
(2020) 10 BOM CK 0010

In the Bombay High Court

Case No : Writ Petition (Stamp) No. 93200 Of 2020

Dunhill Dome Co-Op. Hsg. Society Ltd

APPELLANT

Vs

Manuel Mergulhao And Ors

RESPONDENT

Date of Decision : 05-10-2020

Acts Referred:

Municipal Corporation Act, 1957 — Section 351
Code Of Civil Procedure, 1908 — Order 1 Rule 10

Citation : (2020) 10 BOM CK 0010

Hon'ble Judges : S.C. Gupte, J

Bench : Single Bench

Advocate : S.C. Naidu, C.R. Naidu, Aqeel Kalawadia

Final Decision : Disposed Of

Judgement

1. Heard learned Counsel for the parties. Rule. Rule taken up for hearing forthwith by consent of Counsel.

2. This writ petition challenges an order passed by Mumbai City Civil Court at Dindoshi on an impleadment application of the Petitioner herein. The impleadment application was made in a suit filed by Respondent No.1 herein challenging a notice under Section 351 of Mumbai Municipal Corporation Act ("MMC Act"). It was submitted by the Petitioner in its impleadment application that the suit plot of land (Plot No.202 at Bandra West, Mumbai) was owned by one Salsette Catholic Co-operative Housing Society. The suit plot was demised under a registered lease of 999 years by Salsette Society to the Petitioner herein. A residential building comprising of stilt plus six upper floors was constructed on this plot as per sanctioned plan. The building in the suit plot has been owned by the Petitioner Society. The stilt area of this construction of about 2208 sq.ft. (except an area of 100 sq.ft. reserved for a dispensary), which was free of FSI, was to be allotted and made available to the members of the Petitioner for parking of their vehicles. It is the Petitioner's case that Respondent No.1 has illegally enclosed some stilt area in the building owned by the society. This

unauthorised structure appears to have been assessed by the Municipal Corporation of Greater Mumbai at commercial rate. It is alleged that the property tax in respect of this structure has not been paid by Respondent No.1, who is not a member of the society. It is the grievance of the Petitioner Society that Respondent No.1, who is not entitled to use or occupy any premises in the plot or building of the society, has been using common facilities extended by the society to its members without contributing to the expenditure incurred by the society and has illegally converted the stilt portion into commercial premises and that such enclosure adversely affects the consumable FSI of the society and is in breach of the sanctioned plan. It is the case of the Petitioner Society that as far back as in 2002, a show cause notice was issued by MCGM to Respondent No.1 herein under Section 351 of the MMC Act at the instance of the Petitioner Society. The Petitioner Society had complained to MCGM about the unauthorised structure by enclosing stilt area and its change of use from residential to commercial. After the Respondents' reply, a speaking order was passed on 5 June 2002 by MCGM ordering removal of notice structure. That led to Respondent No.1 herein filing a suit before the City Civil Court (Suit No.3194 of 2002), challenging the speaking order and notice under Section 351. By its judgment and decree dated 29 August 2005, the City Civil Court, not finding fault with the speaking order, dismissed the Respondents' suit. An appeal from that order was dismissed as withdrawn by this Court with limited protection to the Respondent with a view to enable him to apply for regularisation of the structure within six weeks. It is submitted that no such application was made within the stipulated period, but the unauthorised structure has continued to exist at site. It is submitted that, in the premises, on 24 November 2016, a second show cause notice came to be issued by MCGM to Respondent No.1. This show cause notice led to a second speaking order for removal and demolition of the structure and this, in turn, has led to the filing of the present suit. A status-quo order has been passed in respect of the structure as an ad-interim order in the present suit. It appears that the Respondent's motion in this behalf has been heard and is now pending for orders.

