

(2019) 07 BOM CK 0111

In the Bombay High Court

Case No : Writ Petition No. 6563, 6564 Of 2017

Ashok Bansidhar Agarwal

APPELLANT

Vs

State Of Maharashtra And Ors

RESPONDENT

Date of Decision : 22-07-2019

Acts Referred:

Mumbai Municipal Corporation Act, 1888 — Section 351, 354A
Code Of Civil Procedure, 1908 — Order 1 Rule 10(2)
Constitution Of India, 1950 — Article 227

Citation : (2019) 07 BOM CK 0111

Hon'ble Judges : N.J. Jamadar, J

Bench : Single Bench

Advocate : Sushil Upadhaya, Ashok M Saraogi, A.B. Kadam, R.A.Thorat, Aditi Naikare, Pradeep J. Thorat, Santosh Parad

Final Decision : Dismissed

Judgement

1. Rule. Rule made returnable forthwith and, with the consent of the learned counsels for the parties, heard finally.

2. These petitions take exception to the orders dated 9th May 2017 in Chamber Summons No. 72 of 2017 and 192 of 2017, taken out by the petitioners

in the respective petitions, to implead them as party defendants in Suit No. 94 of 2017 instituted by the respondent Nos. 2 to 10 herein against the

respondent No.11—Municipal Corporation, whereby the learned Judge, City Civil Court rejected both the chamber summons.

3. Shorn of unnecessary details, the background facts can be stated as under :—

M/s.Rajeshwari Land Developer Private Limited—petitioner—applicant in Chamber Summons No.192 of 2017 in L.C. Suit No.94 of 2017 is a

company. It deals in the business of development of land and construction of buildings. The petitioners had developed a plot bearing No.1363/1364

situated at Village : Malwani, Malad Marve Road, Malad (W), Mumbai. The petitioners have erected a 21 storied building thereon. Mr.Ashok

Agarwal, (Petitioner in Writ Petition No. 6563 of 2017) has purchased a flat in the building constructed by the petitioner. The respondent No.11?

Municipal Corporation had sanctioned the necessary building plan on being satisfied that there is a road having width of 9.10 mtrs. available for access

to the said building. After completion of the construction, the respondent No.11 has withheld the occupation certificate on the premise that there is no

access to the said building. It transpired that some encroachers have erected unauthorized construction on the road leading to the said premises. The

respondent No.11?Municipal Corporation has initiated action for removal of unauthorized construction on the road leading to the said building.

4. The respondent Nos.2 to 10 herein have, however, challenged the notice, issued by the respondent No.11?Municipal Corporation, under Section

354A of the Mumbai Municipal Corporation Act, 1888 (hereinafter referred as 'the Act'), by instituting Suit No. 94 of 2017. The petitioners alleged

that the officers of the respondent No.11?Municipal Corporation are hand in glove with the plaintiffs in said suit. The defendants therein have not

passed a reasoned order on the reply furnished by the encroachers to the notice under Section 354A. In contrast, the petitioners are in a position to

produce relevant material on record and demonstrate that the structures erected by the plaintiffs in Suit No. 94 of 2017 are unauthorized. In the event,

the Court comes to the conclusion that the notice under Section 354A issued by the respondent No.11?Municipal Corporation is bad in law and

thereby quashes the action initiated by the respondent No.11, it would cause a serious prejudice to the rights of the petitioner as occupation certificate

would be denied on the premise that there is no access to the said building constructed by the petitioner. Thus, the petitioner took out chamber

summons bearing No.192 of 2017 to implead it as party defendant to the said suit, being a necessary party thereto.

5. The petitioner in Writ Petition No. 6563 of 2017 has taken out chamber summons No. 72 of 2017 to implead him as a party defendant by making

similar averments, with the change that the petitioner's' character is that of a purchaser of a flat in the said building constructed by the petitioner in

Writ Petition No. 6564 of 2017.

