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IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8500 OF 2014

Satkar Properties Pvt Ltd.

.. Petitioner

Vs.

Lalbaug Co-operative Housing Society
Limited and others

.. Respondents

Mr.G.S.Godbole Senior Advocate for the Petitioner.

CORAM : R. G. KETKAR, J.

DATE : 30st JULY, 2015

P.C. :

Heard Mr. G.S.Godbole, learned Senior Counsel for the petitioner at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 13/02/2014 passed by the learned 3rd Additional Civil Judge, Senior Division, Small Causes Court, Pune below Exhibit 68 in Regular Civil Suit No. 7 of 2003. By that order, the learned trial Judge allowed the application filed by respondent No.1, hereinafter referred to as third party, for their impleadment in the Suit as defendant No. 7 under Order 1 Rule 10 of C.P.C.

3. In support of this Petition, Mr.Godbole strenuously contended that petitioner, hereinafter referred to as plaintiff, is the

owner of land situate admeasuring 8349 sq.meters situate at survey No. 559A, Hissa No. 2B/1/1/1, survey No. 559A, Hissa No. 2B/1/1/2 and survey No. 559A, Hissa No. 2B/1/1/3 of Pune City, Munjeri and bearing C.T.S, No. 2509B, Munjeri and in particular, a sub-stream flowing/going East-West situate on the North side of the boundary. The said sub-stream is a part and parcel of the suit property. He submitted that the third party is not adjacent land owner of either of the properties described in paragraph 1A and/or 1B of the plaint. The plaintiff has instituted Suit against respondents No. 2 to 7 herein inter alia for declaration that action of respondents No. 2 to 7 of excavating the sub-stream and laying the drainage line in the suit property described in paragraph 1(B) is illegal; for perpetual injunction restraining the respondents No. 2 to 7 herein from excavating the sub-stream and laying the drainage line in the said sub-stream described in paragraph 1(B) of the plaint; for mandatory injunction directing the respondents No. 2 to 7 to grant permission to the plaintiff to lay the drainage pipeline as also cover the drainage line and sub-stream for beautification at their costs in the suit property described in 1(B) of the plaint.

4. During the pendency of the Suit, plaintiff took out application Exhibit 5 for injunction. By order dated 30/01/2003, the learned trial Judge issued injunction restraining respondents No. 2 to 7 from entering into the suit property and excavating sub-stream and

lying the drainage line in the suit sub-stream as described in paragraph 1(B) of the plaint till the decision of the Suit. Respondents No. 2 to 7 did not challenge that order. The order of injunction is in force since 2003. On 26/09/2003, the learned trial Judge framed issues at Exhibit 24. The third party has filed application on 05/12/2013 under Order 1 Rule 10 of C.P.C. for impleading them as defendant No. 7 in the Suit. He submitted that third party is neither a necessary party nor a proper party. In fact, the learned trial Judge while allowing the application also did not record any finding in that regard. The third party is totally stranger in the case and therefore, the learned trial Judge should not have allowed the application under Order 1 Rule 10 of C.P.C.

5. In support of this proposition, he relied upon the decision of the Apex Court in the case of *Kasturi Vs. Iyyamperumal*, (2005) 6 Supreme Court Cases 733 and in particular, paragraph 20 thereof. In paragraph 20, the Apex Court has laid down two tests by which a person who is seeking addition in a pending Suit for specific performance of contract for sale must be satisfied. Firstly, there must be a right to same relief against a party relating to same subject matter involved in the proceedings for specific performance of contract for sale and secondly, it would not be possible for the Court to pass effective decree or order in the absence of such a party. In other words, the Apex Court has laid down tests for finding out

whether a person seeking addition in the Suit is either would be a necessary or a proper party. Applying these tests, the presence of the third party is not necessary for deciding the controversy between the parties. Mr.Gobodle also relied upon the decision of the Apex Court in the case of *Amit Kumar Shaw Vs. Farida Khatoon* (2005) 11 Supreme Court Cases 403.

