CIVIL APPELLATE JURISDICTION  
**WRIT PETITION NO. 6866 OF 2015**

Mr. Hiren Ramesh Chheda

... Petitioner

Vs.

Bhavya Co-operative Housing Society Ltd and others ... Respondents

Mr.Vishwajeet S.Kapse i/b Mr.Yogesh B.,Pawaskar, Advocate for Petitioner.

Mr. Nikhil Wadikar i/b Mr.Nandu Pawar, Advocate for Respondent No.1.

Mr.Harish Pawar a/w Ms.Bhagyashree Belkar, Advocate for the respondent No.2.

Ms. Pallavi Thakar, Advocate for Respondent No.3.

**CORAM : R. G. KETKAR, J.**

**DATE : 13<sup>th</sup> AUGUST, 2015**

**P.C. :**

. Heard Mr.Vishwajeet S.Kapse, learned Counsel for the petitioner, Mr. Nikhil Wadikar, learned Counsel for respondent No.1, Mr.Harish Pawar, learned Counsel for respondent No.2 and Ms. Pallavi Thakar, learned Counsel for respondent No.3. Rule. Learned Counsel for respective respondents waive service. At the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to third party applicant has challenged the judgment and order dated 26/03/2015 passed by the

learned Judge, City Civil Court at Greater Mumbai in Chamber Summons No. 412 of 2015 in L.C. Suit No. 183 of 2008. By that order, the learned trial Judge dismissed the Chamber Summons taken out by third party applicant for condoning the delay in filing the Chamber Summons and for adding him as party to the Suit.

3. In support of this Petition, Mr.Kapse submitted that respondent No.1 hereinafter referred to as plaintiff has instituted Suit inter alia praying for directing respondent No.2, hereinafter referred to as defendant No.1, to specifically perform the agreements for sale of the flats entered into between them and the members of the plaintiffs and to execute deed of conveyance; restraining the defendant No.1 from taking up any construction activity on the suit property or in respect of Bhavya Apartment constructed thereon in any manner whosoever and restraining respondent No.3, hereinafter referred to as defendant No.2, from sanctioning any application or plans in respect thereof; directing defendant No.1 to restore the stilt portion on the ground floor of Bhavya Apartment to its original condition as per building plans sanctioned with I.O.D. No. EB/4599/FS/A dated 04/06/2002 issued by the defendant No.2; mandatory injunction directing defendant No.2 to demolish the walls erected in between the columns of the stilt and to make the stilt portion of Bhavya Apartment constructed on the suit property open and unenclosed, among other prayers.

4. Mr.Kapse submitted that the third party applicant took out Chamber Summons some time in October 2014 and also filed affidavit dated 28/10/2014 in support thereof. He submitted that third party applicant is a bonafide member of the plaintiff Society and is absolute owner of shop No. 7 on the ground floor of Bhavya Apartment. He has entered into tenancy agreement duly registered on 19/05/2004 in respect of said shop. The developer namely defendant No.1 allotted covered garage No. 11 (for short 'said garage') in Bhavya Apartment vide letter of allotment dated 21/08/2006. The said garage is sanctioned in the final plan approved by defendant No.2. He submitted that prayer clauses (c) & (d) in the Suit directly affect and jeopardize the rights of the third party applicant. He, therefore, submitted that the learned trial Judge ought to have allowed the Chamber Summons after condoning the delay and directed the plaintiff to implead as a party defendant in the Suit.

5. On the other hand, Mr.Wadikar supported the impugned order. He submitted that third party applicant has no direct or legal interest in the action. He relied upon the decision of the Apex Court in the case of *Ramesh Hirachand Kundanmal Vs. Municipal Corporation of Grater Bombay*, (1992) 2 Supreme Court Cases 524 to contend that the line has been drawn on a wider construction of rule between the direct interest or the legal interest and the

commercial interest. In the present case, third party applicant at the highest has commercial interest and therefore, in view of the decision of the Apex Court, he is neither a necessary nor a proper party. He further submitted that third party applicant has alleged that defendant No.1 has allotted the said garage vide letter of allotment dated 21/08/2006. The allotment letter is not a registered instrument. The third party applicant, therefore, has no right, title and interest in the said garage and therefore, he is neither a necessary or a proper party. The third party applicant has taken out Chamber Summons only with a view to delaying the proceedings of the Suit.