6. The learned Judge, City Civil Court, was persuaded to reject both the chamber summons by passing the impugned order as the learned Judge was

of the view that the petitioners were not the necessary parties, and that their impleadment would change the nature and scope of the proceedings in

Suit No. 94 of 2017, as, in that event, the question as to whether the respondent No.11—Municipal Corporation can withhold the occupation certificate

to the building in question would be in issue.

7. Being aggrieved by and dissatisfied with the aforesaid orders of rejection of chamber summons Nos.72 of 2017 and 192 of 2017, the petitioners

have invoked the writ jurisdiction of this Court.

8. I have heard Shri Sushil Upadhaya, the learned counsel for the petitioner, Shri A.B.Kadam, the learned AGP for for respondent No.1—State, Mr.

R.A.Thorat, the learned Senior Advocate for respondent Nos. 8 and 9 and Shri Santosh Parad, the learned counsel for the respondent No.11—

Municipal Corporation.

9. Shri Upadhyay, the learned counsel for the petitioners strenuously urged that the learned Judge committed a grave error in declining to permit the

petitioners to be impleaded themselves as party defendant to Suit No. 94 of 2017. It was urged that the fact that the petitioners have a direct interest

in the subject matter of Suit No. 94 of 2017 was completely lost sight of by the learned Judge. The learned counsel would further submit that the

learned Judge ought to have given due weight to the fact that at the instance of the petitioners, the action leading to the issue of notice under Section

354—A, which has been challenged by the respondent Nos.2 to 10, has been initiated. Moreover, serious prejudice is caused to the petitioners on

account of withholding of the occupation certificate to the building erected by M/s. Rajeshwari Land Developer Private Limited for the sole reason

that in view of the unauthorized construction erected by the respondent Nos. 2 to 10, there is no access thereto as per norms.

10. The learned counsel for the petitioners urged with tenacity that the adverse and prejudicial consequences, the determination of Suit No. 94 of 2017

would have, on the rights of the petitioners, cannot be simply ignored. Viewed through this prism, according to the learned counsel for the petitioners,

the petitioners are the necessary parties to the said suit and in their absence no effective decree can be passed therein.

11. In opposition to this, Shri R.A. Thorat, the learned Senior Counsel for respondent Nos. 8 and 9 stoutly submitted that the petitioners have no interest in the subject matter of the dispute raised in Suit No. 94 of 2017, much less direct. The petitioners do not claim any proprietary title over the land bearing city survey No.1491, in respect of which the respondent No.11—Municipal Corporation has issued notice under Section 354— of the Act. The petitioners are total strangers to the said dispute between the plaintiffs and the Planning Authority. An effective decree can be passed in Suit No.94 of 2017 in the absence of the petitioners. Nor their presence is necessary to assist the Court for an effective adjudication. Thus, the petitioners are neither necessary nor proper parties to the said suit.

12. Evidently, the petitioners sought their impleadment as party defendants to Suit No. 94 of 2017 in accordance with the provisions contained in Order

I Rule 10(2) of the Code of Civil Procedure, 1908 ('CPC'). It is trite that under the provisions of Order I Rule 10(2) of the CPC, the Court is

empowered to direct that a person may be added as a party to the suit if presence of such person before the Court is necessary in order to enable the

Court to adjudicate all the questions involved in the suit effectively and completely. The true test to determine whether a party is a necessary party to

the suit is whether in the absence of the person, sought to be impleaded as a party to the suit, the controversy raised in the suit can be effectively and

completely adjudicated.

13. The first and foremost principle which governs the power of the Court in the matter of addition of a party is that the question of addition of a party

under Order I, Rule 10(2) is not one of the initial jurisdiction of the Court but a judicial discretion which has to be exercised keeping in view the facts

and circumstances of a particular case. A profitable reference in this context can be made to a judgment of the Supreme Court in the case of Mumbai

International Airport Private Limited Vs. Regency Convention Centre and Hotels Private Limited & Ors. (2010) 7 Supreme Court Cases 417, wherein

the scope and ambit of Order I, Rule 10(2) was propounded as under :—

—22. Let us consider the scope and ambit of Order I of Rule 10(2) CPC regarding striking out or adding parties. The said sub—rule is not about the

right of a non—party to be impleaded as a party, but about the judicial discretion of the court to strike out or add parties at any stage of a proceeding.

