

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 4086 OF 2016

Mr. Jayantha Sanjeeva Shetty

...Petitioner

Versus

Municipal Corporation Of Greater Mumbai
And Anr.

...Respondents

....

Mr.Chetan C. Agrawal, Advocate for the Petitioner.

Mr. Vinod Mahadik, Advocate for Respondent-BMC.

....

CORAM : R. G. KETKAR, J.

DATE : 28th April, 2016

P.C.

1. Heard Mr. Chetan Agrawal, learned Counsel for the petitioner and Mr. Vinod Mahadik, learned Counsel for the respondent-Corporation, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioner has challenged the judgment and order dated 15.1.2016 passed by learned Judge, presiding over Court room No.8 of Bombay City Civil Court at Greater Mumbai in Chamber Summons No.1391/2015 in Long Cause Suit No.1030/2015. By that order, learned trial Judge allowed the Chamber Summons filed by respondent No.2, hereinafter

referred to as 'applicant', and directed the petitioner, hereinafter referred to as 'plaintiff', to implead the applicant as defendant No.2 in the Suit.

3. The plaintiff has instituted the suit challenging notice dated 13.4.2015 issued by respondent No.1, hereinafter referred to as 'defendant', under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short, 'Act') and for perpetual injunction restraining the defendant from taking any action of demolition pursuant to that notice. During pendency of that suit, the applicant took out Chamber Summons for impleading him as a party defendant No.2. In support of that Chamber Summons, the applicant filed affidavit *inter alia* contending that the applicant is carrying on business under the name and style of Surrendra Pan Bidi Shop and the plaintiff is carrying on business in the adjoining premises. The plaintiff has carried out renovation and alteration work in his premises including top (upper floor) of his shop. He has made complaint to the Corporation. He has also made complaint before the Senior Police Officer attached to Pant Nagar Police Station, Ghatkopar as also Commissioner of Police.

4. The plaintiff resisted the Chamber Summons by filing reply, in or about September, 2015. By the impugned order, learned trial Judge has allowed the Chamber Summons. It is against this order, the plaintiff has preferred this Petition.

5. In support of this petition, Mr Agrawal submitted that the applicant is neither a necessary nor a proper party. Merely because he has made complaint to the Corporation, that does not make him either a necessary or a proper party. He submitted that the applicant herein is *dominus litis* and it is for him to decide to whom to be impleaded as defendant. It is for the plaintiff to decide as to which relief is to be sought. In support of this proposition, he relied upon the decision of this Court (Coram: Ravi K. Deshpande,J.) dated 17.7.2013 passed in **Writ Petition No.6122/2013 [Shri Uttam R. Gite vs. Municipal Corporation of Greater Mumbai and Anr.]** He also relied upon the decision of Apex Court in the case of **Ramesh Hirachand Kundanmal vs. Municipal Corporation of Greater Bombay and others, (1992) 2 SCC 524.**

6. I have considered the submissions advanced by

learned Counsel appearing for the petitioner. I have also perused the material on record.

7. While allowing the Chamber Summons, the learned trial Judge has noted that the plaintiff has carried out some renovation and alteration work in his restaurant and in that process, he had also made some construction on upper floor of pan-bidi shop of the applicant. He has forcibly made said construction on upper floor of shop of the applicant and affixed long hoarding board and water tank. The applicant made complaint to the defendant about illegal construction and on that basis officers of the defendant inspected the premises of the plaintiff and issued notice under Section 351 of the Act. The applicant has produced photographs which show that the plaintiff has made construction on upper portion of pan-bidi shop of the applicant. Learned trial Judge ultimately held in paragraph-6 that the ultimate result of the present suit will also affect some legal rights of the applicant regarding unauthorized construction on upper portion of his pan-bidi shop. Learned trial Judge came to the conclusion that the applicant is a proper party in the suit.

8. Mr. Agrawal relied upon the decision of this Court in the case of **Uttam R. Gite** (supra). In that case, learned Single Judge of this Court noted in paragraph-5 that respondent No.2 Nahur Udyog Premises Co-operative Society (for short, society) claimed ownership over the land belonging to it. Learned Single Judge observed that even if the trial Court decrees the suit in favour of the plaintiff holding that the construction is legal, authorized and in accordance with the sanctioned plan, still that does not prevent the society from claiming title over the suit property and asking for removal of encroachment, if any, by taking recourse to the appropriate provisions of law and forum. The society further contended that the plaintiff is not the owner of the suit property, but it is the society which is the owner of the suit property. It was held that the controversy involved in the suit cannot be enlarged to decide the interse dispute between the plaintiff and the society. It is in that context, the learned Single Judge observed that the plaintiff is the *dominus litis* and it is for him to decide as to who should be joined as defendant in the suit. Merely because the society has made complaint to the Corporation and the Corporation has issued the notice, that does not make the society as a necessary or

even proper party in the suit.

9. In my opinion, said decision is not applicable in the facts of the present case. In the present case, the applicant has not raised the issue of ownership. Perusal of the impugned order and in particular paragraph-5 thereof, *prima facie* shows that the photographs produced by the applicant clearly reveal that some construction is made on upper floor of pan-bidi shop of the applicant. In paragraph-6, learned trial Judge also observed that the ultimate result of the suit will affect some legal rights of the applicant.

10. As far as the decision in the case of **Ramesh Hirachand Kundanmal (supra)**, is concerned, in paragraph-14 the Apex Court observed thus:

“14. It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objectives. The person to be joined must be one whose presence is necessary as a party. 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 so 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, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e. , he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant a person whose only object is to prosecute his own cause of action. Similar provision was considered in *Amon v. Raphael Tuck & Sons Ltd.* (1956) 1 ALL ER 273, wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Mieg et Compagnie S.A. v. Bank of England*, (1950) 2 ALL ER 605 that their true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin, J. has stated:

The test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights.'"

11. Perusal of the paragraph-14, extracted hereinabove, shows that the Apex Court has made distinction between the commercial interest and the legal interest. It is further observed

that it is necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally.

12. In paragraph-6 of the impugned order, learned trial Judge has recorded a categorical finding that offending structure is affecting the legal rights of the applicant. In view thereof, I do not find that any case is made out for interfering with the impugned order. Hence, the Petition fails and the same is dismissed.

13. It is made clear that where a decree is challenged by the petitioner, any error, defect or irregularity in impugned order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of the proposed proceedings as contended by section 105(1) of Civil Procedure Code.

(R. G. KETKAR, J.)