

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1559 OF 2016

Bhavyanidhi Enterprises Private Limited ... Petitioner
Vs.
Municipal Corporation of Greater Mumbai and others ... Respondents

WITH
WRIT PETITION NO.1560 OF 2016

Zamkudi Garments Private Limited ... Petitioner
Vs.
Municipal Corporation of Greater Mumbai and others ... Respondents

Mr. Sandesh Patil i/b. Mr. Yatin N. Shah for Petitioners in both the Petitions.
Mr. Vinod Mahadik for Respondent No.1-BMC in both the Petitions.
Mr. Jitendrakumar G. Damani for Respondents No.2 to 7 in both the Petitions.

CORAM : R. G. KETKAR, J.
DATE : FEBRUARY 09, 2016

P.C. :

Heard Mr. Patil, learned Counsel for petitioners, Mr. Mahadik, learned Counsel for respondent No.1-BMC and Mr. Damani, learned Counsel for respondents No.2 to 7 in both the Petitions at length.

2. By these Petitions, under Article 227 of the Constitution of India, petitioners have challenged the judgments and orders dated 18.01.2016 passed by the learned Judge presiding over Court Room No.8 of the Bombay City Civil Court at Bombay, Borivali Division, Dindoshi (Branch) in Chamber Summons filed in two Suits. By the impugned orders, the learned trial Judge allowed the Chamber Summons taken out by the respondents No.2 to 7 under Order 1, Rule 10(2) of the Code of Civil Procedure, 1908 (for short 'C.P.C.') for impleading them as defendants in the Suits.

3. Mr. Patil submitted that petitioners in both the petitions,

hereinafter referred to as plaintiffs, have instituted Suits in the trial Court challenging the notice issued by the respondent No.1, hereinafter referred to as Corporation, under Section 53 of the Maharashtra Regional and Town Planning Act, 1966 (for short 'M.R.&T.P. Act'). Respondents No.2 to 7 took out Chamber Summons for impleading them as party defendants. He submitted that respondents No.2 to 7 had sold the property bearing CTS No.737/B, 737B/1 to 9 of Village Borivali and corresponding to Original Plot No.36 and Final Plot No.45 of T.P.S.No.III, Borivali admeasuring 1260.08 sq.mtrs. (for short 'said land') to M/s. Amazon Developers (for short 'Developers') on 20.01.1995. Developers carried out construction on the said land and sold the flats. The purchasers in turn, formed the Society, which was registered on 05.01.2009. The Society initiated proceedings under Maharashtra Ownership of Flats (Regulation of the promotion of construction, sale, management and transfer) Act, 1963 (for short 'MOFA') and obtained deemed conveyance on 03.01.2013. On 15.12.2014, Corporation issued notice under Section 53 of the M.R.&T.P. Act.

4. Mr. Patil has taken me through the document styled as 'agreement for sale' dated 20.01.1995 executed by and between Goswami Govindraiji Vallabhlalji and Developers and in particular clauses 5, 16, 17, 29 and 34 thereof to contend that though the document is styled as 'agreement for sale', in effect and substance, it is a conveyance / sale deed in favour of the Developers. He also relied upon Section 11 of the MOFA.

5. Mr. Patil submitted that respondents No.2 to 7 are neither landlords nor owners as they have sold the said land to the Developers. They are neither necessary nor proper party. He also relied upon the

following decisions:

a. ***Ramesh H. Kundanmal Vs. Municipal Corporation of Greater Bombay***, (1992) 2 SCC 524, and in particular paragraph 14 thereof;

b. ***Aliji Momonji & Co. Vs. Lalji Mavji***, (1996) 5 SCC 379, and in particular paragraph 5 thereof;

c. Decision of this Court (Coram: Ravi K. Deshpande, J.) **dated 17.07.2013 in Writ Petition No.6122 of 2013** (Uttam R. Gite Vs. Municipal Corporation of Greater Mumbai and another).