6. I have considered the rival submissions made by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the third party applicant claims that he is a bonafide member of plaintiff-Society and is absolute owner of shop No.7. He also claims that defendant No.1 has allotted the said garage vide letter of allotment dated 21/08/2006. Prayer Clauses (c) & (d) of the Suit read thus”

“(c) the defendant No.1 be directed to restore the stilt portion on the ground floor of the said building Bhavya Apartments to its original condition as per the building plans sanctioned with I.O.D No. EB/4599/FS/A dated 04/06/2002 issued by the defendant No.2.

(d) the defendant No.2 be directed to demolish the walls erected in between the columns of the stilt and to make the stilt portion of the building Bhavya

Apartment constructed on the suit property, open and unenclosed.”

7. Perusal of prayer clauses (c) & (d) clearly shows that plaintiff has prayed for direction against defendant No.1 to restore the stilt portion on the ground floor of the Bhavya Apartment to its original condition as per the building plans sanctioned with I.O.D. No. EB/4599/FS/A dated 04/06/2002 issued by defendant No.2. By prayer clause (d), plaintiff has sought mandatory injunction against defendant No.2 to demolish the walls erected in between the columns of the stilt and to make the stilt portion of the Bhavya Apartment constructed on the suit property open and unenclosed.

8. Perusal of prayer clauses (c) & (d) clearly shows that plaintiff has sought demolition of structure constructed in the stilt portion on the ground floor which is contrary to the building plans sanctioned on 04/06/2002. It appears that the said plans were revised in 2006 and the construction of covered garages were approved. The third party applicant has claimed interest in covered garage No. 11 on the basis of the letter of allotment dated 21/08/2006. Thus, the third party applicant has direct interest or legal interest in the subject matter of the Suit and outcome of the Suit is bound to affect him legally by curtailing his legal rights. In my opinion, the plaintiff on its own should have impleaded third party applicant as party defendant in the Suit as it has vital interest

in the subject matter of the Suit. Nonetheless, third party applicant has now moved Chamber Summons though belatedly in October 2014. In that event, instead of dismissing the Chamber Summons, the learned trial Judge ought to have allowed the Chamber Summons subject to imposing costs. The learned trial Judge, however, dismissed the Chamber Summons on the ground that evidence of plaintiff and defendant No.1 is closed and thereafter, the Chamber Summons is taken out. The learned trial Judge further observed that it was well within the knowledge of the third party applicant about pendency of the Suit and no sufficient reasons are given for filing the Chamber Summons belatedly. The learned trial Judge further observed that even assuming for a moment that the third party applicant has right and interest in respect of the said garage, he has separate and independent remedy and his grievance in respect of garage cannot be gone into in the present Suit. In my opinion, the learned trial Judge failed to appreciate that by allowing the Chamber Summons, multiplicity of the proceedings could be avoided as also the Chamber Summons should not be dismissed only on the ground of delay. When answer to the question whether the third party applicant has direct and legal interest in the subject matter of the Suit is in affirmative, then, it is absolutely necessary to implead third party applicant in the Suit. The learned trial Judge has not considered this aspect at all. Hence, the impugned order cannot

be sustained and is liable to be set aside. Writ Petition is disposed of in the following terms.

i) The impugned order dated 26/03/2015 is set aside and the Chamber Summons No. 412 of 2015 is allowed subject to payment of costs of Rs.10,000/- to the plaintiff within 2 weeks from today. Payment of costs is condition precedent.

ii) The third party applicant is at liberty either to pay costs to the plaintiff directly or deposit the same in the trial Court within 2 weeks from today under due intimation in writing to the plaintiff's advocate.

iii) The plaintiff shall carry out necessary and consequential amendment and also is at liberty to lead additional evidence, if it so desires.

iv) The third party applicant shall file written statement within 4 weeks from the service of amended plaint.

9. Mr.Kapse assures that third party applicant will extend the fullest co-operation for early disposal of the Suit.

10. All the contentions of the parties on merits are expressly kept open.

11. Rule is made absolute in the aforesaid terms. Order accordingly.

**(R. G. KETKAR, J.)**