

vks

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.1083 OF 2018

Johnson John	...	Petitioner.
V/s.		
The Municipal Corporation of Greater Mumbai and anr	...	Respondents

Mr. Owen Menezes with Mr. Ravi Ghadigaonkar i/by
Rajesh B. Parab, for the petitioner.
Mr. Jaideep Mitra i/by Mr. A.S. Khan and Associates for
respondent No.2.
Mr. Pradeep M. Patil, for respondent No.1.

CORAM : DR.SHALINI PHANSALKAR-JOSHI, J.

DATE : 23rd APRIL, 2018.

P.C. :

- 1] Heard learned counsel for the petitioner and respondents.
- 2] By this writ petition filed under Article 227 of the Constitution of India, the petitioner is challenging the order dated 21st December, 2017, passed by City Civil Court, Dindoshi, Mumbai, thereby allowing the Chamber Summons No.400 of 2017 in L.C. Suit No.1051 of 2017.
- 3] The petitioner is the original plaintiff in the suit. The suit was filed by him against Municipal Corporation, restraining it from taking any action in pursuance of the Notice dated 24.11.2016, issued under Section 351 of the Mumbai Municipal Corporation Act, 1888

(for short called as “MMC Act”). In the said suit, respondent No.2 the Housing Society has filed this Chamber Summons to direct the present petitioner to implead it as party defendant, contending inter alia that the suit premises is part of the society and the plaintiff has in connivance with the builder-developer carried out illegal construction of the room in the stilt portion, and making use of it for commercial purpose as a result of which society itself is affected and hence impleadment of the society is necessary to bring on record the true and correct facts, which will be helpful to the Court in deciding the suit on merits.

4] This Chamber Summons came to be resisted by the petitioner-plaintiff contending inter alia that impleadment of the society in the suit is not at all necessary. The lis is between the petitioner and the Municipal Corporation and it pertains to only deciding the legality and validity of the Notice issued under Section 351 of the M.M.C Act. For deciding the said illegality and validity of the notice, the impleadment of society is not essential; therefore, the Chamber Summons needs to be dismissed.

5] The trial Court has, after considering the submissions advanced at bar by learned counsel for both parties, allowed the Chamber Summons holding that, if the respondent society is made as a party, no prejudice will be caused to the petitioner; on the contrary,

the society will bring on record the correct facts, which will be helpful in deciding the case on merits. However, if the impleadment is not allowed, the interests of the society will suffer.

6] For challenging this order of the trial Court, learned counsel for the petitioner-plaintiff has heavily relied upon the Judgment of the Apex Court in the case of *Mohamed Hussain Gulam Ali Shariffi -vs- Municipal Corporation of Greater Bombay and ors [2017 (6) ALL MR 420]*, wherein the suit was filed challenging the notice issued under Section 351 of the MMC Act. The grievance raised in the said suit, by the Municipal Corporation was that the plaintiff has made some unauthorized construction in the building in question known as, “Haroon Manzil” ground floor, 354 S.V. Patel Road, Mumbai. During the pendency of the suit, respondent Nos.2 and 3 filed the Chamber Summons seeking permission to implead them as defendants in the suit, on the count that they are interested in the suit house, inasmuch as they claimed to have ownership rights in the suit house. It was alleged that one Civil Suit No.424 of 2008, seeking specific performance of agreement is filed by respondent Nos.2 and 3 in relation to the suit house and the same is pending and therefore, it was prayed that respondent Nos.2 and 3 being necessary parties for proper adjudication of the rights of the parties in relation to the suit house, they may be directed to be added as defendants in the suit.

7] This application was opposed by the plaintiff on the ground that respondent Nos. 2 and 3 are not necessary parties. The trial Court, had however, allowed the said application and permitted their impleadment. Being grieved, plaintiff therein had preferred writ petition before this Court, which came to be dismissed and hence Special Leave Petition was preferred before the Apex Court. While deciding the said petition, the Apex Court in paragraph No.14 of it's order was pleased to hold as follows :-

“14. To decide this question, in our considered opinion, the only necessary and proper party to the suit is the Mumbai Municipal Corporation, Greater Mumbai, i.e. Respondent No.1, who has issued such notice, and for deciding this question either way, the presence of respondent Nos.2 and 3 is not at all required. In other words, the suit can be decided even in the absence of respondent Nos.2 and 3”.

8] In paragraph No.15 of the order, the Apex Court has then considered the principle of law that, “the plaintiff being dominus litis cannot be forced to add any person as party to his suit unless it is held, keeping in view the pleading and the relief claimed therein, that a person sought to be added as party, is a necessary party and without his presence neither the suit can proceed and nor the relief can be granted”. It was held that, “it is only then, such person can be allowed to become party, else the suit will have to be dismissed for

non impleadment of such necessary party. Such does not appear to be a case here". In the backdrop of these facts it was held that, "the presence of of respondent Nos. 2 and 3 in the facts of this case was not required for deciding the legality of notice impugned in the suit on merits because the dispute centers around the question of legality and validity of the notice, it arises between the Corporation and plaintiff.

9] In paragraph No.17 of the judgment, it was further held that, "In such a suit Court is not called upon to adjudicate the rights between the appellant and respondent Nos.2 and 3 in relation to the suit house. Any such dispute, if arises, the same can be decided in a separate suit, which is pending between the parties or may be filed, if required, by the parties against each other, but such dispute cannot be tried on the cause of action pleaded in the suit filed by the plaintiff where lis is essentially between the plaintiff and the Corporation". It was further observed that, "merely because the suit house is subject matter between all the parties is no ground to get the dispute arising between the parties settled in one suit, regardless of the nature of cause of action on which the suit is founded". Accordingly, the Apex Court has set aside the impugned order passed by the trial Court impleading respondent Nos. 2 and 3 as party defendants in the suit.

