

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

Civil Revision Application NO. 65 OF 2016

M/S. COSMIC DEVELOPERS	...Applicant
<i>Versus</i>	
STATE OF MAHARASHTRA	
AND ORS	...Respondents

....
Mr.P.S. Dani, Senior Counsel a/w. Mr. Induprakash Tripathi,
P.K. Gautam & Ms. Bhagyashri Gavas, for the Applicant.

Mr. P.J. Thorat, Advocate for the Respondent No.4.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 10th MARCH, 2016
PRONOUNCED ON: 31st MARCH, 2016

P.C.

1. Heard Mr. P.S. Dani, learned Senior Counsel for the applicant and Mr. P.J. Thorat, learned Counsel for respondent No.4, at length.
2. Mr. Dani orally seeks leave to delete respondent Nos.1 to 3 as respondent No.4, being original plaintiff, is the only contesting respondent and no reliefs are claimed against

respondent Nos.1 to 3. In view thereof, on the motion made by Mr.Dani, leave to delete respondent Nos.1 to 3 is granted. Amendment shall be carried out forthwith.

3. By this application under Section 115 of Code of Civil Procedure, 1908 (for short, 'CPC'), the applicant has challenged the judgment and order dated 7.1.2016 passed by learned Judge, presiding over Court room No.6 of City Civil Court at Dindoshi (Borivali Division), Goregaon, Mumbai on preliminary issue in L.C. Suit No.118/2011. The applicant, hereinafter referred to as 'defendant No.4' had instituted Notice of Motion No.1886/2015 praying for framing preliminary issue and deciding the question of jurisdiction of the city civil court; for vacating order of status quo dated 19.1.2011 passed in Notice of Motion No.131/2011. By order dated 28.10.2015, learned trial Judge framed preliminary issue about jurisdiction of the civil court to entertain and try the suit in view of Section 42 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (for short, 'Act'). By the impugned order, learned trial Judge held that City Civil Court has jurisdiction to entertain and try the suit and the same is not barred under Section 42 of the Act. It is

against this decision, defendant No.4 has instituted the present application.

4. Rule. Mr. Thorat waives service. At the request and by consent of the parties, rule is made returnable forthwith and the application is taken up for final hearing.

5. Mr. Dani submitted that Writ Petition No.2519/2009 was instituted on the Original Side of this Court by (1) M/s. Hotel Sudesh and (2) Mr. Sudesh Jayram Utekar, son of the plaintiff against respondent No.1, Municipal Corporation of Greater Mumbai (for short, 'Corporation'), respondent No.2 Slum Rehabilitation Authority (for short, 'S.R.A.'), respondent No.3, the applicant herein and respondent No.4, the State of Maharashtra. The petitioners therein prayed for issuance of the writ of mandamus or any other appropriate writ, order or direction directing respondent Nos.1 and 2 therein to enquire in the matter and pass appropriate order for amending Annexure-II after verifying the documents produced by the petitioners therein. The petitioners therein came with the case that the kitchen admeasuring 228 sq. ft. was not included in Annexure II for considering the eligibility of the petitioners therein.

Annexure-II approved only two rooms at Sr. Nos.25 and 26 which are in the name of Jayram Utekar and petitioner No.2 (husband and son respectively of the plaintiff herein). The grievance of the petitioners was that only two premises were shown instead of three premises in the list prepared by the Additional Collector (Encroachment/Removal), Mumbai Suburban District.

6. By order dated 4.3.2010, the Division Bench of this Court disposed of the Writ Petition by directing the petitioners therein to make a representation to the Additional Collector (Encroachment/Removal), Mumbai Suburban district with regard to the existence of third premises (kitchen). The Additional Collector was directed to pass a speaking order after hearing the petitioners. In pursuance thereof, representation was made by Sudesh Utekar, son of the plaintiff. After hearing him, the Deputy Collector (Encroachment/Removal) held that the kitchen cannot be treated as a separate and independent unit of Hotel. Kitchen has to be treated as part of the Hotel which includes kitchen, dining hall.

7. Aggrieved by that decision, Mr.Sudesh Utekar preferred appeal before the Additional Collector under Section 35 of the

Act. By order dated 6.6.2014 the Additional Collector (Encroachment/Removal) dismissed the appeal and confirmed the order dated 18.5.2010 passed by the Competent Authority. The Competent Authority was directed to verify whether the structure shown at Sr. Nos. 25 and 26 in Annexure-II is separate or not and take appropriate action after verifying the factual position.