The discretion under the sub-rule can be exercised either suo moto or on the application of the plaintiff or the defendant, or on an application of a person who is not a party to the suit. The court can strike out any party who is improperly joined. The court can add anyone as a plaintiff or as a defendant if it finds that he is a necessary party or proper party. Such deletion or addition can be without any conditions or subject to such terms as the court deems fit to impose. In exercising its judicial discretion under Order 1 Rule 10(2) of the Code, the court will of course act according to reason and fair play and not according to whims and caprice.â??

(Emphasis supplied)

14. In the backdrop of the aforesaid enunciation of the legal position, it has to be seen whether, in the instant case, the learned Judge was justified in

exercising the discretion not to implead the petitioners as party defendants to the suit. The question needs to be addressed from two perspectives.

One, the nature of the suit instituted by the respondent Nos.2 to 10 against the respondent No.11—Municipal Corporation. Two, the nature of the

interest claimed by the petitioners in the subject matter of the suit. Thereafter, the test as to whether in the absence of the petitioners an effective

decree can be passed, needs to be applied.

15. The respondent Nos. 2 to 10 — the plaintiffs claimed that their respective constructions are situated at Survey No.1491, 1502 and 1503. The

respondent No.11—Municipal Corporation has issued a notice under Section 354—A of the Act on 5th May 2017 to demolish the said structure.

Though proper reply has been furnished by the plaintiffs, the officers of the respondent No.11 have not passed a reasoned order.

16. The said notice is also stated to be vague and invalid. Thus, the plaintiffs have sought a declaration that the said notice is illegal, bad in law and

inoperative. They have also sought injunction restraining the Municipal Corporation from taking any action pursuant thereto.

17. In this backdrop, reverting to the case of the petitioners, it becomes abundantly clear that the petitioners do not claim any title over the land on

which the alleged unauthorized structures stand, in respect of which notice under Section 354—A was issued by the respondent No.11. The petitioners,

on the other hand, assert that those structures are located on the road, which provides the access to the building erected by M/s. Rajeshwari Land

Developer Private Limited. Unless the said unauthorized structures are removed, the requirement of 9.10 mtrs. wide access to the said building can

not be met. Resultantly, the occupation certificate to the said building would be withheld, on the premise that there is no access. Thus the presence of

the petitioners in Suit No.94 of 2017 is warranted.

18. From the aforesaid nature of interest in the subject matter of the dispute, in Suit No. 94 of 2017, it becomes evidently clear that the petitioners

have rested their claims for impleadment on the following counts :

Firstly, the action in question is initiated by the respondent no.11Â Municipal Corporation at the instance of the petitioners. Secondly, the petitioners

have necessary material to lend support to the action of the Municipal Corporation; which has been challenged by the plaintiffs in Suit No. 94 of 2017.

Thirdly, the petitioners would suffer serious prejudice in the event the proposed action of the respondent No.11Â Municipal Corporation is declared as

bad in law and the unauthorized constructions are not demolished and, consequently, the occupation certificate is not granted to the petitioners.

19. The learned counsel for the petitioners also drew attention of the Court to the fact that the petitioners have, in fact, instituted petitions in this Court

seeking writ against the Municipal Corporation to forthwith clear all the encroachments on the road leading to the building and, thereafter, grant the

occupation certificate to the building constructed by M/s. Rajeshwari Land Developer Private Limited. A specific attention was invited to an order

passed by this Court on 1st July 2017 in Writ Petition (O.S.) No.2407 of 2016, whereby the Municipal Corporation was directed to take all possible

steps to remove all the encroachments, after following due process of law.

