

HIGH COURT OF BOMBAY
Bench: Nitin Jamdar and Amit Borkar, JJ.
Date of Decision: 29 November 2023

WRIT PETITION NO. 6933 OF 2022

Ashok Babulal Avasthi**Petitioner**

Versus

Munna Nizamuddin Khan and Others**Respondents**

Legislation:

Order I Rule 10(2) of the Code of Civil Procedure, 1908 (C.P.C.)

Section 351, 354A of the Bombay Municipal Corporation Act, 1888

Section 22 of the Indian Limitation Act, 1877 (XV of 1877),

Subject: legal question: In a suit filed by the occupant or tenant for protection of a structure against demolition by the Authorities, whether the owner or the landlord is a necessary or proper party, and whether the court has the power under Order I Rule 10(2) of the Code of Civil Procedure, 1908, on application or suo moto, to join the landlord/owner as a party to such a suit.

Headnotes :

Writ Petition – Joining of Landlord as a Party in Tenant's Suit Against Corporation for Demolition Action – Examination of the necessity and propriety of landlord's inclusion in tenant's suit for protection against demolition. [Para 1, 28]

Civil Procedure – Impleadment of Parties under Order I Rule 10(2) of CPC – Power of court to join a party as necessary for effective adjudication of the suit – Analysis of the judicial discretion involved in the inclusion of landlords in tenant's litigation against municipal demolition. [Para 6, 7, 28]

Supreme Court Precedents – Interpretation of Aliji Momonji & Co. v. Lalji Mavji and Mohamed Hussain Gulam Ali Shariffi v. Municipal Corporation of Greater Bombay – Assessment of the Supreme Court's stance on the participation of landlords in suits initiated by tenants or licensees against municipal corporations. [Para 16, 17, 23]

Judicial Discretion – Consistent Exercise in Adding Landlord as Proper Party in Tenant's Suits – Recognition of landlord's direct interest in property subject to demolition notice and the rationale for their inclusion as proper parties in relevant lawsuits. [Para 28, 30]

Legal Principle – Landlord as a Proper Party in Tenant's Suit Against Demolition – Affirmation that landlords can be joined as proper parties in tenant-initiated suits against municipal demolition actions, based on their direct interest in the property and potential impact on their rights. [Para 32]

Decision – Resolution of Divergent Views Amongst Single Judges of High Court – Clarification of legal position regarding the inclusion of landlords in tenant's suits against municipal corporations, aligning with Supreme Court precedents. [Para 31, 33]

Referred Cases:

- M/s. Aliji Momonji & Co. V. Lalji Mavji – [1996] 5 SCC 379
- Mohamed Hussain Gulam Ali Shariffi v. Municipal Corporation of Greater Bombay – [2017] 6 ALL M.R. 420 (S.C.)
- Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay – [1992] 2 SCC 524
- Deju Somaya Salian v. The Municipal Corporation of Greater Mumbai – [2018] SCC OnLine Bom 14834
- Nimesh J. Patel v. Municipal Corporation of Greater Mumbai – [2021] SCC OnLine Bom 6588
- Razia Begum v. Sahebzadi Anwar Begum and Others – [1958] SCR 1111

Representing Advocates:

- For the Petitioner: Mr. Pradeep Thorat with Ms. Aditi Naikare and Mr. Aniesh Jadhav
- For Respondent No.1: Mr. Datta Mane with Mr. Maruti Sarkar and Mr. Sushil Shinde
- For Respondent No.2 – Municipal Corporation: Mr. R.Y. Sirsikar

JUDGMENT :(Per Nitin Jamdar, J.)

In a suit filed by the Respondent- Licensee against the Municipal Corporation to restrain it from demolishing the Property, the Petitioner- Owner of the suit property, the Landlord, sought to implead himself as a party defendant. The trial court rejected the application. Being aggrieved, the Owner filed this writ petition. The learned Single Judge opined that there is a divergence of views taken by the single judges of this Court as to whether

the owner of the premises is a necessary or a proper party in such proceedings and referred the matter for consideration by the learned Chief Justice for the constitution of a larger bench to resolve the conflict.

Accordingly, the Reference is placed before us.

2. To understand the context in which the question came to be referred to the larger bench, a few basic facts of this case need to be noted. The suit property, measuring approximately 1200 sq.ft., is on the ground floor of Awasthi Estate, situated on Bal Bhat Road, Goregaon (East), Mumbai. The Respondent No.1 is on the premises as a Licensee. According to Respondent No.1, the officers of Respondent No.2- Municipal Corporation threatened to remove the structure, failing which the Municipal Corporation would demolish it. Respondent No.1 filed L.C.Suit No.3439/2013 in City Civil Court, Dindoshi, Mumbai, against Respondent No.2, the original Defendant - the Municipal Corporation of Greater Mumbai with a prayer for injunction that the Corporation be restrained from demolishing the suit property/ premises or any part thereof without due process of law. The Petitioner filed Chamber Summons No.1115/2015, contending that the suit was filed behind his back regarding a plot of land of which the Petitioner is the owner and that the Petitioner should be joined as a party. This chamber summons was rejected by the City Civil Court by order dated 12 April 2022. The City Civil Court observed that though the Petitioner is the landlord of the property, the property is in possession of Respondent No.1- the original Plaintiff and the dispute between the Petitioner and Respondent No.1 was not the subject matter of the suit, and the relief prayed for could be decided in the absence of the Petitionerlandlord and he was not a necessary party. Challenging this order, the Petitioner filed the present petition.
3. During the hearing before the learned Single Judge (S .V. Kotval J), the Petitioner relied upon the decision of the Hon'ble Supreme Court in the case of M/s.Aliji Momonji & Co. v. Lalji Mavji¹. Petitioner also relied on the order by this Court in the case of Nimesh J. Patel v. Municipal Corporation of Greater Mumbai² which was passed following the decision of the Supreme Court in the case of M/s.Aliji Momonji & Co. and the other Supreme Court decision in the case of Mohamed Hussain Gulam Ali