6. Mr. Patil submitted that notice under Section 53 of the M.R.&T.P. Act is issued by the Corporation. It is for the Corporation to find out as to whether the construction carried out by the plaintiffs is legal, valid and authorized. It is for the Corporation to justify issuance of notice under Section 53 of the M.R.&T.P. Act. He submitted that in the case of **Uttam R. Gite** (*supra*), respondent No.2 Co-operative Society took out Chamber Summons for impleadment and by the order impugned in this Court, it was impleaded as party defendant. Relying upon this judgment, Mr. Patil submitted that society formed by the members is the owner by virtue of deemed conveyance granted on 03.01.2013. Respondents No.2 to 7, on the other hand, claim to be the owners. This Court has held that plaintiff is the dominus lites and it is for him to decide as to which relief has to be sought in the plaint and who should be joined as defendant in the Suit. On one hand, Society claimed that plaintiff is not the owner of the suit property and it is the society which is the owner of the suit property. The controversy involved in the Suit cannot be enlarged so as to decide inter se dispute between the plaintiff and the respondent No.2 Society. He submitted that even in the present case, on the basis of the deemed conveyance, Society has become owner. As against this, respondents No. 2 to 7 are also claiming

ownership. As the subject matter of the Suit is the challenge to the notice under Section 53 of the M.R.&T.P. Act, this judgment squarely applies.

7. Mr. Patil further submitted that in fact, Developers had taken out Chamber Summons for its impleadment, which was rejected by the trial Court. The said order was also not challenged by the Developers. For all these reasons, he submitted that the impugned order deserves to be set aside.

8. On the other hand, Mr. Damani supported the impugned orders. He submitted that against the order dated 03.01.2013 passed by the Competent Authority-cum-District Deputy Registrar, Co-operative Societies (3), Mumbai, respondents No.2 to 7 have instituted Writ Petition in this Court and the same is pending admission. The contention raised by the plaintiffs that respondents No.2 to 7 have sold the said land to the Developers on 20.01.1995 is wholly misconceived. He submitted that on 20.01.1995, respondents No.2 to 7 agreed to sell the said land to the Developers. He invited my attention to clause 18 wherein it was agreed by and between Goswami Govindraji Vallabh Lalji and Developers that owner shall sign, execute conveyance in respect of the said land agreed to be sold in favour of the purchasers or their nominee/s. In short, he submitted that till date, no conveyance in respect of the said land is executed by respondents No.2 to 7 in favour of the Developers and consequently, it cannot be said that the respondents No.2 to 7 are divested of their title. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

9. I have considered the rival submissions advanced by the learned

Counsel appearing for the parties. I have also perused the material on record. Mr. Patil submitted that on 20.01.1995, Goswami Govindrajji Vallabhhlalji had executed conveyance in favour of the Developers. It is not possible to accept this submission. In the first place, perusal of this document clearly shows that it is an agreement for sale. Secondly, clause 18 of the said agreement shows that the parties therein agreed that owner will execute conveyance in respect of the said land in favour of the purchasers or their nominee/s. Mr. Patil could not point out that in pursuance of clause 18, in fact, conveyance was executed by Goswami Govindrajji Vallabhhlalji in favour of the Developers. Mr. Patil submitted that in the Suit, Developers took out Chamber Summons, which was rejected by the trial Court and the said order is not challenged by the Developers.

10. As noted earlier, respondents No.2 to 7 have not executed conveyance in favour of Developers. It, therefore, prima facie, at this stage, cannot be said that respondents No.2 to 7 are divested of their title in respect of the said land. Merely because the Chamber Summons taken out by the Developers is rejected, that does not mean that respondents No.2 to 7 being owners of the said land cannot be impleaded in the Suit. In the case of **Sumtibai Vs. Paras Finance Company, (2007) 10 SCC 82**, in paragraph 9, the Apex Court considered its earlier decision in *Kasturi Vs. Iyyamperumal, (2005) 6 SCC 733*. Paragraph 9 thereof reads thus,

“9. Learned counsel for the respondent relied on a three-Judge Bench decision of this Court in *Kasturi vs. Iyyamperumal* and others - (2005) 6 SCC 733. He has submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. **In our opinion, the aforesaid decision is clearly distinguishable. In our opinion, the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in**

dispute. Obviously, a busybody or interloper with no semblance of title cannot be impleaded in such a suit. That would unnecessarily protract or obstruct the proceedings in the suit. However, the aforesaid decision will have no application where a third party shows some semblance of title or interest in the property in dispute. In the present case, the registered sale deed dated 12.8.1960 by which the property was purchased shows that the shop in dispute was sold in favour of not only Kapoor Chand, but also his sons. Thus prima facie it appears that the purchaser of the property in dispute was not only Kapoor Chand but also his sons. Hence, it cannot be said that the sons of Kapoor Chand have no semblance of title and are mere busybodies or interlopers.

