

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
CIVIL REVISION APPLICATION NO.720 OF 2015
WITH
CIVIL APPLICATION NO.618 OF 2015 IN C.R.A./720/2015**

M/s.Radhe Builders

..Applicants

Vs

1. Kapil B. Parajapati and Ors

.. Respondents

Mr. Swanand Ganoo with Mr. Gurav Mehta and Mr Nilesh Tated i/b Mahimtura & Co, Advocates for Applicants.

Mr. Amir Arsiwale i/b S. Khedekar, Advocate for respondent no.1.

Mr.V.P.Sawant, Advocate for Respondents no.3 and 4.

Mr A.V.Diwate, Advocate for Respondent no.5-BMC.

CORAM : R.G.KETKAR,J.

DATE : 30/11/2015

PC:

1. Heard Mr.Swanand Ganoo, learned counsel for the applicants, Mr. Amir Arsiwale, learned counsel for respondent no.1, Mr V.P.Sawant, learned counsel for respondents no.3 and 4 and Mr. A.V.Diwate, learned counsel for respondent no.5 at length.

2. By this Application under Section 115 of the Code of Civil Procedure, 1908, (for short, 'C.P.C.'), original defendant no.1 have challenged the judgment and order dated 3.9.2015 passed by the learned Judge, Bombay City Civil Court, Mumbai on preliminary issue in S.C.Suit No.2918 of 2013. By that order, the learned trial judge held that City Civil Court has jurisdiction to entertain and try the suit and the suit is within limitation.

3. In support of this petition, Mr. Ganoo submitted that the learned trial Judge framed following preliminary issues :

- (i) Whether the Court has no jurisdiction to try the suit in view of provisions under section 177 of MHADA Act?
- (ii) Whether the Court has no jurisdiction to try the suit as suit is not filed within six months of issuance of NOC?
- (iii) Whether the Court has no jurisdiction to try the suit in view of provisions under section 33 of the Maharashtra Rent Control Act?
- (iv) Whether the present suit is within the limitation?

4. He submitted that while answering issue no.1, the learned trial judge observed that the suit is not barred in view of Section 177 of Maharashtra Housing and Area Development Act 1976 (for short, 'MHADA') as original plaintiff has challenged illegality of the order passed by Officers of the MHADA and, therefore, there is no bar of section 177. While answering issue no.2, the learned trial judge did not consider Section 173 in its entirety. The order was passed by respondent no. 4 on 16.7.2013 and the present suit is instituted on 17.7.2013. As the plaintiff is challenging the order issued by the MHADA under section 95-A, the plaintiff has to comply requirements laid down in Section 173 of the MHADA. In that, without giving two months previous notice in writing to the Authority, member or officer or servant or person of the intended suit and of the cause thereof as also after six months from the date of the act complained of, no person can commence

any suit. In the present case, the order was passed on 16.7.2013 and the suit is instituted on 17.7.2013 which is noncompliance of Section 173.

5. Mr. Ganoo further submitted that the suit is also barred by limitation as the father of the plaintiff had entered into an agreement with defendant no.1 on 11.10.1992. The suit is instituted on 17.7.2013 which is, on the face of it, is barred by limitation. That apart, suit is between landlord and tenant. In view of Section 33 of the Maharashtra Rent Control Act, 1999, even Civil Court has no jurisdiction to entertain and try the suit.

6. On the other hand, Mr. Arsiwale submitted that the plaintiff has deleted prayer clause (c) thereby giving up challenge to the N.O.C. dated 21.12.1993 and has sought declaration that he is entitled to permanent alternate accommodation equivalent in area of the shop no.3 and room attached to it, in all totally admeasuring 200 sq.ft. The order dated 16.7.2013 was passed directing the plaintiff to shift to transit accommodation failing which the Board will proceed with eviction under section 95-A of the MHADA Act. He, therefore, submitted that the plaintiff was urgently required to institute the suit challenging the order dated 16.7.2013. In any case, even if it is assumed for the time being, prayer (b) cannot be granted, nonetheless the civil Court has jurisdiction to entertain and try the suit, qua prayer (a) and,

therefore, suit cannot be dismissed in its entirety.

7. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Prayer clauses (a) and (b) read thus:

(a) It may be declared that plaintiff is entitled for the permanent alternative accommodation equivalent in respect of his entitlement of the shop no.3 and room attached to it of total area admeasuring of 200 sq.ft on the final plot of land 872, annapurna Chawal, Agar Bazar, S.K.Bole Road, Dada (West), Mumbai 400 028;

(b) It may be declared that order dated 16.7.2013 bearing reference no EE GN/RR/DE-II/F-158/2262/2013 passed by the defendant no.3 and 4 annexed at Exhibit "M" to the plaint is illegal and not enforceable for want of authority until defendant no.1 supplies revalidation of NOC obtained from the defendant no.3, intimations of disapproval, sanctioned plan of the proposed building showing the area of the proposed tenement in the building to be constructed from the sanctioned authority, revalidation of the C.C. from the competent authority and all the agreements with the occupiers of the Annapurna Chawl are registered along with compliance of all statutory requirements;"

8. Mr.Ganoo submitted that in fact prayer (b) also does not survive as defendant no.1 has obtained revalidation of N.O.C. upto 31.12.2015. On the other hand, Mr Arsiwale submitted that basically the plaintiff contends that the N.O.C. obtained by defendant no.1, is not genuine. It is, therefore, matter of evidence and that cannot be gone into at this state.

9. Perusal of prayer clause (a) shows that the plaintiff has sought declaration that he is entitled to total area admeasuring 200 sq.ft as a permanent alternate accommodation. Mr. Ganoo

submitted that in fact, the plaintiff's father was in possession of 50 sq.ft and the said was duly certified by authorities of the Board. It is, however, not possible to accept this contention at this stage and it will be open for the parties to substantiate their respective claims in the trial Court. At this stage, the question is whether the Civil Court has no jurisdiction to entertain and try the suit in view of Sections 173, 177 of the MHADA as also section 33 of the Maharashtra Rent Control Act, 1999.

10. Sections 173 and 177 read thus:-

“173. Notice of suit against Authority, etc.

No person shall commence any suit against the Authority or against any member of the Authority or of any Board or of any Panchayat or any officer or against Authority, servant of the Authority or Panchayat or any person acting under the orders of the Authority or Board, or Panchayat for anything done or purporting to have been done in pursuance of this Act (including any contract thereunder), without giving to the Authority, member, officer or servant or person two months previous notice in writing of the intended suit and of the cause thereof, nor after six months from the date of the act complained of.

And in the case of any such suit for damages, if tender of sufficient amends shall have been made before the action is brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.”

177. Bar of Jurisdiction.

“Save as otherwise expressly provided in this Act, no civil court shall have jurisdiction in respect of any matter which the Authority or the Tribunal is empowered by or under this Act, to determine; and no injunction or stay shall be granted by any court or other authority in respect of any action

taken or to be taken in pursuance of any power conferred or duty imposed by or under this Act.”

11. As noted earlier, in the present case, on 16.7.2013 the Board has passed the order directing the plaintiff to shift to the transit accommodation failing which the plaintiff will be evicted from the premises in his occupation. It is in these circumstances, the plaintiff was constrained to institute the suit on 17.7.2013.

12. As far as the contention based on Section 177 is concerned, basically by the prayer clause (a) the plaintiff has claimed possession of 200 sq.ft as a permanent alternate accommodation. In view thereof, it is not possible to accept the contention that the suit is in respect of matter which the Authority or Tribunal under the Act is empowered to determine.

13. Mr. Ganoo submitted that Section 173 is in two parts, namely, first part lays down that no person shall commence any suit against the Authority, among others, without giving two months previous notice in writing and the other part is that the suit cannot be commenced after six months from the date of the act complained of. He relied upon the decision of this Court in the case of Dhirajlal Vishanji Chedda Vs Kshitija Infrastructure Pvt Ltd, Mumbai, 2013(1) Mh.L.J. 58 to contend that notice issued under section 95-A of MHADA Act cannot be challenged in Civil Court. In my opinion, prayer clause (a) does not fall within the

ambit of Section 173. Even if it is assumed in favour of the applicants that prayer clause (b) is covered by Sections 173 and 177, still the suit cannot be dismissed in its entirety.

14. In the case of *Sopan Sukhdeo Sable Vs. Assistant Charity Commissioner*, (2004) 3 S.C.C. 137, Apex Court held that merely because some of the reliefs cannot be granted in the Civil Court, it would not entail an automatic rejection of the entire plaint. In other words, assuming that the prayer clause (b) cannot be granted by the Civil Court in view of bar under sections 173 and 177, nonetheless, the authorities under the MHADA Act cannot decide prayer clause (a) and the said prayer can be decided only by the Civil Court. Consequently, the Civil Court would not be justified in rejecting the plaint in its entirety.

15. As far as the contentions based on Section 33 and the limitation Act are concerned, the learned trial Judge has rightly rejected these contentions as this is not a dispute between landlord and tenant and is for entitlement of 200 sq.ft as a permanent alternate accommodation. Hence, no case is made out for invocation of powers under section 115 of C.P.C. The Application fails and the same is dismissed. In view of dismissal of the Application, Civil Application No. 618 of 2015 for stay does not survive and the same is dismissed.

(R.G.KETKAR, J.)