¹

1996 (5) SCC 379

Shariffi v. Municipal Corporation of Greater Bombay³. According to the Petitioner, these decisions supported the contention of the Petitioner that the landlord should have been joined even though relief was sought by Respondent No.1- Plaintiff against Respondent No.2Municipal Corporation. The learned Counsel for the Petitioner fairly brought to the notice of the learned Single Judge the decision of the learned Single Judge of this Court in the case of Deju Somaya Salian v. The Municipal Corporation of Greater Mumbai⁴ taking a different view than the view taken by Nimesh Patel. In the case of Deju Salian, the learned Single Judge, after referring to the Supreme Court decisions in the cases of Aliji Momonji and Mohamed Hussain Shariffi, concluded that he was bound by Mohamed Hussain Shariffi and because the Plaintiff, being a dominus litis cannot be forced to join any party to his suit unless the legal position requires so.

4. After considering the submissions, The learned Single Judge (S .V. Kotval J) opined as under:

8. Thus, the learned Single Judge in the case of Deju Salian (supra) has expressed a contrary view to the one expressed by

² 2021 SCC OnLine Bom 6588

³ 2020 (14) SCC 392

⁴ 2018 SCC OnLine Bom 14834

another Single Judge in Nimesh Patel's case (supra). In Nimesh Patel's case (supra), this particular order passed in Deju Salian (supra) was not pointed out. Thus, it is quite apparent that there are two conflicting views expressed by two Single Judges of this Court referring to the two same Supreme Court

Judgments in Ali Momonji (supra) and Mohamed Hussain Gulam Ali Shariffi (supra). To resolve this apparent conflict, it is necessary to refer this issue to a Larger Bench.

9. Learned Counsel for the Respondents submitted that necessary orders be passed in this case.

10. In this case, it is necessary to refer this issue to a Larger Bench. For that purpose, I am relying on the provisions of Rule 8 of Chapter I of the Bombay High Court Appellate Side Rules, 1960. The issue for reference is formulated as follows;

“Whether in a suit filed by the occupant or tenant for protection of a structure against demolition by the Authorities, whether the owner or the landlord is a necessary party?”

The learned counsel for the parties jointly states that the issue as framed does fully reflect the controversy, and it needs to be clarified/ modified. The learned counsel states that the issue in the broader sense not only pertains to the question of whether the owner or the landlord is a necessary party, but it also pertains to the power of the court under Order 1 Rule 10(2) of the Code of Civil Procedure, 1908 on application or sou moto to join a landlord or owner as a party to such a suit based on such person being a proper party. The counsel jointly requested that the word "proper" be added to the question framed and the issue be resolved as stated above so that there is certainty on this legal aspect. Therefore, at the joint request of the counsel, we proceed to reframe the question to bring the legal controversy into sharper focus. The question reframed is as follows.

“In a suit filed by the occupant or tenant for protection of a structure against the action of demolition by the Authorities, whether the owner or the landlord is a necessary or proper party and whether the court has power under Order I Rule 10(2) of the Code of Civil Procedure, on application or sou moto to join the landlord/owner as a party to such a suit ?”

The learned counsel agree that this is the question on which divergence is noted in the impugned order.

5. This question postulates a fact situation where a landlord/owner seeks impleadment in a suit filed by the occupier/ tenant/licensee seeking to restrain the local authority from demolishing the property on grounds specified in the governing statute. For convenience, we have referred to this contingency as the - tenant's suit or such suit. The landlord/owner as - the landlord. Occupier/ tenant/licensee as - the tenant. The local authority is the Corporation. The proposed action or notice as demolition action and demolition notice.
6. Order I of the Code of Civil Procedure, 1908, deals with the parties of a civil suit. Rule 1 thereof states who may be joined as plaintiff to the suit. Rule 2 deals with the powers of the Court to order separate trials. Rule 3 deals with who may be joined as defendants in the suit. Rule 3A empowers the Court to order separate trials. Rule 4 empowers the Court to order for or against the parties. Rule 5 states that the defendant need not be interested in all the reliefs claimed. Rules 6 and 7 deal with the joinder of parties on the same contract and when the plaintiff is in doubt from whom redress is to be sought.

