

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 5911 OF 2014

Fulwantibai C. Rathod

And Ors

...Petitioners

Versus

M/s. M. K. Enterprises

And Ors

...Respondents

....

Mr. R.A. Thorat, Senior Advocate a/w. P. J. Thorat, Advocate for the Petitioners.

Mr. Shamrao B. Gore, Advocate for Respondent No.4.

....

CORAM : R. G. KETKAR, J.

DATE : 06th JANUARY, 2017

JUDGMENT :

1. Heard Mr.R.A. Thorat, learned Senior Counsel for the petitioners and Mr. Shamrao Gore, learned Counsel for respondent No.4, at length.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as the 'plaintiffs', have challenged the judgment and order dated 22.4.2014 passed by the learned Judge, City Civil Court, Greater Mumbai in Chamber Summons No.1158/2013 in S.C. Suit No.108489/1993. By that order, the learned trial Judge allowed the Chamber Summons taken out by respondent No.4

Shantinath Darshan Co-operative Housing Society Limited (for short, 'society') in terms of prayer clause (a) subject to costs of Rs.5000/- to be paid to the plaintiffs. The learned trial Judge added the Society as defendant No.4 in the suit and directed the plaintiffs to carry out the amendment. The relevant and material facts giving rise to filing of this petition, briefly stated, are as under.

3. The plaintiffs have instituted suit against defendant No.1 M/s. M.K. Enterprises, defendant No.2 Girish N. Mehta and defendant No.3 Nathubhai V. Kalsaria. Defendants No.2 & 3 are the Partners of defendant No.1. The plaintiffs have *inter alia* prayed for declaration that the first defendant are the trespassers upon the land described in Schedule-A and in respect of construction thereon and that they have no right, title and interest or are not entitled to the benefit under the agreement dated 25.3.1987 as modified by and read with agreement dated 19.9.1991 or to put up or continue to put up any construction on the said land under the suit agreement; for direction to the defendants to vacate the land described in Schedule-A and the construction thereon and hand over vacant and peaceful possession to the plaintiffs; for perpetual

injunction restraining the defendants from entering upon or remaining upon the land described in Schedule-A or carrying out construction or any other activities on the said land.

4. The plaintiffs and the defendants entered into an agreement dated 25.3.1987 whereunder the defendants/developers agreed to provide five self-contained flats to the plaintiffs. The plaintiffs and the defendants thereafter entered into supplementary agreement on 19.9.1991. It was agreed between them that the flats will be allotted to (1) Mrs. Fulwantibai C. Rathod, (2) Mr.Kumarpal C. Rathod, (3) Mr.Narendra C. Rathod, (4) Mr. Navin C. Rathod, (5) Mr.Pravin C. Rathod and (6) Chhaganraj G. Rathod on behalf of his minor and retraded son Ajaykumar C. Rathod. Said flats shall be in separate wing of ground, first and second floor with terrace free of cost and named as 'Rathod Niketan' with separate gate.

5. During pendency of the suit, the plaintiffs took out Chamber Summons for incorporating paragraphs-17A and 17B and prayer clause (d-1). That Chamber Summons was allowed on 9.5.1997 and the plaintiffs carried out the amendment. The society took out Chamber Summons

No.1749/2007 *inter alia* for its impleadment in the suit. In support of that Chamber Summons, Shekhar Naidu made affidavit dated 20.9.2007 justifying the impleadment of the society. The society however did not prosecute the Chamber Summons and in fact on 5.3.2008 withdrew the same unconditionally. The plaintiffs thereafter took out another Chamber Summons for amending the plaint so as to incorporate paragraphs-17C to 17R as also paragraph-23A prayers (d-2) and (g). Said Chamber Summons was allowed on 12.12.2008 and the plaintiffs carried out necessary amendments.

6. It is thereafter on 9.6.2013 the Society took out present Chamber Summons for impleadment as defendant No.4. By the impugned order, the learned trial Judge has allowed the Chamber Summons. It is against this order, the plaintiffs have instituted the present Petition.

