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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.15378 OF 2024

Dattatraya Ramchandra Chavan
Age : 72 Years, Occupation : Business,
Senior Citizen, Having address at:-
Flat No.101, 1st Floor, Parle Neel
Gangan Co-operative Housing Society
Limited standing on Plot bearing No.
232 of TPS Scheme No.5, Village Vile
Parle, CTS No.1635 of Feroz Shah Mehta
Road, Vile Parle (East), Mumbai : 400057. ...**Petitioner**

Versus

1. **G. Jaykumar**
Age : Adult, Occupation : Business,
Both residing at : Flat No.3 and 4,
Ground Floor, Parle Neel Gangan
Co-operative Housing Society Limited
standing on Plot bearing No.232 of TPS
Scheme No.5, Village Vile Parle, CTS No.
1635 of Feroz Shah Mehta Road, Vile
Parle (East), Mumbai : 400 057.

2. **Municipal Corporation for Greater
Mumbai** : A statutory Body having its
Office at Mahanagarpalika Marg,
Opp. CTS, Fort, Mumbai : 400 001. ...**Respondents**

Mr.S.N.Chandrachud i/b. Mr.Hemant P. Ghadigaonkar a/w Mr.Hitendra Gandhi:-	Advocates for Petitioner.
Mr.Kunal Bhanage i/b. Mr.Akshay Pawar:-	Advocate for Respondent No.1.

CORAM : S. M. MODAK, J.

DATE : 18th NOVEMBER 2024

ORAL JUDGMENT :-

1. Heard learned Advocate for the Petitioner-Intervenor and learned Advocate for Respondent No.1 / Plaintiff.

2. In a Suit filed by the Plaintiff, there is a challenge to the action of the Municipal Corporation of Greater Mumbai (“MCGM”) for issuing a notice under Section 351 of the Mumbai Municipal Corporation Act, 1888 (“MMC Act”) dated 17th December 2018 and there is a challenge to the Speaking Order dated 23rd February 2020. According to the Plaintiff, they are illegal and issued / passed in an arbitrary exercise of the power. There is also a permanent injunction sought restraining the Corporation from acting upon those actions.

3. During pendency of the Suit, the present Petitioner being a member of Neel Gangan Co-operative Housing Society Limited and an occupant of Flat No.101, filed a Chamber Summons praying for issuing direction to the Plaintiff to join him as a party Defendant. This Chamber Summons was **dismissed** by the Court of City Civil – Borivali Division, Dindoshi, Mumbai as per the order dated 30th July 2024. That is why, the Intervenor has filed this Writ Petition.

4. Though, all the prayers in the Plaint are against the Corporation who is Respondent No.2 in this Petition, complaints / representations filed / made to the Corporation and documents to show type of action taken is filed along with the Writ Petition. **The prayer made in the Chamber Summons is against the Plaintiff only.** That is why, I have taken up this Writ Petition for final disposal at an admission stage even though, the MCGM is not served and appeared before me.

5. The only issue involved in this Petition is, “*whether a member of a Co-operative Society can seek an impleadment in a Suit filed by another member against the Local Authority when the Society is not a party Defendant*”.

6. Learned Advocate Shri.Chandrachud made following submissions:-

- (a) All action taken by the Corporation is at the behest of the complaints made by the present Petitioner and in fact, when the Corporation has not paid heed to his complaint.
- (b) He was compelled to file a Writ Petition before the Division Bench and there is an order dated 9th January 2020 directing the Corporation to hear him and dispose of the representation dated 20th March 2018.
- (c) The trial Court while dismissing the Chamber Summons has wrongly made observation about the merits of the claim of the Petitioner and he ought to have reserved it.

7. Learned Advocate for Respondent No.1 / Plaintiff supported the order and opposed for any interference in a Writ jurisdiction. He made following submissions:-

- (a) The contents of Affidavit in support of Chamber Summons nowhere show how the Petitioner is going to be affected by the alleged construction and dispute involved in the Suit.
- (b) The Affidavit nowhere avers about joining hands by the Plaintiff with the Society and that is why, the Society is not coming forward to oppose the Plaintiff's claim.
- (c) The averments in the Chamber Summons do not satisfy either of the tests laid down in Order I, Rule 10(2) of the Code of Civil Procedure, 1908 ("**CPC**"). He cannot be said as a proper or necessary party.
- (d) To buttress his submission, he relied upon the observations by a Division Bench of this Court in case of ***Ashok Babulal Avasthi V/s. Munna Nizamuddin Khan and Another***¹ and more specifically, the observations in paragraph No.36.
- (e) Even if the nature of alleged violations complained by the Petitioner and depicted in the show cause notice and Speaking Order are considered, it cannot be said that the Petitioner is really affected by those alleged constructions considering its nature.

Consideration

8. It is important to note that the flats occupied by the Plaintiff and

¹ 2023 SCC OnLine Bom 2559

flat occupied by the Petitioner are situated in a building owned by the Society. The flats of the Plaintiff are situated on the ground floor whereas, that of the Petitioner is on the first floor. If, the nature of complaint of an illegal construction is considered, it deals with:-

- (a) An amalgamation of two flats done by the Plaintiff without permission.
- (b) Construction of Opla outside the flats of the Plaintiff in common passage.
- (c) An encroachment in Office premises of the Society.