Rules 8 and 9 contemplate the situation where numerous persons have the same cause in the suit and the procedure to be adopted. Under Rule 8A, the Court has the power to permit a person or a body of persons to present an opinion or to take part in the proceeding. Rule 9 deals with misjoinder and nonjoinder of parties.

7. Rule 10 of Order I of the Code of Civil Procedure, 1908 (C.P.C.), more particularly sub-rule (2) thereof, is of relevance for the matter at hand, which reads thus:

Rule 10. Suit in name of wrong plaintiff.

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.--The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.-Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant

(5) Subject to the provisions of the ¹ [Indian Limitation Act, 1877 (XV of 1877)], section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.

(Emphasis supplied)

Thus, under Order 1, Rule 10 (2) of C.P.C., the Court has the power to add or remove any party whose presence in the opinion of the Court may be necessary in order to enable the Court effectually and completely to

adjudicate upon and settle all the questions involved in the suit. The power under Rule 10(2) can be exercised by the Court *sou motu* or by a party to the suit or on application by the third party who seeks to join as a party to the suit. Under this Rule, the Court has to form an opinion and, thus, use its discretion, which has to be done judicially.

8. The basic principle is that a plaintiff, as the *dominus litis*, cannot be compelled to join someone not involved in the claim. However, this is not an absolute principle, as there is the concept of a 'necessary party' whose absence would prevent an effective decree. Also, a 'proper party' is one whose presence aids the court in fully adjudicating the dispute. Order I Rule 10(2) of CPC grants the court discretion to include or exclude parties during proceedings. This facet is not to do with the right of the parties but the power of the court.

9. The ambit of the power of the Court under Rule 10(2) of Order I of C.P.C. arose for consideration by the Hon'ble Supreme Court in the case of *Razia Begum v. Sahebzadi Anwar Begum*². In this case, Razia Begum filed a suit seeking a declaration as the legal wife of respondent No.3, the Prince, and claimed *Kharch-e-pandan* from him. Respondent No.3 admitted the marriage, acknowledged plaintiff- Razia Begum's entitlement to what she claimed, and admitted to having three children from the marriage. Respondent No.1 therein, Sahebzadi Anwar Begum, the legally wedded wife of respondent No.3, along with her son, applied to be added as defendants in the suit under Order I Rule 10(2), denying Razia Begum's marriage to respondent No.3. The trial court allowed the application, stating that Sahebzadi and her son should be added as defendants. Razia Begum challenged this in a revision before the High Court, which upheld the trial court's decision. Dissatisfied,

²

AIR 1958 SC 886

Razia Begum appealed to the Supreme Court, arguing that the trial court lacked jurisdiction to add Sahebzadi and her son as defendants. The contention was that Sahebzadi and her son's presence was not necessary to fully adjudicate the suit, they had no interest in the estate, and their claim of potential succession to the estate did not grant them the right to intervene. The Supreme Court dealt with the power under Order I Rule 10(2) of C.P.C to join a party as a defendant when the Court is satisfied that such a party ought to be joined to a suit. After considering the law on the subject, the Supreme Court noted that adding parties under Rule 10 of Order 1 of C.P.C. is a matter of judicial discretion, not of initial jurisdiction. This discretion hinges on the specific circumstances of each case. There could be debate over the court's power distinct from its inherent jurisdiction or the limited sense in which the term is used in Section 115 of C.P.C.

10. Thus, the addition of the party under Order I Rule 10(2) is generally a question, not one of the initial jurisdiction of the court but of judicial discretion, which is to be exercised given the facts and circumstances of a particular case. The situation contemplated under Order I Rule 10(2) of C.P.C. can arise in various circumstances, and the question of whether a party is a proper party would differ. In this Reference, we are concerned with the factual situation referred to earlier.
11. As our survey of past decisions of this Court would indicate, the Court (as approved by the Supreme Court) has consistently exercised judicial discretion under Order I Rule 10(2) of the C.P.C., joining the landlord as party defendant upon an application in the tenant's suit questioning the notice or action of the Corporation for demolition.
12. The first such opinion can be found in 1966 in Application No.938/1964, decided on June 30, 1966, by Y.V. Chandrachud, J (as his lordship then was). Later, G.N.Vaidya, J, in Civil Revision Application No.901/1968, considered the challenge of the plaintiff, who had filed the suit against the municipal corporation, to the order of the trial court by which a co-operative housing society, on its application, was joined as defendant. The plaintiff contended that the court had no jurisdiction to pass such orders as the plaintiff had no dispute with the society and that if the society had any cause of action, it should file its independent suit. Vaidya, J negated the contention of the plaintiff, holding that under Order I Rule 10(2), the court is empowered to join any party as a defendant if the court is satisfied that such party has to

be joined as a party to the suit. Vaidya, J, relied on the decision of the Hon'ble Supreme Court in the case of Razia Begum, holding that the issue was not of initial jurisdiction but of judicial discretion and found that the Society was interested in denying the claim of the plaintiff regarding premises, and the trial Court had rightly exercised the discretion that the Society should be joined as respondent. One more matter, in Appeal No.587/1981, learned that the Single Judge of this Court (Rege J.) allowed the appeal by order dated 17 January 1969 and directed that the landlord should be made a party respondent in the suit filed by a tenant.

