

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 11707 OF 2014

Mohamed Hussain Gulam Ali Shariffi ...Petitioner

Versus

Municipal Corporation Of Greater Bombay
And Ors. ...Respondents

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Mr.Vineet Naik, Senior Advocate a/w. Farhan Dubash, Siddanth Samantaray, P.N. Mehta, for the petitioner.

Ms.Firdaus Moosa a/w. Prakash Mahadik, Advocate for Respondents No.2 & 3.

Mr.Vinod Mahadik, Advocate for respondent-BMC.

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CORAM : R. G. KETKAR, J.

DATE : 16th NOVEMBER, 2016

P.C.

1. Heard Mr.Vineet Naik, learned Senior Counsel for the petitioner, Mr.Vinod Mahadik, learned Counsel for respondent No.1 and Ms.Firdaus Moosa, learned Counsel for respondents No.2 and 3, at length.

2. By this petition under Article 227 of the Constitution of India, the petitioner hereinafter referred to as the 'plaintiff', has challenged the judgment and order dated 16.10.2014 passed by the learned Judge of the City Civil Court, Greater Mumbai in Chamber Summons No.1353/2014. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondents

No.2 and 3, hereinafter referred to as the 'applicants' for joining them as defendants in the suit.

3. The plaintiff has instituted suit against respondent No.1, hereinafter referred to as 'defendant' *inter alia* challenging the notice dated 17.5.2013 issued by the defendant under Section 351 of the Mumbai Municipal Corporation Act, 1888 (for short, 'Act'). In the notice, it is stated that the plaintiff has carried out unauthorized work of covering common open space by constructing B.M. & ladi-coba-ladi roofing of size approx 44.5 ft. X 56.00 ft. and height 10.0 ft.. The plaintiff gave reply dated 25.5.2013. The plaintiff thereafter instituted Writ Petition No.269/2014 in this Court against the State of Maharashtra and the defendant. That Petition was allowed to be withdrawn with liberty to institute suit challenging the notice issued under Section 351 of the Act.

4. In pursuance thereof the plaintiff instituted suit challenging the notice issued under Section 351 of the Act as also letter dated 20.6.2013. The plaintiff also prayed for injunction restraining the defendant from acting upon the notice dated 17.5.2013 and letter dated 20.6.2013. During pendency of the suit, the applicants took out Chamber Summons for impleading them as the defendants. The plaintiff resisted the Chamber Summons. After hearing both sides, by the impugned order the learned trial Judge

has allowed the Chamber Summons. It is against this order, the plaintiff has instituted the present Petition.

5. In support of this Petition, Mr.Naik strenuously contended that the applicants have no right, title and interest in the subject matter of the suit. The applicants have instituted Suit No.424/2008 on the Original Side of this Court for specific performance of the agreement dated 18.5.2007. He has taken me through the orders passed in that Suit. He has also relied upon the decision of Apex Court in the case of **Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Ors., (1992) 2 SCC 524** and in particular paragraphs-9, 10, 13,14, 15 and 18 thereof. He submitted that the applicants are neither a necessary nor a proper party. He submitted that the applicants have presently no interest in the subject matter of the litigation, namely, the suit instituted by the plaintiff. The applicants will not be affected by the outcome of the suit instituted by the plaintiff. Their presence is also not necessary for effectively and completely adjudicating upon and settling the questions raised in the suit instituted by the plaintiff. In short, he submitted that the presence of the applicants is not necessary for deciding the validity of the notice issued by the defendant under Section 351 of the Act. He, therefore, submitted that the Petition requires consideration.

6. Mr. Naik invited my attention to the order dated 26.10.2016 passed by this Court in this matter. This Court noted that ad-interim relief was granted by the trial Court on 5.6.2014 and is continued till date. Defendant has not filed reply to the motion. Grievance made on behalf of the applicants that the defendant is not pursuing the motion diligently was noted. This Court therefore directed the defendant to file reply explaining why from 5.6.2014 when ad-interim relief was granted, no reply is filed. Mr.Mahadik submitted that the defendant has filed reply to the motion on 15.11.2016. Be that as it may. The defendant will ensure that in every matter where its action is under challenge, it takes prompt steps in filing pleadings and defending its order.

7. On the other hand, Ms.Moosa supported the impugned order. She submitted that the applicants instituted suit on the Original Side. Notice of lis pendens in respect of the suit premises has been registered on 2.4.2008. Despite that the Deed of Assignment was executed on 18.6.2008 in favour of the plaintiff. She has also relied upon the orders passed by this Court in the suit instituted by the applicants. She also relied upon the decision of Apex Court in the case of **M/s.Aliji Monoji & Co. v. Lalji Mavji and others, AIR 1997 SC 64**, wherein Apex Court has considered the decision of **Ramesh Kundanmal**

(supra) and has held that the landlord is a proper party in an action under Section 351 of the Act.

8. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Perusal of the impugned order shows that the learned trial Judge has allowed the Chamber Summons mainly on the ground that the suit instituted by the applicants claiming ownership rights is pending between the plaintiff and the applicants amongst other parties. Apart from that the defendant has issued notice under Section 351 of the Act on the basis of the complaint lodged by the applicants.

9. Mr. Naik invited my attention to order dated 28.2.2008 passed by the learned Single Judge of this Court in Notice of Motion No.639/2008. While declining to grant ad-interim relief, the learned Single Judge noted that one of the parties whose interest was sought to be dealt with was a minor (the fifth defendant therein) for whom there was no legally and validly appointed guardian. Apart from that the learned Single Judge also noted that out of the part payment of Rs.66 Lakhs, Rs.54 Lakhs was alleged to have been paid in cash.

10. Mr. Naik also invited my attention to the order dated 11.12.2008 passed by the learned Single Judge in Chamber Summons No.1745/2008 in that suit. In that

order, the learned Single Judge recorded that the notice of *lis pendens* in respect of the suit premises was registered on 2.4.2008 and despite that 1st to 6th defendants therein created third party interest in favour of the respondents (present plaintiffs). The learned Single Judge *prima facie* recorded that 1st to 6th defendants had dealt with the suit property after registration of the *lis pendens* notice and issued ad-interim relief restraining the respondents (plaintiffs herein) from creating any third party interest in respect of the suit property.

11. By order dated 24.8.2009 in Notice of Motion No.639/2008 in that Suit, the learned Single Judge appointed Court Receiver in respect of the suit property as also issued injunction restraining the defendants therein from disposing of or alienating or encumbering or from creating any third party rights in respect of the suit property and/or the suit shops and/or developing the same and/or putting up any construction thereon. Aggrieved by that decision, the plaintiff herein preferred appeal as also the applicants who are the plaintiffs in that suit preferred appeal. Both these appeals were decided by the Division Bench of this Court on 13.4.2010. The order passed by the learned Single Judge to the extent of appointing Court Receiver was set aside and the order of injunction with the additional directions and orders was maintained.

12. In view thereof and in the light of the orders passed by this Court from time to time in the suit instituted by the applicants, it cannot be said that the applicants are totally strangers to the subject matter of the suit. On the basis of the complaints made by the applicants, the defendant has issued notice under Section 351 of the Act alleging carrying out of unauthorized work by the plaintiff herein.

13. In the case of **Ramesh Kundanmal (supra)**, notice was issued by the Corporation in respect of two chattels on the terrace allegedly erected by the appellant unauthorizedly. The appellant came with the case that these chattels/structures are moveables on wheels and plates where servicing and/or repairs are done and used for storing implements of the mechanics. Apex Court noted in paragraph-18 that the second respondent has no interest in these chattels and the demolition of the same in pursuance to the notice is not a matter which affects the legal rights of the respondent. In paragraph-13, Apex Court also noted the distinction between the present interest as distinct from the commercial interest. In paragraph-14, Apex Court has 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 questions 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, 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.*, wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Mieg et Compagnie S.A. v. Bank of England*, that the 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 intervenor in the enjoyment of his legal rights.'

[Emphasis supplied]

14. Perusal of paragraph-14, extracted hereinabove, shows 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.

15. In the case of ***M/s.Aliji Monoji & Co. (supra)***, Apex Court considered the decision in ***Ramesh Kundanmal (supra)***. In ***M/s. Aliji Monoji & Co. (supra)***, Apex Court considered the question whether the landlord is a necessary or proper party to the suit for perpetual injunction against demolition of the demised building. Apex

Court held that the landlord has 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 right, title and interest would be in jeopardy.

16. In the present case, as noted earlier, the applicants have instituted suit for specific performance of the agreement dated 18.5.2007 as also the plaintiff challenged the Assignment Deed dated 18.6.2008 executed in favour of the plaintiff herein. The applicants have contended that the deed of assignment was executed after registration of notice of lis pendens on 2.4.2008. In my opinion, it cannot be said that the applicants are totally strangers to the suit property. They are a proper party to the suit. In view thereof, I do not find that the learned trial Judge has committed any error in allowing the Chamber Summons. It cannot be said that the outcome of the suit will not affect the applicants herein. Hence, the Petition fails and the same is dismissed.

17. At this stage, Mr. Naik orally applies for stay of this order for a period of six weeks from today. Ms.Moosa opposes this prayer. Perusal of the orders passed from time to time shows that no stay was granted to the impugned order. In fact in the order dated 26.10.2016 it was clarified that if any amendment is carried out it will be subject to

further orders to be passed in the present petition. As I have dismissed the Petition, oral application for stay made by Mr.Naik is rejected. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)