6. I have considered the submissions advanced by Mr.Godbole. I have las perused the material on record. As noted earlier, the plaintiff has instituted Suit for various reliefs indicated earlier. During the pendency of the Suit, learned trial Judge had also issued injunction on 30/01/2003. The third party has filed application at Exhibit 68 on 05/12/2013. In paragraph 4, third party applicant asserted that sub-stream is running throughout the monsoon as all the rain water of the market yard area accumulates and flows through the said sub-stream to main nala which is alleged as natural sub-stream by the plaintiff. In paragraph 6, third party applicant contended that plaintiff has constructed the compound wall in the nala itself due to which the width of nala is substantially reduced at the back side of Talera Garden portion only. In paragraph 8, it is contended that third party applicant is in existence from the year 1985 adjacent to the nala and the drainage water of applicant Society is let out in the nala through drainage line. It is not the personal property of the plaintiff. In other words, the third party

applicant has disputed the claim of the plaintiff that it is owner of the sub-stream and that it is part of 1B. It is further contended that defendant No.1-Corporation has every right to maintain the nala by cementing, channeling and construct retaining wall and put the barbed fence wire on the wall at certain height so that no one can dump the waste or use it for toilet or latrine. In paragraph 10, it is asserted that as the defendant No.1-Corporation did not construct the retention wall, barbed fencing, cementing and proper channeling of nala and the fruit merchants who are sitting and carrying on business in the neighbouring land of Talera Garden is also open to nala and their daily waste, flower waste, garbage is dumped into the nala. Due to this, nala is choked. It creates bad smell, gives rise to spreading of mosquitoes. Lot of cases of Malaria, Dengue, Chikungunya are reported in the third party applicant Society. In paragraph 13, it is asserted that order passed in the present Suit is directly affecting the substantial interest and legal rights of the third party applicant.

7. By the impugned order, the learned trial Judge has held that issue involved in the present Suit is related to the sub-stream and laying drainage line. The drainage water of the third party applicant is let out in the nala. The third party applicant is being directly affected by order passed in the Suit. The third party applicants are the persons who will be affected by the order passed

in the matter, and therefore, they are interested in the matter. The learned trial Judge has observed that it will be better to decide the matter in their presence in order to avoid any prejudice that may be caused to them due to their absence in the matter. The learned trial Judge has held that presence of third party applicant is necessary to effectually and completely adjudicate upon and settle the controversy raised in the Suit.

8. In the case of *Kasturi Vs. Iyyamperumal* (*supra*), the Apex Court was considering the question of jurisdiction of the Court under Order 1 Rule 10 of C.P.C. to add a party but is not made party in the Suit instituted by plaintiff unless the party proposed to be added has direct and legal interest in the controversy involved in the Suit. A person is legally interested in the answers to the controversy only if he can satisfy the Court that it may lead to a result that may affect him legally. In my opinion, in view of assertions made by the third party in application Exhibit 68 as also findings recorded by the learned trial Judge, it cannot be said that third party is not a proper party.

9. In the case of **Amit Kumar Shaw** (*supra*) in paragraph 9, the Apex Court has held thus:

“The object of Order 1 Rule 10 is to discourage contests on technical pleas, and to save honest and bona fide claimants from being non-suited. The power to strike out or add parties can be exercised by the Court at any stage of the proceedings. Under this Rule, a person may be added as a party to a suit in the following two cases: (1) When he

ought to have been joined as plaintiff or defendant, and is not joined so, or (2) When, without his presence, the questions in the suit cannot be completely decided.”

10. Perusal of above extracted portion shows that under Order 1 Rule 10 of C.P.C., a person may be added as a party to a Suit when without his presence, the question in the suit cannot be completely decided. By applying the tests laid down by the Apex Court in the cases of **Kasturi** (*supra*) & **Amit Kumar Shaw** (*supra*), I do not find that the learned trial Judge has committed any error in passing the impugned order. The third party applicant has disputed the claim of plaintiff that sub-stream is in their property. In view thereof, no case is made out for invoking powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed. It is, however, expressly made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in the impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by Section 105(1) of C.P.C.

(R. G. KETKAR, J.)