13. In 1984, the learned Single Judge (B.A. Masodkar, J) rendered a detailed opinion on the subject in the case of Kantaben W/o. Chandulal Kalidas v. Parsi Dairy Farms³. In this case, the Bombay Municipal Corporation had issued a notice under section 351 of the Act of 1988 concerning a shade put up on the rear side of the building in the plaintiff's occupation. The plaintiff held the premises as lessee. The suit was filed to question the notice. Kantaben, being the landlady of the premises of which the plaintiff was a tenant, applied for impleadment in the suit by taking out a chamber summons. The chamber summons was dismissed, and a revision was filed in this Court, which came up for consideration before the learned Single Judge. Kantaben argued that there was ample power in the court to permit such a joinder when the property was vested in her by reason of title. As regards this, the plaintiff contended that such a joinder could not be directed as the presence of the landlady was neither necessary nor expedient to such an injunction suit, and the cause was only between the plaintiff and the Corporation. Masodkar, J, by detailed reasoning, allowed the revision and directed joinder. Masodkar, J observed that though a joinder is ordinarily against the will of the plaintiff if it is necessary for the interest of justice, the same can nonetheless be directed as the owner would have a direct interest in the property and the Corporation employees would enter upon the property. Masodkar, J noted that the earlier judgments of this Court concerning the relief of injunction against the Municipal Corporation had indicated this course.
14. The orders passed by this Court show a consistent view since 1966 that in the case of a suit for injunction against the Municipal Corporation by a tenant

³ 1985 (2) Bom CR 353

against the action of demolition if the landlord and or owner applies for impleadment, such application should be granted based on being a proper party.

15. In the case of Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay⁴, the Hon'ble Supreme Court had an occasion to consider the ambit of Order I Rule 10(2) in respect of a case that arose from this Court. In this case, the occupier filed a suit against the Municipal Corporation to restrain it from demolishing the structure. The Municipal Corporation of Greater Bombay issued a notice under section 351 of the Bombay Municipal Corporation Act, 1888, to one Kundanmal for the demolition of two chattels on the terrace of the premises on the ground that were unauthorized structures. Kundanmal filed a suit in the City Civil Court, Mumbai, challenging the validity of the notice and for an injunction to restrain the Corporation from demolishing the property. The Civil Court granted an interim injunction in favour of Kundanmal. Hindustan Petroleum Corporation made an application to be joined as a defendant in the suit on the grounds that it had material to show that the structures were unauthorized and that Hindustan Petroleum was a necessary party to the suit. The Civil Court allowed the application, taking the view that Hindustan Petroleum had the right, title and interest in the suit and was a proper and necessary party. Kundanmal challenged this order in this Court by way of a writ petition. The writ petition was dismissed. Kundanmal approached the Hon'ble Supreme Court. The Supreme Court posed itself a question as to whether Hindustan Petroleum was a necessary or proper party to be joined under Order I Rule 10 of C.P.C. in a suit filed by Kundanmal against the Municipal Corporation. The Hon'ble Supreme Court observed the construction of the phrase "whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the suit" is crucial. It was held that the court is empowered to join a person whose presence is necessary for the prescribed purpose and cannot, under the rule, direct the addition of a person whose presence is not necessary for that purpose. The Supreme Court, on facts, found that the notice did not relate to the structure but to chattels, which were movable on wheels and plates where servicing or repairs were to be done and were used by Kundanmal for storing implements. It was

⁴ (1992) 2 SCC 524

found that Hindustan Petroleum had no interest in these movables. Thus, on facts, the orders passed by the City Civil Court and the High Court were quashed. The view taken in law was the same as in Razia Begum.

16. Now, we turn to the decision referred to in the order of reference: the decision of the Supreme Court in *Aliji Momonji*. In brief, the facts of this case were that in the year 1990, M/s. Ali Momonji and Company filed a suit for perpetual injunction against the Municipal Corporation of Bombay to restrain it from demolishing a portion of a building. The Municipal Corporation had issued a notice under section 351 of the Municipal Corporation Act for demolition on the ground that Ali Momonji had made an unauthorized structure. The contesting respondents sought to implead themselves by filing a notice of motion containing that they had a direct interest in the property. The motion was allowed by the trial court. The High Court confirmed the order. Thereupon, Ali Momonji moved to the Hon'ble Supreme Court. On behalf of Ali Momonji, it was argued that the contesting respondents had only commercial interest and had nothing to do with the suit. A question as to whether the landlord is a necessary or proper party was raised, and it was contended that the High Court had not correctly considered the decision in the case of *Ramesh Kundanmal*. The Supreme Court opined that the decision in the case of *Ramesh Kundanmal* would not apply to the facts of the case before it. On the question regarding the landlord being a necessary and proper party, the Hon'ble Supreme Court observed thus:

“5. The controversy is no longer res integra. It is settled law by catena of decisions of this Court that where the presence of the respondent is necessary for complete and effectual adjudication of the dispute, though no relief is sought, he is a proper party. The necessary party is one without whose presence no effective and complete adjudication of the dispute could be made and no relief granted. The question is whether the landlord is a necessary or proper party to the suit for perpetual injunction against the Municipal Corporation for demolishing the demised building? The landlord has a direct and substantial interest in the demised building before the demolition of which notice under Section 351 was issued. In the event of its demolition, his rights would materially be affected. His right, title and interest in the property demised to the tenant or licensee would be in jeopardy. It may be that the construction sought to be demolished by the Municipal Corporation was made with or without the consent of the landlord or the lessor. But the demolition would undoubtedly materially affect the right, title and interest in the property of the landlord. Under those circumstances, the landlord necessarily is a

proper party, though the relief is sought against the Municipal Corporation for perpetual injunction restraining the Municipal Corporation from demolition of the building. Under those circumstances, the question of the commercial interest would not arise. In Ramesh Hirachand Kundanmal case [(1992) 2 SCC 524] this Court had pointed out in para 18 of the judgment that the notice did not relate to the structure but to two chattels. The original lessee from the landlord had no direct interest in that property. Under these circumstances, it was held that the second respondent has no direct interest in the subject-matter of the litigation and the addition thereof would result in causing serious prejudice to the appellant and the substitution or the addition of a new cause of action would only widen the issue which was required to be adjudicated and settled. It is true, as pointed out by Shri Nariman that in para 14, this Court in that case had pointed out that 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 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 not necessary for the purpose of this case to go into the wider question whether witness can be a proper and necessary party when the witness has a commercial interest. This Court in New Redbank Tea Co. (P) Ltd. v. Kumkum Mittal [(1994) 1 SCC 402] has pointed out that Respondent 11 who filed a suit for specific performance in the High Court was sought to come on record in the suit in which he had no direct interest in the pending matter. Under those circumstances, this Court had held that Respondent 11 was neither necessary nor proper party in the leasehold interest involved in the suit. In Union of India v. Distt. Judge [(1994) 4 SCC 737] the Union of India who ultimately had to bear the burden of payment of the compensation was held to be a necessary party under Order 1 Rule 10 CPC for determination of the compensation in respect of the acquired land. In Bihar SEB v. State of Bihar [1994 Supp (3) SCC 743] the same question was also reiterated and it was held that the Electricity Board was a person interested and also a necessary party. In Anil Kumar Singh v. Shivnath Mishra [(1995) 3 SCC 147] similar question was answered holding that the respondent was a necessary party.

6. In view of the finding that in the event of building being demolished, right, title and interest of the landlord would directly be affected, the landlord would be a proper party, though no relief has been sought for against the landlord. The High Court, therefore, was right in refusing to interfere with the order passed by the trial court impleading the landlords.”

(emphasis supplied)

Therefore, the Supreme Court observed that if the building is demolished, the right, title and interest of the landlord would be directly affected, and the landlord would be a proper party, though no relief is directly sought against

him. This decision in Aliji Momonji was followed in several cases by the learned Single Judges of this Court.

17. The next decision, which is of importance, is the case of Mohamed Hussain Shariffi, which came up for consideration of the Hon'ble Supreme Court in the year 2016. The facts in this case need to be noted. Mohamed Hussain Shariffi was the plaintiff, and he had filed suit against the Municipal Corporation of Greater Bombay. Respondent Nos.2 and 3 therein sought to be added in the suit filed by Mohamed Hussain Shariffi against the Municipal Corporation. They had filed a suit for specific performance on the basis of an agreement for ownership, which was pending. In the suit, Mohamed Hussain Shariffi challenged the notice of the Municipal Corporation issued under section 351 of the Mumbai Municipal Corporation Act. The main grievance was that the plaintiff had made an unauthorized construction. First, Mohamed Hussain Shariffi directly filed a writ petition, which was withdrawn to file a civil suit. In the civil suit, respondents Nos.2 and 3 therein filed a chamber summons alleging that they had an interest in the suit property as they claimed to have ownership rights and in another civil suit, they had sought specific performance in respect of the suit house, and the same was pending. Based on this claim, they sought to join themselves as necessary and proper parties for adjudication. Mohamed Hussain Shariffi opposed the application on the grounds that they were not necessary and proper parties. By order dated 9 December 2016, the Hon'ble Supreme Court disposed of the appeal, observing as follows:

“12. In our considered opinion, having regard to the nature of the controversy, which is the subject-matter of the suit, Respondents 2 and 3 are neither necessary nor proper parties. As would be clear from mere perusal of the plaint, the basic question, which is required to be decided in the suit, is whether notice issued under Section 351 of the Act by Respondent 1 (Corporation) to the appellant is legally valid or not [see Prayer (a) in the plaint — p. 251 of Vol. II of SLP paper book].

13. 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 1, who has issued such notice, and for deciding this question either way, the presence of Respondents 2 and 3 is not at all required. In other words, the suit can be decided even in the absence of Respondents 2 and 3.

14. It is a settled principle of law, which does not need any authority to support the principle, that the plaintiff being a dominus litis cannot be forced to add any person as party to his suit unless it is held keeping in view the pleadings 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 is only then such a 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 the case here.