20. In the circumstances, according to the learned counsel for the petitioners, the presence of the petitioners is absolutely necessary for an effectual

and complete adjudication of Suit No. 94 of 2017.

21. I find it rather difficult to accede to the aforesaid submission. The very nature of the suit instituted by the respondent Nos. 2 to 10, against the

Planning Authority, calling in question the notice under Section 354Â A of the Act, indicates that the fate of the said suit would revolve around the

legality and validity of the said notice and the actions proposed to be taken by the Planning Authority pursuant thereto. Indisputably, the petitioners do

not claim proprietary title over the land on which the alleged unauthorized

constructions have been erected. The petitioners, thus, have no direct interest in the property which is the subject matter of the dispute in Suit No. 94 of 2017. What the petitioners claim is that non-removal of those unauthorized constructions would have consequences on their entitlement to get the occupation certificate for the building in question. This circumstance is of no consequence in determining the question as to whether the petitioners are the necessary parties to the said suit.

22. A useful reference in this context can be made to a judgment of the Supreme Court in the case of Ramesh Hirachand Kundanmal Vs. Municipal

Corporation of Greater Bombay & Ors. (1992) 2 Supreme Court Cases 524. In the said case, the Municipal Corporation had issued a notice under

Section 351 of the Bombay Municipal Corporation Act to the appellant for demolition of two chattels on the terrace on the ground that those were

unauthorized constructions. The appellant had challenged the validity of the said notice. The respondent No.2 therein, being the original lessee, had

applied for being impleaded as a defendant in the suit on the ground that it had material to show that the constructions were unauthorized. The trial

Court took a view that the lessee had right, title and interest in the suit premises and, therefore, a necessary party. Before the Supreme Court, it was

urged on behalf of the respondents that though the respondent No.2 was not a necessary party, yet, it was a proper party, whose presence was

necessary for a complete adjudication of the controversy.

23. In the backdrop of the aforesaid facts, pointing out the distinction in the matter of impleadment of a party in a suit relating to property and a matter

involving a declaration as regards the status or legal character, the Supreme Court observed that, in a suit relating to property in order that a person

may be added as a party, he should have a direct interest as distinguished from a commercial interest in the subject-matter of the litigation. It was

further observed what makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved in the

suit. The observations of the Supreme Court in paragraph 13 and 14 are instructive and, thus, extracted below :—

13 A clear distinction has been drawn between suits relating to property and those in which the subject-matter of litigation is a declaration as

regards status or legal character. In the former category, the rule of present

interest as distinguished from the Commercial interest is required to be shown before a person may be added as a party.

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 objective. 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—and 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 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 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.

.....â??

(Emphasis supplied)

24. In the context of the nature of adjudication warranted on a notice issued by the Planning Authority alleging unauthorized development and the interest which a third party may have in the outcome of suit, the Supreme Court further expounded the legal position in the following words :â??

â??15 It has been strenuously contended before us that the second respondent has no interest in the subject—matter of the litigation and the presence of the respondent is not required to adjudicate upon the issue involved in the suit or for the purpose of deciding the real matter involved. It is pointed out that the subject—matter in the suit is the notice issued by the Municipal Corporation to the appellant and the issue is whether it is justified or not.

The Hindustan Petroleum Corporation Limited is interested in supporting the Municipal Corporation and sustaining the action taken against the

appellant. But that does not amount to any legal interest in the subject matter in the sense that the order, if any, either in favour of the appellant or against the appellant would be binding on this respondent. It is true that being lessee of the premises, the Hindustan Petroleum corporation Limited has an answer for the action proposed by the Municipal Corporation against the appellant, but for the purpose of granting the relief sought for by the appellant by examining the justification of the notice issued by the Municipal Corporation, it is not necessary for the Court to consider that answer. If that be so, the presence of the respondent cannot be considered as necessary for the purpose of enabling the Court to effectually and completely adjudicate upon and settle all the questions involved in the suit. The appellant is proceeded against by the municipal Corporation for the alleged action in violation of the municipal laws. The grievance of the respondent against the appellant, if any, could only be for violation of the agreement and that is based on a different cause of action. The consolidation of these two in the same suit is neither contemplated nor permissible.â??