10] Thus, the facts of the reported authority before the Apex

Court, recited hereinabove in detail, stand totally on different footing, as in that suit, respondent Nos.2 and 3 were claiming the ownership in the suit property on the basis of the agreement of sale, in respect of which the suit for specific performance was filed. In that context, it was held that they can agitate their grievance and decide their disputes and get them settled by filing separate suit and their impleadment was not necessary in the backdrop of facts of that suit.

11] However, the facts in the present case stand on totally different footing. In this case, admittedly the suit premises in respect of which the notice is issued under Section 351 of the M.M.C. Act, are part of society. It is specific case of the Society that the petitioner has covered stilt portion of the building, which was used as passage and thereby carried out illegal and unauthorized construction, which is not only causing inconvenience to the other members of the society but it is also absolutely unlawful, illegal activity, which was required to be stopped; and at the instance of the society, Corporation has taken the action against the said construction. So the facts in the present case cannot be considered as identical to the facts of the above said judgment of the Hon'ble Supreme Court.

12] Conversely, in the facts of the present case the impleadment of the Society in the present suit will help and assist the Court in arriving at proper finding and adjudication of the dispute. If

without impleading the Society, the dispute between the parties that is the petitioner plaintiff and respondent corporation is allowed to be decided, then it will definitely affect the interests of the society and therefore, society appears to be necessary party to the present suit, in order to decide effectively even the legality and validity of the notice issued by the Municipal Corporation to the petitioner under Section 351 M.M.C. Act.

13] This Court has adopted this view consistently and directed impleadment of the Society whenever such notice under Section 351 of the M.M.C Act, is issued to the member of the Society by the Municipal Corporation and the suit is filed to challenge the said notice. Learned counsel for respondent Society has, in this respect relied upon the judgment of this Court in the case of *Savji Bhavan Bera and another -vs- Municipal Corporation of Greater Mumbai and another* [2001 (3) Bom C.R. 787]. In that case also, unauthorized construction was made on the open space let out to the appellant by lessee and the notice was issued in respect of the illegality of the said construction under Section 351 M.M.C Act. When the Co-operative Society made an application for its impleadment, in that suit, it was held that the impleadment of the Society is necessary for deciding the dispute involved in the suit property. It was also noticed that the said Co-operative Society had repeatedly complained to the authorities of

the unauthorized construction that has been put up. In the present case also, the co-operative Society, is constrained to stop unauthorized construction put up in the stilt area of Society, hence it has to be held that impleadment of the co-operative society is necessary in the facts of the present case.

14] In another judgment of this Court in the case of *Milind Dattatreya Sugavkar -vs- Municipal Corporation of Greater Mumbai and another* [2006 (1) Mh. L.J. 385] in the identical fact situation, when the notice under Section 351 M.M.C Act, was issued and it was challenged by the plaintiff therein, application was made by the Society in which the flat was situate, for its impleadment under Order 1 Rule 10 C.P.C. In the backdrop of the facts, it was held that the Society is necessary party, not merely because it claims to have necessary record or evidence, but because Society, will be bound by the order which will be passed by the Court and therefore, its presence will be necessary to effectively and completely settle the issues involved. It was further held that Society certainly has direct interest in the property particularly in the common open space, where according to the Society, unauthorized construction stands. Accordingly it was held that the order of impleadment of the Society in the suit cannot be faulted.

15] At this stage, it may be useful to refer to the test laid down by the Apex Court for the purpose of deciding who is a necessary or proper party to the suit. In the case of *Ramesh Hirachand Kundalnmal -vs- Municipal Corporation of Greater Bombay and ors* [(1992) 2 SCC 524], in paragraph No.8, it was held that :-

"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 reasons 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."

16] In the facts of the present case, as stated above, the case of the respondent Society is that the petitioner has made unauthorized construction in the stilt area. Therefore, whatever order will be

passed in the present suit, the Society being bound by it, it is going to affect the interests of the Society and therefore, without making the society as party in the suit, great prejudice can be caused to the interests of the Society and its other members.

17] Learned counsel for the respondent has also relied upon the judgment of this Court in the case of *Ranjitsingh Linga and anr -vs- Municipal Corporation of Greater Mumbai and anr* [2010 (4) Bom C.R. 363], wherein also it was found that the second respondent the landlord of the suit premises has direct and substantial interest in the subject matter of the suit. Hence, his impleadment in the suit was considered to be proper for adjudicating the dispute involved in the suit finally, properly and completely.

18] In the facts of the present case, the trial Court, while allowing impleadment of the respondent Society as party has held that any order passed in the suit will affect the interests of the Society. As against it, if the Society is made as a party, no prejudice will be caused to the petitioner. On the contrary, the presence of Society will assist the Court in deciding the lis between the parties on its own merits.

19] In the present case there is direct and substantial interest of the Society in the stilt area on which alleged unauthorized construction is made and the Society will be affected by the decision

of Court. Therefore, impleadment of the Society in the suit as allowed by the trial Court cannot be faulted. The impugned order, therefore, passed by the trial Court calls for no interference. Hence writ petition stands dismissed.

20] At this stage, learned counsel for the petitioner seeks stay to the execution and implementation of this order for a period of 8 weeks. It is pointed out by learned counsel for the respondent that during the pendency of this writ petition, there was no stay. In view thereof, this prayer cannot be considered and hence stands rejected.

[DR.SHALINI PHANSALKAR-JOSHI, J.]