15. We do not find that the presence of Respondents 2 and 3 in the facts of this case is required for deciding the legality of notice impugned in the suit on merits because the dispute centres around the question of legality and validity of the notice which, as mentioned above, arises between Respondent 1, who has issued the notice, and the person to whom it is given i.e. appellant.”

As is elaborated later, this order does not refer to the decision in Aliji Momonji, and the factual position was that respondent Nos.2 and 3, seeking impleadment, were not owners of the premises, and their suit for specific performance was pending.

18. Later, a learned Single Judge of this Court (A.S.Chandurkar, J.) considered the challenge to impleadment of owners to a suit filed by the tenants against the Nagpur Municipal Corporation. The learned Single Judge referred to the decision in the case of Mohamed Hussain Shariffi and observed that the landlord's presence is not necessary in a suit filed by the tenant. However, this order did not refer to the decision in the case of Aliji Momonji.

19. Two decisions that considered both the decisions of Aliji Momonji and Mohamed Hussain Shariffi and led to the Reference were in Deju Salian, by the learned Single Judge (R.D.Dhanuka, J.) and Nimesh Patel by the learned Single Judge (Bharati Dangre, J.) In Deju Salian, Dhanuka J followed Mohamed Hussain Shariffi and disallowed the landlord's impleadment. Dangre, J referred to Aliji Momonji and Mohamed Hussain Shariffi and held that Mohamed Hussain Shariffi has not deviated from the law laid down in Aliji Momonji and followed Aliji Momonji and allowed impleadment. Thus, the learned single judge (Kotwal J.), having found a difference of opinions between the learned single judges in Deju Salian and Nimesh Patel, referred the question to the larger bench.

20. In Deju Salian, the petitioner therein, claiming to be a tenant, had challenged the notice issued by the Municipal Corporation under section 354A

of the Act of 1888. Respondent No.3 therein had sought impleadment on the ground that he is one of the co-owners and relied upon the decision of the Supreme Court in Aliji Momonji. The petitioner therein relied upon the decision in the case of Mohamed Hussain Shariffi. Deju Salian is the first case where both the decisions, Aliji Momonji and Mohamed Hussain Shariffi, were placed for consideration of the learned Single Judge.

The learned Single Judge observed and held thus:

"3. Learned Counsel for the respondent no. 3 placed reliance on the judgment of Supreme Court in case of Aliji Momonji & Co. v. Lalji Mavji, (1996) 5 SCC 379 in support of the submission that in a suit impugning the notice under section 351 of the Mumbai Municipal Corporation Act, the landlord would be a necessary party. Learned Counsel for the petitioner on the other hand placed reliance on the latest judgment of Supreme Court in case of Mohamed Hussain Gulam Ali Shariffi v. Municipal Corporation of Greater Bombay, 2017 (6) ALL M.R. 420 (S.C.) in support of the submission that in the plaint impugning the notice issued by the Municipal Corporation under section 351 of the Mumbai Municipal Corporation Act, a party who claims ownership in respect of the suit property is not a necessary party.

4. The respondent no. 3 has already filed a separate suit for seeking partition of the property, including the suit property herein. In the later judgment of the Hon'ble Supreme Court in case of Mohamed Hussain Gulam Ali Shariffi (supra) it is held that the plaintiff being a dominus litis cannot be forced to add any person as party to his suit unless it is held keeping in view the pleadings 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 be proceeded with and nor the relief can be granted. It is only then such person can be allowed to become party, else the suit will have to be dismissed for nonimpleadment of such necessary party.

5. It is not the case of the petitioner (original plaintiff) in the plaint that the respondent no. 3 is neither a landlord nor the actual occupant of the suit property. The reliefs claimed in the suit filed by the petitioner is only for challenging the validity of the notice issued by the respondent no. 1 under section 354A of the Mumbai Municipal Corporation Act. I am respectfully bound by the later judgment of the Supreme Court in case of Mohamed Hussain Gulam Ali Shariffi (supra). The impugned order passed by the learned trial judge is contrary to the principles of law laid down by the Supreme Court in case of Mohamed Hussain Gulam Ali Shariffi (supra) and thus deserves to be set aside. I, therefore, pass the following order:

6. Impugned order dated 6th June, 2018 passed by the learned trial judge in Chamber Summons No. 1370 of 2017 is quashed and set aside. Chamber Summons No. 1370 of 2017 is dismissed. The writ petition is allowed in the aforesaid terms. There shall be no order as to costs."

The order in Deju Salian is primarily based on the principle of following the law laid down in the latter decision of the Supreme Court on the subject matter.

21. In Nimesh Patel, the issue was whether the landlord was a necessary or proper party in a suit against the Municipal Corporation against the demolition of the premises. Learned Single Judge noted the decisions of the Hon'ble Supreme Court in the cases of Aliji Momonji and Ramesh Kundanmal and also the decisions of the learned Single Judge of this Court in Dunhill Dome Co-op. Hsg. Soc. Ltd. v. Manuel Mergulhao⁸ and Arun R. Singh v. Municipal Corporation of Greater Mumbai⁹ wherein the decisions of the Supreme Court in Aliji Momonji and Mohamed Hussain Shariffi were referred to. Learned Single Judge distinguished the decision in the case of Mohamed Hussain Shariffi and allowed impleadment.