(emphasis supplied)”

11. In the present case, it cannot be said that respondents No.2 to 7 have any semblance of title in the said land.

12. Mr. Patil relied upon the decision in the case of **Ramesh H. Kundanmal** (*supra*), and in particular paragraph 14 thereof. The said decision was subsequently considered in the case of **Aliji Momonji & Co.** (*supra*). 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 disputes, 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 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 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 off 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. Under those circumstances, the question of the commercial interest would not arise. In Ramesh Hirachand Kundanmal's case [supra], this Court had pointed out in para 18 of the judgment that the notice did not relate to the structure but to two chattels. Original lessee from the landlord had no direct interest in that property. Under these circumstances, it was held that the second respondent has no direct interest in the subject matter of the litigation and the addition thereof 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 was required to be adjudicated and settled, It is true, as pointed out by Shri Nariman that in para 14, this Court in that case had pointed out that what makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance. The only reason which makes it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. **The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest.** It is not necessary for the purpose of this case to go into the wider question whether witness can be a proper and necessary party when the witness has a commercial interest. This Court in New Redbank Tea Co. Pvt. Ltd. vs. Kumkum Mittal & Ors. [(1994) 1 SCC 402] has pointed out that respondent 11 who filed a suit for specific performance in the High Court was sought to come on record in the suit in which he had no direct interest in the pending matter. Under those circumstances, this Court had held that respondent was neither necessary nor proper party in the lease-hold interest involved in the suit. In Union of India & Anr. vs. District Judge, Udhampur & Ors. [(1994) 4 SCC 737] the Union of India who ultimately had to bear the burden of payment of the compensation was held to be a necessary party under

Order 1 Rule 10, CPC for determination of the compensation in respect of the acquired land. In *Bihar State Electricity Board vs. State of Bihar & Ors.* [(199) 4 Supp. 3 SCC 743] the same question was also reiterated and it was held that the Electricity Board was a person interested and also a necessary party. In *Anil Kr. Singh vs. Shivnath Mishra* [(1995) 3 SCC 147] similar question was answered holding that the respondent was a necessary party.

(emphasis supplied)”

13. Mr. Patil relied upon decision of this Court in the case of **Uttam R. Gite** (*supra*). In that case, there was inter se dispute between plaintiffs and respondent No.2 about ownership. In the present case, I have, prima facie, already held that respondents No.2 to 7 have semblance of interest in the said land. They are not prima facie divested of the title. Though order of deemed conveyance is passed on 03.01.2013, the Petition instituted by respondents No.2 to 7 is pending in this Court.

14. In the impugned order, the learned trial Judge has recorded a finding in paragraph 7 that respondents No.2 to 7 herein are prima facie shown to be the owners of the land on which building was to be constructed. The trial Court also considered that name of respondents No.2 to 4 are recorded in the property card of the land on which building was constructed. The learned trial Judge, therefore, held that they have direct interest in the said land on which alleged authorized structure has been constructed and in respect of which notice under Section 53 of the M.R.&T.P. Act was issued. It was further recorded that notice under Section 53 of the M.R.&T.P. Act was also issued to Vallabh Goswami.

15. In view thereof and for the reasons recorded in paragraph 7 of the impugned order, I do not find that the learned trial Judge has committed any error in allowing the Chamber Summons. Hence, Petitions fail and

the same are 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.

16. At this stage, Mr. Patil orally applies for stay of this order for a period of 4 weeks from today. He assures that petitioners will not seek further extension of time. Assurance given by Mr. Patil is recorded. He submitted that by order dated 18.01.2016, the learned trial Judge stayed order passed on Chamber Summons for a period of 3 weeks. He, therefore, prays for continuation of the said order for the period of 4 weeks from today. Mr. Damani opposes the extension.

17. As the petitioners intend to challenge this order in the higher Court as also the trial Court has stayed its own order, I find that the request made by Mr. Patil is reasonable. Hence, notwithstanding dismissal of this Petition, this order is stayed for a period of 4 weeks from today with specific understanding that request for further extension shall not be entertained.

(R. G. KETKAR, J.)

Minal Parab