7. In support of this Petition, Mr. Thorat submitted that the plaintiffs are the owners of the land. They entered into the development agreement with defendants No.1 to 3 initially on 25.3.1987. Thereafter the plaintiffs and defendants No.1 to 3 entered into supplementary agreement on 19.9.1991. By

incorporating prayer clause (d-1) the plaintiffs have sought declaration that by writing dated 29.11.1994 the plaintiffs and defendant No.1 have settled their dispute and that defendant No.1 agreed to deliver possession of 10 flats each having carpet area of 360 sq. ft. with two flats situate on each of ground + first, second, third and fourth floor of B Wing of the building constructed on the land described in Exhibit-A with all amenities and facilities. He submitted that earlier the Society had filed Chamber Summons No.1749/2007 for identical relief, namely, its impleadment as defendant No.4. Said Chamber Summons was unconditionally withdrawn on 5.3.2008. Mr. Thorat has extensively taken me through the copy of the plaint, amendments made by the plaintiffs on 9.5.1997 and 12.12.2008 as also affidavit of Mr.Shekhar Naidu in support of Chamber Summons No.1749/2007. He submitted that perusal of the affidavit in support of Chamber Summons taken out by society clearly shows that the society apprehended that the plaintiffs are asking for separate building, separate entrance in respect of the suit building which is not possible as per the BMC plans. The society also came with the case that the plaintiffs obstructed their members from performing Pooja in

the societies open premises on the ground that it belongs to the plaintiffs and they won't allow the members of the society to enter into that area. It was also averred that entire open space belongs to the society being compulsory open space. He submitted that the society having withdrawn the Chamber Summons unconditionally, could not have filed present Chamber Summons. He submitted that the society has not demonstrated that it will be affected by the decree that may be passed in the suit. In any case, if the society is not a party to the suit, it will not be bound by the decree so passed in the suit and can obstruct the execution of the decree in the event of the plaintiffs succeeding in the suit. In short, he submitted that the society is neither a necessary nor a proper party. The plaintiffs being *dominus litis*, the Court could not have compelled the plaintiffs to implead the society as defendant No.4.

8. On the other hand Mr. Gore supported the impugned order. He submitted that the earlier Chamber Summons was withdrawn on the basis of legal advice given to the society. He submitted that the plaintiffs amended the suit on 12.12.2008 and the said fact came to the knowledge of the

society when evidence was led by the plaintiffs in Suit No.5416/2006. The society instituted that suit under Maharashtra Ownership of Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 against defendants No.1 to 3 as also the plaintiffs herein. The suit was decreed by the trial Court on 7.3.2012. Aggrieved by that decision, the plaintiffs preferred First Appeal in this Court. By interim order, direction to execute the conveyance in favour of the society is stayed.

9. Mr. Gore submitted that the fact that the plaintiffs amended the suit on 12.12.2008 was brought to the notice of the society when evidence was led by the plaintiffs in Suit No.5416/2006. In view thereof, the society filed present Chamber Summons for its impleadment. He has taken me through the affidavit dated 19.6.2013 made by Shekhar Naidu, Secretary of the society to contend that the society is a necessary party as it will be affected by the reliefs claimed by the plaintiffs. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

10. I have considered the rival submissions advanced by

learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the plaintiffs have instituted suit against defendants No.1 to 3 for various reliefs. Originally the plaintiffs had claimed declaration that the first defendants are the trespassers and have no right, title and interest or are not entitled to the benefit under the agreements dated 25.3.1987 and 19.9.1991 or to put up any construction on the suit land under said agreements. On 9.5.1997, the plaintiffs amended the plaint and incorporated paragraphs-17A and 17B and added prayer clause (d-1). It is not in dispute and is rather a matter of record that the society filed Chamber Summons No.1749/2007 for its impleadment as defendant No.4. On 5.3.2008, Chamber Summons was unconditionally withdrawn.

11. It is also not in dispute that the plaintiffs thereafter amended the plaint on 12.12.2008 and incorporated paragraphs-17C to 17R, prayer clause (d-2) as also (g-1) to (g-4). Perusal of the amendment and in particular paragraphs-17O, 17P, 17Q as also prayer clause (d-2), (f), (g) and (g-1) will undoubtedly affect the rights of the society. Perusal of plan at Exhibit-Z shows that earlier only one wall was shown in the

compound of the plot. By plan at Exhibit-Z-1 two walls are shown in the compound of the building. Comparison of plan at Exhibit Z with the plan at Exhibit Z-1 after the amendment on 12.12.2008, undoubtedly will curtail the rights of the members of the society in respect of the compound. It is also not in dispute that the plot is not sub-divided. In view thereof, in the event of the trial Court granting decree in terms of prayer clauses (d-2), (b), (c), (d) it will certainly affect the societies rights. This development has taken place after withdrawal of Chamber Summons by the society on 5.3.2008, namely, after the plaint was amended on 12.12.2008. In view thereof the earlier unconditional withdrawal of Chamber Summons by the society will not come in their way.