8. Mr. Dani submitted that instead of challenging that decision, the plaintiff has instituted the suit in the City Civil Court *inter alia* for declaration that shop No.1-A (kitchen) admeasuring 16 ft. X 16 ft made of B.M. Walls with A.C. Sheets roof on land bearing Survey No.273, corresponding to CTS No.774A of village Malad at Jamadar Estate, Kurar Village, Kokani Pada, Malad (East), Mumbai – 400 097 (for short, 'suit premises') is independent premises occupied by her; for declaration that the plaintiff is entitled to alternate accommodation in lieu of the suit premises; for declaration that order dated 18.5.2010 passed by Deputy Collector (Encroachment/Removal) holding that the suit premises is a part of the hotel premises is bad in law, illegal and inoperative; for

mandatory order directing the defendant Nos.1 to 3 to show the name of the plaintiff in Annexure-II as eligible for alternate premises in lieu of the suit premises; for perpetual injunction restraining defendant Nos.1 to 3 from dispossessing or removing the plaintiff from the suit premises without offering her permanent alternate accommodation in lieu of the suit premises.

9. Mr. Dani has taken me through the assertions made in the plaint and in particular paragraph Nos.1 to 8, 12 to 14 and prayer clauses. He has also invited my attention to :

[1] Rent receipt dated 1.5.1982 issued by the landlady in the name of the plaintiff in respect of room No.2. Rent receipt of Rs.200/- was issued in respect of payment of rent for January to April, 1982. This rent receipt is not issued in the name of her son Sudesh as claimed in paragraph-2 of the plaint;

[2] Rent receipt dated 1.7.1982 issued by the landlady in favour of the plaintiff in respect of room No.1 of Rs.60/- towards payment monthly rent of August, 1982. He submitted that the rent receipt is not issued in the

name of the husband of the plaintiff as claimed in paragraph-2 of the plaint. He submitted that room Nos.1 and 2 are held to be eligible as evident from Sr. Nos.25 and 26 of Annexure-II and accordingly alternate premises are given.

- [3] Deposit receipt dated 5.10.1986 issued by the landlady in favour of the tenant Hotel Sudesh in respect of room No.1A showing deposit of three months Rs.180/-. This receipt is not issued in the name of the plaintiff as claimed in paragraph 1 of the plaint.
- (4) Shop Act licence in respect of shop No.2 wherein the plaintiff and her son Sudesh are shown as employer.
- (5) Trade licence issued in favour of Sudesh Jayaram Utekar and the plaintiff in respect of shop No.2, viz. dining hall and kitchen admeasuring 46.5490 sq. mtrs + 33.3760 sq. mtrs. aggregating to 79.9250 sq. mtrs.
- (6) Trade licence in respect of shop No.2 having area of 24.67 sq. mtrs. for permit room.

(7) Extract of Register of Firms in the name of M/s. Hotel Sudesh having address of shop Nos.1 and 2 and name of the partners were shown as plaintiff and her son Sudesh Utekar.

(8) Order dated 18.5.2010 passed by the Deputy Collector (Encroachment/Removal) and order dated 6.6.2014 passed by Additional Collector.

10. Mr. Dani submitted that perusal of the entire plaint shows that no allegations of fraud/collusion is made by the plaintiff. He submitted that unless the plaintiff succeeds in obtaining the relief in terms of prayer clause (c), the plaintiff is not entitled to relief in terms of prayer clauses (a) and (b). In view of Section 42 of the Act, the Civil Court has no jurisdiction to entertain and try the suit. He relied upon the decision of Apex Court in the case of **T. ARIVANDANDAM vs. T.V. Satyapal and another, (1977) 4 SCC 467** and in particular para-5 thereof to contend that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order 7 Rule 11 of CPC taking care to see that the

ground mentioned therein is fulfilled and if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing of the case by examining the party searchingly under Order X of CPC. The Court has to take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. He submitted that said decision is subsequently followed in the case of ***Raj Narain Sarin (Dead) through L.Rs. and others vs. Laxmi Devi and others, (2002) 10 SCC 501.***

11. On the other hand, Mr.Thorat supported the impugned order. He invited my attention to paras-5, 12 and 14 of the plaint as also order dated 18.5.2010 passed by the Deputy Collector (Encroachment/Removal). He submitted that though the plaintiff has not specifically pleaded fraud, she has challenged the action of the defendant Nos.3 to 4 on the ground that it is malafide and is an illegal action. He submitted that prayer clauses (a) and (b) can be granted only by the Civil Court. He further submitted that against the order dated 18.5.2010, appeal was preferred by Sudesh Utekar, son of the plaintiff. Though by order dated 6.6.2014, learned Additional Collector

(Encroachment and Removal) dismissed the appeal and confirmed the order dated 18.5.2010 passed by the Competent Authority, the Competent Authority was directed to verify whether the structures shown at Sr.Nos.25 and 26 in Annexure-II is a separate or not and take appropriate action after verifying the factual position. Till date, no such verification is made by the Competent Authority. He relied upon the decision of this Court in the case of ***Gari Mohammed Zakir Hussain & Others vs. Municipal Corporation of Greater Mumbai and others, 2002(2) Bom.C.R. 98*** and in particular paragraph-5, 8, 13, 15, 17 and 19 thereof. He therefore submitted that no case is made out for invoking powers under Section 115 of CPC.