9. There are complaints filed by the Intervenor to the Corporation Authorities for taking action for these acts against the Plaintiff. It is a matter of record that the Division Bench directed the Corporation to decide the representation after hearing the concerned parties. That order is dated 9th January 2020. Whereas, the show cause notice issued is dated 17th December 2018. (Page No.55). The Speaking Order is passed on 23rd February 2020. (Page No.65). This Court is not expected to make any comment about the merits of the alleged unauthorised construction and validity of issuing notice and passing Speaking Order. **The only issue is about the *locus standi* of the Petitioner.** The Society has neither appeared before the trial Court nor they are before this Court. This Court is not aware why the Society has

not appeared before any Court. On the set of these facts, the claim of the Petitioner needs to be decided.

10. It is true, Order I, Rule 10(2) of CPC gives guidelines as to how a person can be added as a party. There are two tests. They are:-

- (a) Name of the person who ought to have been joined either Plaintiff or Defendant. So to say, without joining him as a party, no relief can be granted. In this case, the Corporation is a proper party because against him, relief is sought by the Plaintiff.
- (b) A party whose presence before the Court is necessary and the test is for deciding the issues involved effectually and completely.

11. I have read the observations in case of ***Ashok Babulal Avasthi*** (cited supra). This was a judgment on a reference because earlier, there were two different views expressed by two learned Judges of this Court. The Division Bench has answered the reference by observing:-

“Landlord or owner of the property is a proper party when there is an action taken restraining the Local Authority from taking action of demolition”.

It is true, in Para No.36, the Division Bench has elaborated, how the landlord is a proper party. The reasoning is ultimately the landlord is the owner of the property and any decision taken by the Court about this property is going to affect the said landlord.

12. No doubt, the relationship in between the landlord and tenant on one hand and the relationship in between a member of the Society and the Society on the other hand, stand on different footing. If, the scheme of the provisions of the Maharashtra Co-operative Societies Act, 1960 (“**MCS Act**”) are perused, the Society is the owner of the entire building and land (subject to conveyance) and person who is a member of the Society is having a right to possess the flat / shop. Now, in this case, no doubt the amalgamation of two flats is an issue which has taken place inside the flat. Other two grievances pertain to construction of Ota in common passage and an encroachment to the Office premises.

13. The trial Court in Para No.12 observed:-

“The Intervenor has not submitted any document against the Plaintiff to show how he is affected due to alleged unauthorised construction of the Plaintiff except words”.

When the Affidavit in support of Chamber Summons is perused, in Para No.21 (Page No.78), the Intervenor has pleaded:-

“Unauthorized structure is adversely affecting the rights of the Applicant as he encroached the society property which is common benefit of the all the members of the society including the Applicant and the same is highly prejudice and causing mental agony to me”.

14. If, there are allegations against the member of constructing Ota in common passage and encroaching the Office premises, no doubt, other member is having every right to make a grievance if his rights as a member are affected. Even though, the Society is not coming forward, it cannot be said that an individual member has to appear before the Court through the Society only. Being a member, he is also having an individual right to make use of common passage and the Office also.

15. If, considered from that perspective, the Petitioner's presence before the trial Court is necessary. Ultimately, the trial Court after evidence, will be deciding whether the notice is as per the law or not. For that purpose, the trial Court is going to hear the Plaintiff and the Corporation. When the Corporation has taken an action at the behest of the Petitioner, certainly his presence before the Court in adjudicating the dispute effectively as well as completely is necessary.

16. The trial Court was wrong in observing that the Petitioner has failed to produce any document which will show how harm is going to cause. **The trial Court has mixed up two issues.** First one, the entitlement of a person to be joined as a party and second, the merits of his contention at the time of deciding the Application. The Court has

only to consider *prima facie* whether he is a proper or necessary party or altogether stranger. In this case, the Petitioner cannot be considered as a stranger. The Petitioner may succeed or may not succeed in assisting the Court to arrive at a proper conclusion that is the question of merit which can be gone into only when the parties will adduce the evidence.

17. Prayer clause (a) of the Chamber Summons reads thus:-

“That the Applicant be joined as a Defendant in the present suit by directing the Plaintiff to carry out necessary amendment in the Plaint in the interest of justice and kindness.”

18. I am inclined to allow the Petition. Hence, following order is passed:-

ORDER

- (i) The Writ Petition is allowed.
- (ii) The order dated 30th July 2024 passed by the Judge, City Civil Court, Borivali Division, Dindoshi, Mumbai on Chamber Summons No.448 of 2020 is set aside.
- (iii) The Chamber Summons is allowed in terms of prayer clause (a).
- (iv) The Respondent No.1-Plaintiff is directed to join the Petitioner as Defendant No.2 by carrying out necessary amendment within six (6) weeks from today. The

Petitioner-Respondent No.2 is permitted to file Written Statement once the amendment is carried out.

- (v) The Respondent No.1 is directed to inform the Petitioner about carrying out the amendment and no fresh summons will be issued.
- (vi) Even, the Respondent No.1, if he desires, is at liberty to carry out an amendment in the Plaint in view of this development. If, he wants, he can exercise this liberty within eight (8) weeks from today.
- (vii) If, Chamber Summons is moved, trial Court to allow it only on verifying that amendment pertains only to the averments of allowing impleadment of the Petitioner.

19. In view of the above, **Writ Petition stands disposed of.**

[S. M. MODAK, J.]