

dik

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 503 OF 2014
IN
SUIT NO. 2862 OF 2008**

Global Buildcon Pvt. Ltd.	...Applicant
In the matter between	
Abdul Sattar Haji Usman & Anr.	...Plaintiffs
VS	
The Archbishop of Bombay & Global Buildcon Pvt. Ltd. & Ors.	...Defendants

.....

Mr Sunil S. Yadav for the Plaintiffs
Mr G.W.Mattos, AGP for Defendant No.2
Mr Vijay Vaghela for Defendant No.4.
Mr Chetan Mhatre i/b Utangale & Co. for Defendant Nos.9 and 10

.....

CORAM : S.C. GUPTA, J.

DECEMBER 08, 2015

P.C. :

This Notice of Motion is taken out by original Defendant No.5 for modification of the orders passed by this Court on 5 December 2011 and 20 February 2014 and allow Defendant Nos.4 and 5 to lead evidence on the preliminary issue.

2 By the order dated 5 December 2011, this Court whilst hearing Notice of Motion No.3591 of 2008 for interlocutory reliefs sought by the Plaintiffs, framed a preliminary issue of jurisdiction in the following terms:

- a) Whether the defendant No.5 proves that the present suit is barred by virtue of Section 42(4) & (5) of the Maharashtra Slum Area (Encroachment and Improvement) Act, 1971 ?

This Court also recorded an agreement of counsel appearing for both parties that there would be no oral or documentary evidence on this point but that both parties would argue their respective cases on the basis of legal provisions and statements in the plaint. After the parties filed their written arguments on the preliminary point on that basis and the matter was ripe for hearing, the Plaintiffs sought to file an affidavit of evidence of their witness in lieu of examination-in-chief. This Court permitted the Plaintiffs to do so by its order dated 23 January 2014. Later, when the attention of the Court was invited to the order of 5 December 2011, recording *inter alia* the agreement of both parties that there would be no oral or documentary evidence on the issue, this Court recalled its order dated 23 January 2014 and directed the office to return the affidavit of evidence in lieu of examination-in-chief filed by the Plaintiffs. By this application, Defendant Nos.4 and 5 seek to modify these two orders and allow them to lead evidence on the preliminary issue. The application is on the footing that the Plaintiffs have pleaded a case of fraud, but that considering the fact that all actions were taken by the authorities in accordance with law on the basis of facts which were known to the Plaintiffs and considered by the State Government, it was not open for this Court to once again adjudicate the issue. It is, accordingly, submitted that cross-examination of the Plaintiffs' witness is absolutely necessary and that the Defendants be also permitted to lead evidence.

2 The suit is on the footing that the Plaintiffs are owners of the suit property and that the acquisition thereof by the State Government (Defendant No.2) under Section 4(1) of the Maharashtra Slum Area (Encroachment and Improvement) Act, 1971 ('Slum Act') is without authority of law and without following due process, and is, accordingly, bad. The Plaintiffs, in the premises, seek declaration of their ownership of the suit property and also the consequential relief of delivery of possession thereof by Defendant Nos.1 and 2. The Plaintiffs also apply for a permanent injunction restraining the Defendants from interfering with the use, occupation and enjoyment of the suit property by the Plaintiffs. The Defendants in their reply to the Plaintiffs' Notice of Motion for interlocutory relief have pleaded bar of jurisdiction under Section 42 of the Slum

Act. It is the case of the Defendants that Section 42 of the Slum Act bars the jurisdiction of the Court to consider any challenge to an order passed by competent authorities under the Slum Act and also on the basis that there is a bar for granting of any injunction against implementation of an order passed by the competent authorities. This objection and the preliminary issue arising as a result thereof are matters of law. It was clearly agreed between parties before the present Notice of Motion was filed that the parties would not lead oral or documentary evidence on the preliminary issue and would argue the preliminary issue merely on the basis of the provisions of law and the statements in the plaint. The Court has recorded that agreement and, accordingly, permitted the parties to file their submissions. That was on 5 December 2011. This order was once again confirmed when the Plaintiffs' attempt to lead oral evidence was rejected by this Court, when it directed the office to return the affidavit of evidence filed by the Plaintiffs in lieu of examination-in-chief. That was on 20 February 2014. Nothing has changed since that date. The parties have already filed their written submissions on the preliminary issue and the matter is ready for hearing on the preliminary issue and thereafter, for considering interlocutory relief to be granted in the Plaintiffs' Notice of Motion. At this stage, it is not permissible to the Defendants to contend that they be permitted to lead evidence on the preliminary issue. None of the grounds urged by the Defendants in support of this application have any merit. Even if it is the Plaintiffs' case that the acquisition of the suit property by the State Government is vitiated by fraud, it is for them to prove such a case. The Defendants' objection to the jurisdiction of this Court is simply on the grounds that (a) the acquisition, being a decision of the State Government and the competent authorities under the Slum Act, cannot be questioned before this Court and (b) this Court has no jurisdiction to pass any injunction order in respect thereof. These are pure questions of law, which the parties have agreed expressly to argue on the basis of the provisions of law and statements contained in the plaint.

3 Accordingly, there is no merit in the Notice of Motion. The same is dismissed. There shall, however, be no order as to costs.

4 Considering the dismissal of the Motion, the suit shall appear on the board for hearing of the preliminary issue on 21 December 2015 at 3.00 p.m. The suit shall be placed along with the Plaintiffs' Notice of Motion, namely, Notice of Motion No.3591 of 2008. The parties are put to notice that after the preliminary issue is determined, the Court shall proceed to hear the Plaintiffs' Notice of Motion.

(S.C.GUPTE J.)

CERTIFICATE

Certified to be true and correct copy of the original signed
Judgment/ Order.