12. I have considered the rival submissions advanced by learned Counsel for the parties. I have also perused the material on record. It is not in dispute that Writ Petition No.2519/2009 was instituted by (1) M/s. Hotel Sudesh and (2) Mr. Sudesh Jayram Utekar, son of the plaintiff, on the Original Side of this Court against (1) the Corporation, (2) S.R.A., (3) the applicant herein and (4) the State of Maharashtra. The grievance of the petitioners therein was that the kitchen admeasuring 228 sq. ft

was not included in Annexure-II for considering the eligibility of the petitioners. Annexure-II approved only two rooms at Sr. Nos.25 & 26 which was in the name of Jayran Utekar and Sudesh Utekar, husband and son of the plaintiff. The grievance of the petitioners was that only two premises were shown instead of three premises in the list prepared by the Additional Collector (Encroachment/Removal), Mumbai Suburban District. Perusal of the assertions made in the Petition does not indicate that any allegations of fraud were made against the authorities. By order dated 4.3.2010, the Division Bench of this Court disposed of the petition by directing the petitioners therein to make a representation to the Additional Collector (Encroachment/Removal), Mumbai Suburban District with regard to the existence of the third premises (kitchen). The Additional Collector was directed to pass a speaking order after hearing the petitioners.

13. In pursuance thereof, Mr. Sudesh Utekar, son of the plaintiff, made a representation. After hearing him, the Deputy Collector (Encroachment/Removal) held that the kitchen cannot be treated as a separate and independent unit of the Hotel.

Kitchen has to be treated as a part of the Hotel which includes kitchen, dining hall. It is not in dispute that aggrieved by that decision, Mr. Sudesh Utekar preferred appeal under Section 35 of the Act. By order dated 6.6.2014, the Additional Collector (Encroachment/Removal) dismissed the appeal and confirmed the order dated 18.5.2010 passed by the Competent Authority. Mr. Thorat was not in a position to demonstrate that aggrieved by this decision the petitioners in Writ Petition No.2519 of 2009 have carried the matter further. In other words, the order dated 18.5.2010, which was confirmed by the Appellate Authority, has attained finality. The present suit is instituted by Laxmibai Jairam Utekar, wife of Jairam Utekar and mother of Sudesh Utekar *inter alia* praying for declaration that shop No.1-A admeasuring 16 ft. x 16 ft. situate in land bearing Survey No.273 corresponding to CTS No.774A of village Malad at Jamadar Estate, Kurar Village, Kokani Pada, Malad (East), Mumbai – 400 097 is an independent premises occupied by the plaintiff; for declaration that she is entitled to alternate accommodation in lieu of shop No.1-A; for declaration that order dated 18.5.2010 passed by Deputy Collector (Encroachment/Removal) is bad in law, illegal and inoperative; for mandatory order directing

defendant Nos.1 to 3 to show name of the plaintiff in annexure-II as eligible for alternate premises in lieu of shop No.1-A; for perpetual injunction restraining defendant Nos.1 to 3 from dispossessing or removing the plaintiff from shop No.1-A without offering her permanent alternate accommodation in lieu of the suit premises.

14. Perusal of the rent receipt dated 1.5.1982 in respect of room No.2 shows that it was not issued in the name of the plaintiff but was issued in the name of her son. The plaintiff however asserted in paragraph-2 that the rent receipt in respect of room No.2 was issued in her name. Similarly, rent receipt dated 1.7.1982 in respect of room No.1 was issued in favour of the plaintiff and not in favour of her husband Jairam Utekar, as claimed in paragraph-2 of the plaint. Rooms No.1 and 2 were held eligible as is evident from Sr. Nos.25 and 26 of Annexure-II. Deposit receipt dated 5.10.1986 in respect of room No.1A was in favour of Hotel Sudesh. This receipt was not issued in the name of the plaintiff as claimed in paragraph-1 of the plaint. Even on this ground, the plaintiff has no locus to maintain the suit in respect of room No.1-A.