22. In Aliji Momonji, the Hon'ble Supreme Court held that the principle of dominus litis can be deviated from by exercising power under Order I Rule 10(2) of C.P.C. since the court has the power to add a party. The Supreme Court held with reference to Order I Rule 10(2) that in the event the building is being demolished, the landlord would be directly affected, and the landlord would be a proper party, though no relief is sought against the landlord. In the case of Aliji Momonji, the facts and circumstances were simple, and the dicta of the Supreme Court is clear. The question that arose in Aliji Momonji is whether power under Order I Rule 10(2) of C.P.C. can be exercised to implead the landlord as

⁸ 2020 SCC OnLine Bom 10596

⁹ 2018 SCC OnLine Bom 20349

party respondent in a suit filed by an occupier/ tenant to restrain the Municipal Corporation from taking action against the property which is owned by the landlord/ owner. The Supreme Court in Aliji Momonji held that, if not necessary, the landlord is a proper party and, therefore, refused to interfere in the order directing impleadment of the landlord/ owner. There are no two interpretations of this legal position.

23. The question is whether the view taken in Aliji Momonji is deviated from in Mohamed Hussain Shariffi. A careful analysis of the decision in Mohamed

Hussain Shariffi would show that there is no conflict at all between the two decisions. Firstly, in Mohamed Hussain Shariffi, there is no reference to the decision in the case of Aliji Momonji. In paragraph 14 in Mohamed Hussain Shariffi quoted above, the Hon'ble Supreme Court reiterated the settled position of law that the plaintiff is a dominus litis and cannot be forced to add a party to his suit unless he is a necessary party and without whose presence the suit cannot proceed or no relief can be granted and that only such person can be allowed to become a party. In Mohamed Hussain Shariffi, the same position of law as in

Aliji Momonji was reiterated, and the Supreme Court, on facts, found that respondent Nos.2 and 3 therein were not necessary parties. This was so because those who sought impleadment were not the owners but had filed suit for specific performance, which was pending.

24. In Deju Salian, there is no evaluation of the two decisions. A general legal proposition was extracted from Mohamed Hussain Shariffi, a case with specific facts, and was applied, observing that it was the latter decision. Assuming that there is a conflict between the decisions in Aliji Momonji and Mohamed Hussain Shariffi, the principle relied upon in Deju Salian of following the decision in Mohamed Hussain Shariffi because it is a latter decision is without noticing the decision of the Full Bench of this Court in the case of Kamleshkumar Ishwardas Patel v. Union of India¹⁰ and the decision of the Division Bench of this Court in Mrs.Gaur Pratibha v. State of Maharashtra. The Full Bench in Kamleshkumar considered the law in extenso in respect of the course of action to be adopted by the High Court when confronted with the contrary decisions of the Honorable Supreme Court emanating from the Benches of co-equal strength. The Full Bench observed that when there are contrary decisions of the Supreme Court of the Benches of equal strength, the course to be adopted by the High Court is, firstly, to try to reconcile and to explain those contrary decisions by assuming, as far as possible, that they applied to different sets of circumstances. If the conflict is entirely unavailable, then a careful examination of the decisions needs to be carried out to follow the decision which seems to be more correct, whether such a decision be the latter or the earlier one. The Full Bench opined that no blanket proposition can be laid down either in favour of the earlier or the later decision. The proper

10 1994 Mh.L.J. 1669

course is to follow either the former or the latter in time but must follow that one, which, according to it, is better in point of law. In the case of Mrs. Gaur Pratibha, the Division Bench of this Court followed the decision of the Full Bench in Kamleshkumar Ishwardas Patel. Before the Division Bench, two conflicting decisions of coequal Benches of the Supreme Court were cited on behalf of the State. It was urged that the latter of the two co-equal bench decisions should be followed. The Division Bench reviewed the decisions on dealing with conflicting decisions of co-equal strength. The Division Bench referred to various decisions and also the decision of the Full Bench of this Court in Kamleshkumar. It held that if there is an apparent conflict between two decisions of the coequal strength bench of the Hon'ble Supreme Court, it is not an absolute principle of law that it is the subsequent decision which must be followed. There has to be a detailed inquiry by the High Court faced with two such decisions that are closer to the facts of the case.

25. Thus, as laid down in Kamleshkumar and Mrs Gaur, there cannot be a universal and absolute rule for the High Court, in case of perceived conflict, to follow the latter Supreme Court decision without any further enquiry, but the court is expected to embark upon detailed scrutiny. There is no such scrutiny in Deju Salian. To answer the reference, we do not need to delve deeper into the above position of law as we find that the legal position laid down in Aliji Momonji has not been diluted or varied in the case of Mohamed Hussain Shariffi. Apart from this, the attention of the Bench of two learned Judges of the Hon'ble Supreme Court in Mohamed Hussain Shariffi was not drawn to the earlier decision of the Bench of two learned Judges in Aliji Momonji and also the decision in Mohamed Hussain Shariffi has to be understood in the facts of that case.

