

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.8668 OF 2012

Bhimji Shivji Bhanushali ... Petitioner
Vs.
Municipal Corporation of Greater Bombay and another ... Respondents

Mr. Rajesh Kachare with Mr. S. M. Suryawanshi for Petitioner.
Ms Geeta Joglekar for Respondent No.1-BMC.
Ms Nilam S. Pawar for Respondent No.2.

CORAM : R. G. KETKAR, J.
DATE : NOVEMBER 26, 2015

P.C. :

Heard Mr. Kachare, learned Counsel for petitioner, Ms Joglekar, learned Counsel for respondent No.1 and Ms Pawar, learned Counsel for respondent No.2 at length.

2. By this Petition under Article 227 of the Constitution of India, original plaintiff has challenged the judgment and order dated 03.08.2012 passed by the learned Judge, City Civil Court, Dindoshi, Goregaon, Mumbai in Chamber Summons No.409 of 2012 in L.C.Suit No.953 of 2012. By that order, the learned trial Judge allowed the Chamber Summons taken out by the respondent No.2 herein – applicant therein under Order I, Rule 10 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for adding it as party defendant.

3. Mr. Kachare submitted that petitioner is owner of a shop premises admeasuring about 30” x 50” ft bearing Census No.PXC 7-1/1 situate at near Joseph Compound, Joseph Patel Road bearing CTS No.3328 and 3325, Malad (West), Mumbai 400 095. Respondent No.1 - Municipal Corporation of Greater Mumbai, hereinafter referred to as Corporation,

issued notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short 'Act') alleging that the petitioner-plaintiff has carried out unauthorized construction. In pursuance of that notice, order was passed on 25.04.2012. Aggrieved by that notice, plaintiff has instituted Suit against the Corporation challenging notice issued under Section 351 as also the order dated 25.04.2012 and sought perpetual injunction restraining the Corporation from demolishing the alleged offending structure. He submitted that respondent No.2 took out Chamber Summons on the ground that owners have granted development rights in respect of Survey No.120, Hissa No.1 corresponding to City Survey No.3325 admeasuring 2219.40 sq.mtrs. He submitted that respondent No.2 has commercial interest. In other words, respondent No.2 has no direct and substantial interest and is interested only in development in pursuance of the development rights given by the development agreement dated 22.12.2007. He submitted that respondent No.2 has no interest in the structure of the plaintiff in respect of which Section 351 notice is issued by the Corporation. It is for the plaintiff and Corporation to prove the respective contentions, namely, plaintiff claims that it is authorized construction and Corporation contends otherwise. In short, he submitted that the developer who has only commercial interest in respect of City Survey No.3325 is neither a necessary nor a proper party. In support of this submission, he relied upon the following decisions:

- a. ***Ramesh Kundanmal Vs. Municipal Corporation of Greater Bombay, (1992) 2 SCC 524***, and in particular paragraph 14 thereof; and
- b. ***New Redbank Tea Co. Pvt. Ltd. Vs. Kumkum Mittal, (1994) 1 SCC 402***, and in particular paragraphs 11 and 12 thereof.

4. On the other hand, Ms Pawar supported the impugned order. She submitted that respondent No.2 is given development rights to develop

City Survey No.3325 admeasuring 2219.40 sq.mtrs. While allowing the Chamber Summons, the learned trial Judge has recorded a finding that respondent No.2 has got right, title and interest in the plot of land bearing City Survey No.3325 beneath the suit structure to develop the same. If any unauthorized structure is erected on the said plot or if any order is passed in respect of the suit structure then it will directly affect the rights of the applicant. She relied upon the decision of the Apex Court in the case of *M/s. Aliji Monoji & Co. Vs. Lalji Mavji*, AIR 1997 SC 64 wherein the Apex Court has considered its earlier decision in *Ramesh Kundanmal (supra)*. She, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

5. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. The question is whether respondent No.2 has any commercial interest or has a direct and substantial interest in City Survey No.3325. If it is held that respondent No.2 has merely commercial interest then in that event, respondent No.2 cannot be termed as either a necessary or a proper party. If however, it is held that respondent No.2 has direct and substantial interest in City Survey No.3325, and even if no relief is claimed against it, it would be a proper party.

6. In the present case, it is evident that in respect of City Survey No.3325, respondent No.2 has been given development rights. Mr. Kachare invited my attention to clause 6 of the said development agreement and submitted that respondent No.2 has merely a commercial interest and no direct and substantial interest in City Survey No.3325. In paragraph 12 of the impugned order, the learned trial Judge has observed that respondent No.2 being a developer has got right, title and

interest in City Survey No.3325 beneath the suit structure to develop the same. If any unauthorized structure is erected on the said plot or if any order is passed in respect of the suit structure then it will directly affect the rights of the respondent No.2. In the case of **M/s. Aliji Monoji & Co.** (*supra*), the Apex Court has considered the decision in the case of **Ramesh Kundanmal** (*supra*). In that case, the question that fell for consideration was whether the landlords are necessary or proper party where the appellant who had made construction of the building is sought to be demolished by the Corporation. In paragraph 5, the Apex Court observed that the landlord has a direct and substantial interest in the demised building before the demolition of which notice under Section 351 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 licensee would be in jeopardy.

7. Mr. Kachare submitted that respondent No.2 is not the owner of City Survey No.3325 and he has merely a right to develop the said property, and therefore, has commercial interest as against the requirement. In paragraph 6 of that report, the Apex Court has held that in the event of building being demolished, right, title and interest of the landlord would directly be affected and the landlord would be a proper party, though no relief has been sought for against the landlord. In the present case, the learned trial Judge has categorically recorded a finding in paragraph 12 that the rights of the respondent No.2 to develop the property in question would be directly affected if any adverse order is passed. In view thereof, I do not find that the learned trial Judge has committed any error in passing the impugned order. 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) C.P.C.

(R. G. KETKAR, J.)

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