3. On these facts, the application of the Petitioner Society for its impleadment to the suit clearly appears to be in order. Under Order 1 Rule 10 of the Code of Civil Procedure, the Court has a discretion, at any stage of the suit, to order impleadment of a party, whose presence before the Court may be necessary in order to enable the Court to effectively and completely adjudicate upon and settle all questions involved in the suit. The fundamental question to be decided in the present suit is whether or not the suit structure within the property owned by the Petitioner Society is authorised or legal. The Society's presence before the Court is necessary to enable the Court to effectually and completely adjudicate upon and settle this question. It is the Petitioner Society, which has erected this building; it has a definite say on whether or not the structure erected in the suit building is in accordance with the sanctioned plan, on which the building, including its stilt portion, has been erected by the Petitioner Society. The

Petitioner is most vitally interested in the subject matter of the present suit, namely, the purported unauthorised structure constructed by Respondent No.1 within the premises owned by the Petitioner Society. The Petitioner Society has been the originator of the very first action on the part of MCGM for removal of the unauthorised structure. The Petitioner Society, accordingly, deserves to be joined as a party defendant to the suit of Respondent No.1.

4. Learned Counsel for Respondent No.1 relies on the judgments of the Supreme Court in the cases of Ramesh Hiranand Kundanmal vs. MCGM¹ and Mohamed Hussain Gulam Ali Shariffi vs. MCGM². In Ramesh Kundanmal, the Supreme Court has held that addition of parties was a question of judicial discretion and not a question of initial jurisdiction of the court, such discretion having to be exercised in the light of facts and circumstances of every case. In the case before the Supreme Court, the third party, who applied for impleadment, had claimed that it had evidence to produce on the question of authorisation or otherwise of the construction, demolition of which was ordered by the Municipal Corporation under Section 351 of the MMC Act. The court held that merely because the party had relevant evidence to offer on some of the questions involved in the suit, it could not be joined as a defendant to the suit. In Mohamed Hussain's case, the party applying for impleadment claimed to have interest in the suit house by virtue of their ownership rights claimed under an agreement for sale. It was claimed by the interveners that they had filed a suit seeking specific performance of that agreement. It was merely on that basis that they claimed themselves to be necessary parties for proper adjudication in relation to the suit house. The Supreme Court held that having regard to the nature of the controversy, which was the subject matter of the suit before it, respondent nos. 2 and 3 were neither necessary nor proper parties.

5. Both these cases are clearly distinguishable on facts. In Ramesh Kundanmal, impleadment was sought on the sole basis that the party seeking impleadment had some evidence to offer on some of the questions involved in the suit. In Mohamed Hussain, impleadment was sought simply on the basis that the suit property was subject matter of an agreement for sale as between an existing party to the suit and the intervenor, specific performance of which was sought separately by the third party intervenor. In our case, the Petitioner society is the owner of the whole structure, including the stilt portion, which is claimed to have been unauthorisedly enclosed by Respondent No.1 (plaintiff). The society is vitally interested in protecting its property. It was at the instance of the Petitioner Society that the Municipal Corporation initiated proceedings under Section 351 of the MMC Act. The question before the court in the Respondent's challenge to those proceedings was, whether or not the structure was authorised, that is to say, was in accordance with the sanctioned plan in respect of the suit building. It is very much a question, in which the society is vitally interested. In fact, in similar circumstances, concerning another stilt portion of the same building, a learned Single Judge of this Court, after considering the judgments of both Ramesh Kundanmal and Mohamed Hussain, has taken a view

that the Petitioner Society herein, which was also an applicant for intervention in that other suit, was necessary to be joined as a party defendant to the suit. (See case of Johnson John vs. MCGM, Writ Petition No.1083 of 2018, order dated 23 April 2018).

6. I am also fortified in this view by a judgment of another Single Judge of this Court in the case of Arun R. Singh vs. MCGM³. By his order dated 13 December 2018, passed in that writ petition, the learned Single Judge, relying on the case of Aliji Monoji & Co. vs. Lalji Mavji⁴, has held that the society owning the premises, in which unauthorised construction was made and for which a notice under Section 351 of the MMC Act was issued, was vitally affected and ought to be joined. The learned Single Judge, on that basis, distinguished the judgment in Mohamed Hussain Gulam Ali Shariffi (supra).

7. Accordingly, Rule is made absolute and the petition is allowed by quashing and setting aside the impugned order of the City Civil Court at Dindoshi dated 4 April 2017 and allowing the impleadment application of the Petitioner Society. The City Civil Court is directed to hear the Petitioner Society, and only thereafter, decide the pending notice of motion, being Notice of Motion No.1332 of 2017. The writ petition is disposed of accordingly.

8. This order will be digitally signed by the Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.