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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**CIVIL WRIT PETITION NO. 13176 OF 2018
WITH
INTERIM APPLICATION NO. 345 OF 2022
IN
CIVIL WRIT PETITION NO. 13176 OF 2018**

SHREESH CO-OPERATIVE HOUSING SOCIETY LIMITEDPETITIONERS

V/s.

MANTHAN CO-OP. HOUSING SOCIETY LTD AND ANOTHERRESPONDENTS

Mr. D. S. Sakhalkar i/b Swapnil A. Waradkar advocate for the Petitioner and for the applicant

Mr. Ashutosh R. Gole for respondent no. 1

Mr. Ajit R. Pitale for respondent no. 2 in Writ Petition

CORAM : NITIN W. SAMBRE, J.

DATE: JANUARY 27, 2022.

P.C.:

1) Heard respective counsel. Present petition is directed against impugned order dated 21/06/2018 passed by 3rd Jt. Civil Judge, Senior Division, Thane below Exh. 17, an application preferred by the Petitioner-third party under Order I Rule 10(2) of the Code of Civil

Procedure, 1908 seeking impleadment as Defendant.

2) Respondent-Plaintiff Shreesh Cooperative Housing Society preferred R.C.S. No. 527/2018 seeking following reliefs:

“a. It may be ordered, decreed and declared that the Plaintiff has the right of way through the suit access i.e. an access for ingress and egress from over the property i.e. Final Plot no.138-B which is shown by alphabets A, B, C and D more particularly described hereinabove and is also delineated by a yellow color wash in the sketch / map filed herewith for the ingress and egress to the said property of the Plaintiff viz. Final Plot no.138-A under TPS no.1, lying, being and situate at Village - Panchpakhadi, Thane, registrations District and Sub-District of Thane and now within the limits of Thane Municipal Corporation.

b. It may be further ordered, decreed and declared that the act of the Defendant Corporation of issuing impugned notice/letter dated 03rd May 2018 to the Plaintiff is a nullity, without jurisdiction; as the same is not issued in good faith and mandatory provisions of law are not

followed and that the same is nothing but an abuse of exercise of powers and further it may be ordered, decreed and declared that the Defendant Corporation, its officers, representatives etc. do not have any rights to obstruct the Plaintiff from using the said right of way/access through the suit access to approach the said property.

c. The Defendant its officers or any other persons claiming through it or acting on its behalf may be restrained by an appropriate order and decree of permanent prohibitory injunction of this Hon'ble Court restraining it from acting upon the impugned notice/letter dated 3rd May 2018 issued to the Plaintiff and/or from obstructing the Plaintiff's right of way and ingress and egress running through the suit access to approach the said property and/or from doing any acts which are prejudicial to the lawful rights of the Plaintiff qua the Suit Property.

d. Interim reliefs in terms of prayer clause no.(c) above may be granted.

e. Costs of the suit may kindly be provided for.

f. Any such other and further order may kindly be granted

in favor of the Plaintiff as the nature and circumstances of the case may require and as the Hon'ble Court deems fit and proper.”

3) The contention of the learned counsel for the Petitioner is, Petitioner is not only appropriate but necessary party to the Suit. So as to substantiate his claim, he would urge that Suit claim is basically directed against the rights of the Petitioner-Society. He would further claim that Suit required to be decided after impleadment of the Petitioner as right of the Petitioner will be affected in its absence. For effective adjudication of lis between the parties, Petitioner needed to be added as Defendant.

4) While countering the aforesaid submissions, learned counsel for Respondent-Plaintiff would urge that order impugned is just and proper as the Suit is basically directed against the action of Respondent-Defendant Municipal Corporation. According to him, Respondent is dominus litis and as such may suffer consequence for non addition. As such, according to him, impugned order is just and proper.

5) Considered submissions.

6) Relevant pleadings in para 3 & 4 in the Plaint which are germane for deciding the cause read thus:

3. It is submitted that there is only one access available to the members of the Plaintiff society to approach the Plaintiff society which runs through the Final Plot no.138-B which is adjacent property to the Plaintiff's property. The Plaintiff shall rely upon the map plan separately filed along with the list of documents, to show the existence and location of the said access to approach the said property. There is a 60 meter wide road runs towards the Northern side of the said property. The said road is a public road. The said access to approach the said property of the Plaintiff society starts at the Southern side of the said 60 meter wide public road. Since there was no other access available to approach the said property of the Plaintiff, the Thane Municipal Corporation also while issuing permissions and sanctions considered the availability of the said access road to approach the said property of the Plaintiff. In the map/plan filed along with the suit, the access for ingress and egress from over the said adjacent property i.e. Final Plot no.138-B to the said property of the Plaintiff is shown by alphabets A, B, C and D and also shown delineated by yellow wash colour. The points A and B is terminus *a quo* and points C and D is *terminus ad quem*. The said access running from the said adjacent property i.e. Final Plot no.138-B to the said property of the Plaintiff is hereinafter referred to as the "Suit Access". The Plaintiff submits that the society members of the Plaintiff are using the suit access as an only

access to approach the said property of the Plaintiff. The Plaintiff submits that there is an area towards the Eastern side of the said property of the Plaintiff which is reserved as Recreation Ground. The said RG area is for the common benefit of the Plaintiff society members as also the adjoining society called Shrish society members. The suit access which is the only access to approach the said property is thus also used by the Plaintiff society members to approach the said RG area. The Plaintiff submits that other than suit access there is no access available to approach the said property of the Plaintiff society as also the said RG area, which is commonly used by the Plaintiff society as also by the adjoining society. As a matter of fact, the Plaintiff society and its members have been using the said suit access since past more than 35 years or so, without any kind of obstruction, disturbance either from the said Shrish Society or from the Defendant Corporation in any manner whatsoever.