15. Mr. Thorat submitted that the prayer clauses (a) and (b) can be granted only by the Civil Court. It is not possible to accept this submission. Perusal of order dated 18.5.2010 passed by the Competent Authority shows that after considering the submissions advanced on behalf of Mr.Suresh Utekar, a specific finding was recorded that shop No.1-A which is used as a kitchen cannot be treated as a separate and independent unit of Hotel. Kitchen has to be treated as a part of the hotel which includes kitchen, dining hall. Aggrieved by that decision though appeal was preferred by Mr.Sudesh Utekar, the same was dismissed. Said decision has attained finality. By prayer clause (c), the plaintiff has challenged the order dated 18.5.2010. In the first place the plaintiff not being party in Writ Petition has no locus to challenge that order. Secondly, in view of Section 42, the said relief cannot be considered and consequently cannot be granted by the Civil Court.

16. By prayer clause (d) the plaintiff has sought mandatory order to include her name in Annexure-II as eligible to alternate premises in lieu of shop No.1-A. Under Section 42 even this prayer cannot be gone into by the Civil Court. By prayer clause

(e), the plaintiff has sought perpetual injunction restraining defendant Nos.1 to 3 from dispossessing or removing the plaintiff from shop No.1-A without offering her permanent alternate accommodation in lieu of shop No.1-A. Even this prayer cannot be considered and consequently can be granted by the Civil Court unless and until the Authorities under the Act hold that shop No.1-A, which is admittedly used as a kitchen, is an independent premises and is no way connected with hotel M/s. Hotel Sudesh. In other words, the plaintiff can succeed in obtaining reliefs in terms of prayer clauses (a) and (b) if and only if order dated 18.5.2010 is set aside.

17. Mr. Thorat relied upon the decision of this Court in the case of ***Gari Mohammed Zakir Hussain (supra)***. In that case, the learned Single Judge of this Court reproduced the prayers made by the plaintiff in paragraph-5 of the report. In paragraphs-8 and 9 of the report, it was observed that the allegations in the plaint were that the Authorities acted in collusion with developer (defendant Nos.5 to 8) and had unduly favoured the said defendants by permitting them to develop the subject land. It was contended that the impugned action was

tainted with malafide and clearly amounted to transgressing powers entrusted to the concerned authorities under the provisions of the Act. The reliefs that were essentially claimed were founded on the assertions that the authorities acted in excess of their jurisdiction and their act of commission or omission was vitiated on account of *mala fide* in fact and in law. In paragraph-15, it was observed that the allegations were that the act done or intended to be done by the concerned authority was result of fraud, collusion or *mala fide* and was clearly in transgression of the powers conferred on that person or authority under the Act or Rules, in such a case, the allegation would be actionable, before the Civil Court being one of civil nature to be tried only by the Civil Court by virtue of Section 9 of CPC. In the present case, the plaintiff has not alleged fraud. That apart, I have already held that the plaintiff can succeed only if order dated 18.5.2010 is set aside. Said order has attained finality. In view thereof, the decision in the case of **Gari Mohammed Zakir Hussain (supra)** is not applicable to the facts of the present case.

18. In the case of **T. Arivandandam (supra)**, the Apex

Court has held that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order 7 Rule 11 of CPC taking care to see that the ground mentioned therein is fulfilled and if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing of the case by examining the party searchingly under Order X of CPC. The Court has to take deterrent action if it is satisfied that the litigation was inspired by vexatious motives and altogether groundless. Said decision is followed subsequently in the case of **Raj Narain Sarin (supra)**. Applying the tests laid down in the case of **T. Arivandandam (supra)**, I am satisfied that the present suit is meritless in the sense of not disclosing a clear right to sue. If clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing at the threshold. If the averments made in the plaint as a whole are read, I am satisfied that the plaint does not disclose a clear right to sue. Having regard to the material on record, I am satisfied that the suit is inspired by vexatious motives and altogether groundless. In view thereof, the learned trial Judge committed serious error in holding that the Civil

Court has jurisdiction to entertain and try the suit and is not barred under Section 42 of the Act. Hence, Civil Revision Application succeeds. Impugned order is set aside and as the Suit has no survival value the same is dismissed. The applicant/defendant No.4 shall produce copy of this order before the learned trial Judge for disposing of the suit in terms of this order. Rule is made absolute in aforesaid terms with no order as to costs.

19. At this stage, Mr. Thorat orally applies for continuation of the order dated 19.01.2011 passed by the learned trial Judge directing parties to maintain status-quo as of that date for the period of 8 weeks from today.

20. Mr. Tripathi opposes the application on the ground that because of the suit structure, defendant No.4 is not in a position to handover possession to the slum dwellers though development is completed.

21. Having regard to the fact that the status-quo was operating from 19.01.2011 as also taking into account the difficulty expressed by Mr. Tripathi, in my opinion, some

protection deserves to be granted to the plaintiff. Hence, notwithstanding dismissal of the Suit, order directing parties to maintain status-quo as of 19.01.2011 shall remain in force for the period of four weeks from today. Order accordingly.

(R. G. KETKAR, J.)

Deshmane (PS)