12. In the case of **Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay and Ors., (1992) 2 SCC 524**, the Apex Court has laid-down the principles to be considered while deciding the application for impleadment. In paragraph-14 it is 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.* (1956) 1 ALL E.R. 273, wherein after quoting the observations of Wynn-Parry, J. in *Dollfus Mieg et Compagnie S.A. v. Bank of England*, (1950) 2 ALL E.R. 611, 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 intervener in the enjoyment of his legal rights.'"

13. Perusal of the above extracted paragraph clearly

shows that the Apex Court has held 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. The Apex Court has also observed that the line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. In the present case, it is evident that the society has direct interest or legal interest in the action initiated by the plaintiffs.

14. Apart from that as noted earlier, the society has instituted Suit No.5416/2006 against defendant No.1 M/s. M.K. Enterprises (defendant No.1 in the present suit), defendant No.2 Fulwantibai C. Rathod (plaintiff No.1 in the present suit) and defendant No.3 Kamarpal C. Rathod (plaintiff No.2 in the present suit). That suit was decreed on 7.3.2012 in terms of prayer clauses (a), (b), (c), (f) and (g) of the plaint. Defendants No.1 to 3 therein were directed to execute the conveyance in favour of the plaintiff society by completing their title within a period of six months. Prayer clauses (a), (b) and (f) read thus :

- “(a) This Hon'ble Court may be pleased to declare that the Defendants are bound and liable under provision of Maharashtra Ownership Flat's Act as well as Individual Agreement entered into between themselves with the members of Plaintiff to perform their statutory obligations to complete the suit building to obtain Occupation Certificate and to convey the said property viz. A piece and parcel of land and a building situated therein by name Shanti Darshan bearing Survey No.471, Hissa No.1(A), C.T.S. NO.316 village Malad (South), Taluka Borivali, admeasuring an area of 1293.02 sq.mtrs. Situated Opp. Mittal collage, Nahar Nagar, Malad (W), Mumbai 400 064 to the Plaintiffs by complying with all the pending work.
- (b) The Defendants, their agents, relatives, servants, employees etc. be restrained by an order and permanent injunction for obstructing the Plaintiff, their members and residents from enjoying, using the common gates of the society building as well as the common open space and facilities such as common terrace, boarwell, water connections, and all other common facilities within the premises of the society.
- (f) The Defendants, their agents, relatives, servants, employee etc. be restrained by an order and temporary injunction from obstructing the Plaintiff, their members, and residents, from enjoying using the common gates of the society building as well as the common terrace, boarwell, water connections, and all other common facilities within the premise of the society.”

15. Aggrieved by that decision, defendants No.2 & 3 have preferred First Appeal No.857/2012 and also took out

Civil Application No.2078/2012. It is not in dispute that this Court has stayed the trial Court's decree only to the extent of directing the defendants therein to execute conveyance in respect of suit property in favour of the society. Thus this Court has not stayed clauses (b) and (f) extracted hereinabove. By these clauses the defendants therein have been restrained from obstructing the society, its members, residents from enjoying, using the common gates, common open space and facilities such as common terrace, boarewells, water connections and other common facilities within the premises of the society. The defendants therein are also restrained from creating any third party right, title and interest in respect of the suit property. This development also took place after withdrawal of the Chamber Summons No.1749/2007 on 5.3.2008 unconditionally. The withdrawal of the earlier Chamber Summons, therefore, will not come in the way of the society.

16. By the impugned order, the learned trial Judge has allowed the Chamber Summons. In paragraph-15, the learned trial Judge has referred to the plaintiffs amending the plaint on 12.12.2008. In the light of above discussion, I do not find

that the learned trial Judge has committed any error in holding that in view of subsequent developments, the society was justified in filing the present Chamber Summons. Hence no case is made out for invocation of powers under Article 227 of the Constitution of India. Petition fails and the same is dismissed. Rule is discharged. In the circumstances of the case, there shall be no order as to costs.

17. 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 C.P.C.

18. As the suit is of the year, 1993, the learned trial Judge is requested to decide the suit as expeditiously as possible and preferably by 31.12.2017. Order accordingly.

(R. G. KETKAR, J.)