4. The Plaintiff records that all of a sudden on 4th May 2018, the Defendant issued a letter /notice dated 03rd May 2018 to the Plaintiff society and threatened to stop using the suit access to approach the said property of the Plaintiff. The Defendant vide the said letter mischievously recorded that there is a 60 meter wide road made available towards the Western side of the said property and that the said road is made available after removing the encroachments thereon. The Defendant thus abruptly asked the Plaintiff society to stop using the suit access and to make available themselves the

access from the said 60 meter wide road towards the western side of the said property of the Plaintiff. The Plaintiff was shocked to receive the said mischievous letter at the hands of the Defendant society. The Defendant referred to the said letter dated 03rd May 2018 certain other notices/orders, copies of which were never even furnished to the Plaintiff at any point of time. The Plaintiff thus is not aware of any of the said notices/ letters or orders referred to in the said notice dated 3rd May 2018. The Plaintiff states that it has a reason to believe that the Defendant has issued the said impugned notice dated 3rd May 2018 at the instance of the adjoining Shrish Co-operative Society Ltd, as the Defendant has further threatened the Plaintiff that, in case the Plaintiff does not stop using the said suit access within 7 days of the date of the said notice, the Defendant would permit the said adjoining Shrish Society to construct the wall so as to stop the suit access to approach the said property of the Plaintiff. This is ridiculous. The Plaintiff states that the access which is suggested by the Defendant in the impugned notice dated 3rd May 2018, is impossible to be used as an access to approach the said property on many counts. As on date, there is an existing wall in between the said 60 meter wide road running from the western side of the said property and the said property. Additionally, there is a well and a water tank situated in between the said proposed approach/access to approach the said property. Considering this impossibility to use the said suggested access, vehicles like Ambulance, Hers Van cannot even approach the said property. The said suggested access is practically impossible to be used

as an access to approach the said property. The said access is also falling short of the minimum required size. The suit access thus is the only access available to the Plaintiff for ingress to and egress of the said property. The Plaintiff thus has an easementary rights over the said suit access to approach the said property. The said impugned notice dated 03rd May 2018 issued by the Defendant to the Plaintiff is thus illegal, null, arbitrary and not binding upon the Plaintiff. The Plaintiff immediately recorded its objection to the said impugned notice dated 03rd May 2018 by sending its objection letter dated 07th May 2018.”

7) As against above pleadings in the Plaint, Petitioner claimed to have preferred Writ Petition No. 13176/2018 in relation to the very subject matter i.e. way passing through property being plot No. 138-A and 138-B. In the communication addressed by Respondent-Defendant Corporation to the Respondent-Plaintiff Society on 03/05/2018, it is categorically mentioned that, adjoining to plot No. 138 there appears to be 60 ft. wide road as reflected in the development plan which was encroached and as such, members of the Respondent-Plaintiff were using 60 ft. wide road from plot no. 138-B i.e. Petitioner’s plot. As such, Respondent-Plaintiffs were directed to make themselves available their own road as referred to

above.

8) Factual gamet is original plot 138 got divided into two parts viz. 138-A and 138-B. It is claimed that there is 60 ft. wide road runs towards Southern side of the property 138-B which is claimed to be a public road. Plot no. 138-B is owned by Petitioner-Society. As such, existence of roadway through plot no. 138-B and whether there exist 60 ft. wide road passing through property of the Petitioner is the issue which needs to be looked into. Respondent-Plaintiff has referred to the present Petitioner in his Complaint with a specific pleadings attributing existence of right of way through Petitioner's property. Once the relief claimed by the Respondent-Plaintiff is based on pleadings in relation to the passing of the road through the property of the Petitioner-Society, it is necessary that the Petitioner-Society needs to be added in the Suit as the right of the Petitioner is likely to be hampered. In absence of Petitioner being party to the Suit, right of the Petitioner is likely to be affected if not added as party. There appears to be enforceable legal right in favour of the Petitioner having regard to the pleadings in their Application for impleadment and Suit proceedings. Impleadment of the Petitioner is necessary for

adjudicating the lis between the parties so as to pass effective orders. Pleadings in the Complaint primarily demonstrate that Petitioner has prima facie right to participate in the subject matter of Suit. That being so, in absence of Petitioner, an effective order cannot be made in the proceedings by properly adjudicating the issue.

9) Appropriate support can be drawn from the Judgments of this Court in the matters of **Amitkumar Shaw V/s. Farida Khatoon¹, Sumitra Anna Aware V/s. Anusaya Rajaram Aware² Chitra Lekha Builders V/s. G.I.C. Employees Sonal Vihar Co.Op. Housing Society Ltd.³ Madhukar Vyankatesh Ullal V/s. Anita Hermy D'Souza⁴ and Digambar s/o Gangaram Halde Patil Vs. Sayyed Khaja s/o Sayyed Mohioddin⁵.**

10) In that view of the matter, order impugned passed rejecting the prayer of the Petitioner passed by 3rd Jt. Civil Judge Senior Division, Thane below Exh. 17 is hereby quashed and set aside. Application Exh. 17 stands allowed.

11) Respondent-Plaintiff to carry out amendment within period of 4

1 2005(3) Mh.L.J. 330(SC)

2 2012(3) Mh.L.J. 649

3 2005(4) Mh.L.J. 360

4 2006(2) Mh.L.J. 483

5 2018(5) Mh.L.J. 653

weeks from today by furnishing copy of the Complaint and relevant copy to the Petitioner within such period. Petitioner will be at liberty to file consequential reply in the Suit within period of 60 days from today.

12) In view of disposal, of Writ Petition, Interim Application also stands disposed of.

[NITIN W. SAMBRE, J.]

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MASHAL

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by IRESH
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