26. The distinguishing features in the decision of Mohamed Hussain Shariffi have been noted in Nimesh Patel. The learned Single Judge examined the dicta in Aliji Momonji, Ramesh Kundanmal and Mohamed Hussain Shariffi. Having analyzed all the judgments in Nimesh Patel it is noted that the decision in Ramesh Kundanmal was distinguishable on facts. The learned Single Judge also distinguished the decision in the case of Mohamed Hussain Shariffi by observing that those who had sought impleadment in the suit were

not the owners, and their claim of ownership was a subject matter of a different suit.

27.

Thus, as the learned counsel for the parties rightly pointed out to us, conflict is not in the decisions of the Supreme Court but amongst the Single Judges of the Court as to what the law laid down by the Supreme Court is. It is not necessary to refer to all the orders in the compilation placed before us, which either followed the decision of Mohamed Hussain Shariffi or Aliji Momonji. The phrases "necessary" and "proper" have been interchangeably used in several orders. This also got carried forward in the question form in the reference order, which we have modified. Deju Salian led to several orders adopting the view that under Order 1 Rule 10(2) of the C.P.C., the court cannot add the landlord as a party respondent in a tenant's suit against the Municipal Corporation for demolition. This approach contradicted a series of decisions that preceded it since 1966, exercising discretion in favour of the landlord.

28.

The pivotal issue for consideration is not whether a landlord is a necessary party in a tenant's suit against the corporation from demolishing the property, treating the landlord a suit, but whether the trial court is empowered to direct impleadment of the landlord under Order I Rule 10(2) of C.P.C as a proper party. This distinction must be borne in mind. It is clear, and it is not even argued by the counsel for the Petitioners, that if the landlord is not joined in such a suit by the tenant at the inception, the suit must be dismissed for non-joinder of the necessary party. Also, in such circumstances, the defendant Corporation may not be able to argue that the suit is bad for the non-joinder of the necessary party simply because the landlord is not joined as a necessary party, even if the landlord does not intend to. The question arises when the landlord applies to become a party to such a suit and the power under Order I Rule 10(2) of C.P.C is invoked. Order 1 Rule 10(2) of the CPC relates to the party whose presence enables the Court to adjudicate the questions involved in the suit effectively and completely. This provision grants discretion to the court to join those shown to have a direct interest in the property for the protection of which reliefs of injunctions are sought. In such cases, this Court has consistently exercised its discretion for the last five decades to allow such a joinder. This exercise of discretion has become a well-established practice.

29. While discretion inherently implies flexibility and adaptability, a level of predictability emerges if discretion is used in a particular manner, guided by specific considerations. Advocates and litigants then anticipate a particular approach by the court in similar cases. This can offer stability and clarity in how certain matters are handled within the legal system, providing a framework for litigants to understand how the court will likely exercise its discretion in specific circumstances.

30. There is a rationale to the consistent exercise of judicial discretion under Order 1 Rule 10(2) of C.P.C. in allowing the landlord's application for joinder in a tenant's suit in respect of demolition action of the Corporation treating the landlord as a proper party. That is because the impact of a notice for demolition issued by the Corporation extends beyond the tenant to fundamentally affect the property itself. It cannot be said that as a true owner of the property, the landlord holds no interest in any legal dispute regarding authorized or unauthorized construction. The intended action of demolition directly affects the owner of the property or the structure, who has a legitimate entitlement to maintain the identity of the property and integrity, safeguarding it from potential damage. The property occupied by the tenant ultimately belongs to the landlord. The tenant possesses only a derivative title through a lease or license, while the landlord retains full ownership and all reversionary rights upon the lease or license termination. Secondly, the proposed demolition by the Corporation may entail legal entry onto the property to deal with the alleged unauthorized construction. Notices issued by the corporation direct its employees and agents to enter the premises to remove the disputed construction. If the Corporation exercises its legal authority to enter the premises, it would essentially be entering upon the property owned by the landlord. Given these factors, the landlord's legitimate concerns and interests cannot be overlooked or undermined. Thus, if the landlord seeks a joinder, it is appropriate for a proper party to be joined for a comprehensive and equitable resolution of the suit.

31. Therefore, to conclude, it is clear that the decision of the Hon'ble Supreme Court in Mohamed Hussain Shariffi has not deviated from the law laid down in Aliji Momonji, and there is no conflict between these two decisions. The view taken by the learned Single Judge in Deju Salian to the contrary is not correct. The decision of the Single Judge in Nimesh Patel correctly

interpreted the decisions of the Supreme Court as having no conflict and followed the decision in Aliji Momonji, and the same is approved.

32. Answering the question, we hold that in a suit filed by the occupier/ tenant/ licensee seeking to restrain the local authority from taking action of demolition against the property, where the landlord/ owner of the property seeks impleadment, the Court is empowered to permit the same exercising the power under Order I Rule 10(2) of Code of Civil Procedure on the premise that the landlord/ owner is a proper party. Such a direction by the court in this fact situation would be a sound exercise of discretion consistent with the long-standing use of discretion in this manner. Refusal to permit such a joinder by not accepting the landlord/owner as a proper party would be an improper use of discretion and be liable to be set aside.
33. With reference being answered thus, the Writ Petition be placed before the learned Single Judge for disposal.

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