25. The aforesaid pronouncement appears to be on all four with the facts of the instant case. The only interest the petitioners have in the outcome of

C.S. No. 94 of 2017 is that in the event, the validity of the notice under Section 354AA is upheld and consequent action of demolition of unauthorized

structure is taken, they would have the benefit of the alleged access to the building with requisite width and may get the occupation certificate. That

outcome does not make them either necessary or proper party to the suit.

26. The reliance placed by Shri Thorat on a recent judgment of the Supreme Court in the case of M ohamed Hussain Gulam Ali Shariffi Vs. Municipal

Corporation of Greater Bombay and Ors. 2017 (6) All.M.R. 420 (SC) also appears to be well founded.

27. In the said case, the appellant therein had instituted a suit challenging a notice issued under Section 351 of the Bombay Municipal Act, by the

Municipal Corporation. The respondent Nos. 2 and 3 therein sought to implead themselves as defendants in the said suit on the premise that they had

an interest in the suit house, for which they had instituted a suit for specific performance of the agreement for sale executed in their favour. The City

Civil Court impleaded the respondent Nos.2 and 3 as proper party to the said suit. The appellant's writ petition was dismissed by this Court. In an

appeal to the Supreme Court, it was held that in the backdrop of the notice issued under Section 351 of the Act, by the Municipal Corporation, the only question which fell for adjudication was whether the notice under Section 351 of the Act is legally valid or not? The Supreme Court went on to observe as :Â?

â??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.

â?|.....

17 In the suit in question, the Court is not called upon to adjudicate the rights between the appellant and respondents Nos. 2 and 3 in relation to the suit

house. Any such dispute, if arises, the same can be decided in the 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 present suit by the appellant where the lis is

essentially between the appellant (plaintiff) and respondent no.1. Merely because the suit house is the 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.â??

28. The case of the petitioners herein rests on a much weaker foundation than the aforesaid two cases. The case of Ramesh Hirachand Kundanmal

(Supra), the party added therein was the original lessee of the premises on which unauthorized construction was alleged. In the case of Mohamed

Hussain Gulam Ali Shariffi (Supra), the parties added therein claimed to have an interest in the suit house by virtue of an agreement for sale allegedly

executed in their favour. In the case at hand, the petitioners do not claim any proprietary interest in the land on which the unauthorized constructions

are allegedly erected. The petitioners, on the contrary, desire to ensure a favourable outcome of C.S. No. 94 of 2017 so as to advance their

commercial interest. This pure commercial interest separates the petitioners from the class litigants who have an abiding interest in the orderly and

planned development and thus approach the Court to compel the planning

authority to perform its duty.

29. The learned Judge was justified in observing that the impleadment of the petitioners would change the nature of adjudication.

If the petitioners are impleaded as party defendants, inevitably, the questions as to whether the building permission was lawfully granted, whether

access as per norms was available at the time of grant of building permission and whether the Corporation can now withhold the permission for want

of access as per norms would be urged for consideration and adjudication. These aspects are not germane for the adjudication of the dispute between

the respondent Nos. 2 to 10 and respondent No.11. There is a clear and present danger of the trial of the suit taking the turn of a distinct trial between

the petitioners and Planning Authority.

30. The conspectus of the aforesaid consideration is that the learned Judge, City Civil Court has rightly exercised the discretion by not impleading the

petitioners as party defendants to Suit No. 94 of 2017 by applying the correct legal principles to the facts of the case. Thus, no interference is

warranted in the impugned orders in exercise of the extraordinary jurisdiction under Article 227 of the Constitution of India. Thus, the petitions deserve

to be dismissed.

31. The petitions stand dismissed. However, there shall be no order as to costs.

32. Rule stands discharged.