

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO.991 OF 2016
WITH
CIVIL APPLICATION NO.2583 OF 2016**

Mr. Mohammed Afzal Iqbal Khan)
Age 42 Year Old Business)
An adult Indian Inhabitant,)
Azad Nagar, Near Janta Nagar Society)
Jasmin Mill Road, Near Mahim Fatak,)
Dharavi Mumbai 400 017) **..Appellant**

Vs.

1 The Municipal Corporation)
of Greater Mumbai)
Having its registered office at)
Mahapalika bhuvan, Mahapalika Marg,)
Mumbai 400 001)

2 The Assistant Municipal Commissioner)
G/North Ward Office,)
Harishchandra Yevle Marg,)
Dadar (W) Mumbai 400 028)

3 Maulesh Builders Pvt Ltd)
Surya Mahal, 4th floor,)
5 Burjorji Bharucha Marg,)
Fort, Mumbai 400 001) **..Respondents**

Mr. S. P. Srivastava for the Appellant /Applicant
Mrs. M. R. Bhoir for the Respondent Nos.1 & 2
Mr. Salik Khan for the Respondent No.3

CORAM : R. M. SAVANT, J.
DATE : 10th JUNE, 2016

ORAL JUDGMENT

1 Admit.

2 Having regard to the challenge raised heard forthwith.

3 The above First Appeal is directed against the order dated 13-4-
2016 passed by the Learned Ad-hoc Judge, Greater Mumbai, by which order,
the application Exhibit 6 filed by the Respondent No.3 herein i.e the Defendant
No.3 to the Suit came to be allowed and resultantly the Plaint came to be
rejected under Order VII Rule 11(d) of the Civil Procedure Code (CPC).

The facts giving rise to the Appeal can in brief be stated thus:

4 The Appellant herein is the original Plaintiff who has filed the Suit
in question being L.C. Suit No.1776 of 2015. The Plaintiff claims to be in
occupation and possession of a hut situated at Azad Nagar Near Janta Nagar
Society, Jamin Mill Road, (60 feet road) opp Santosh Bar, Near Mahim Fatak,
Dharavi, Mumbai 400 017. This is as per the description given in paragraph (1)
of the plaint. The Respondent Nos.1 and 2 herein are the Defendant Nos.1 and
2 to the Suit and it is the case of the Plaintiff that the Defendant No.1 is the
owner of the suit property. The Defendant No.3 i.e. the Respondent No.3
herein as per the Plaintiff is a builder and developer appointed by the Dharavi
Azad Nagar Co-operative Housing Society Ltd, for development. In the said

Suit, the Plaintiff is claiming the following reliefs by way of prayer clauses (a) and (b) which for the sake of ready reference are reproduced herein under :

(a) That this Hon'ble Court be pleased to declare that the Defendants are not entitled to disturb and/or interfere in the peaceful use, occupation and possession of the Plaintiff in the suit premises and/or demolish the suit premises i.e. Hut situated at Azad Nagar Near Janta Nagar Society, Jamin Mill Road, Near Mahim Fatak, Dharavi, Mumbai 400 017, in any manner whatsoever without following the due process of law.

(b) That this Hon'ble Court be pleased to grant permanent injunction restraining the Defendants their servants and agents from disturbing and/or peaceful use, occupation and possession of the Plaintiff in the suit premises and/or demolishing the suit premises i.e. Hut situated at Azad Nagar Near Janta Nagar Society, Jamin Mill Road, Near Mahim Fatak, Dharavi, Mumbai 400 017, in any manner whatsoever without following the due process of law.

5 In the said Suit, the Plaintiff it seems moved a draft Notice of Motion which was an application for temporary injunction. The injunction sought was that the Defendant No.3 should not demolish his structure without following the due process of law. It seems that on the same day i.e. 5-8-2015, the Defendant No.3 had filed an application under Section 9A and also under Order 7 Rule 11 of the CPC for dismissal of the Suit. Since the Notice of Motion filed by the Plaintiff for temporary injunction came to be allowed on the same day itself, the application in so far as Section 9A is concerned, had turned

infructuous and what remained was only the application under Order 7 Rule 11 of the CPC. The Plaintiff opposed the said application and filed his reply to the said application and denied the ground on which the rejection of the plaint was sought by the Defendant No.3.

6 The Trial Court considered the said application and has by the impugned order dated 13-4-2016 has allowed the application and has rejected the Plaint under Order 7 Rule 11(d) of the CPC. The Learned Judge as can be seen from the impugned order proceeded on the correct premise that the application under Order 7 Rule 11(d) would have to be considered on the touchstone of the averments made in the plaint. As indicated above the substantive reliefs sought in the Suit are by way of prayer clauses (a) and (b) which have been already reproduced herein above for ready reference. However, whilst dealing with the reliefs sought in the Plaint, the Learned Judge in paragraph (5) has observed to the following effect :

“By filing present suit the Plaintiff has challenged action of Defendant No.2 and prayed for declaration that defendant no.1 and 2 are not entitled to give any sanction or permission to the defendant no.3 to carry out any construction activity in the suit property and for various reliefs. The suit of the Plaintiff is barred under Section 42 of the Maharashtra Slum Act (I.C. & R.) Act 1971. From the provisions of alw also it is clear that the suit is not maintainable in this court as this court does not have jurisdiction to try and entertain this suit. Therefore when the jurisdiction does not lie with the court, normally the plaint should be returned. However, the

Plaintiff has already filed the proceeding by invoking the provisions of Maharashtra Slum Act (I.C. & R) Act 1971. Since the Plaintiff has already filed Appeal before Appellant Authority under Slum Act, instead of returning the plaint for presenting in the proper court, order of rejecting the plaint is required to be passed.”

7 Hence the Learned Judge has proceeded to consider the application on the basis that the Plaintiff has challenged the action of the Defendant No.2 and prayed for declaration that the Defendant Nos.1 & 2 are not entitled to give any sanction or permission to the Defendant No.3 to carry out any construction activity in the suit property and for various reliefs. The Learned Judge also adverted to the fact namely that the Plaintiff has already filed the proceeding by invoking the provision of Maharashtra Slum Act (I.C. & R) 1971. The observation made by the Learned Judge in respect of the reliefs sought in the Suit are not borne out by the said prayer clauses (a) and (b). It is also not clear as to on what basis the Learned Judge has observed that the Plaintiff has already filed an Appeal before the Appellate Authority under the Slum Act. It is trite that the Plaint can be rejected under Order 7 Rule 11 of the CPC, if the Suit is barred under any of the clauses of Rule 11. In my view, the Learned Judge has proceeded on an erroneous premise as regards the reliefs sought by the Plaintiff in the Suit in question namely of a declaration sought and that the Defendant Nos.1 and 2 are not entitled to give any sanction when the said prayer clauses (a) and (b) do not bear out any such reliefs sought by the Plaintiff. The consideration of the application in the said circumstances by

the Learned Judge is therefore vitiated. The impugned order dated 13-4-2016 is therefore required to be set aside and the application would have to be relegated back to the Trial Court for a denovo consideration of the same. On remand the consideration by the Learned Judge would have to be in terms of the observations made in the instant order and having regard to the provisions of Order 7 Rule 11 of the CPC. On remand the application to be decided latest by 31-7-2016. The Appeal is allowed to the said extent and to accordingly stand disposed of.

8 In view of the disposal of the above Appeal, the Civil Application does not survive and to accordingly stand disposed of as such.

9 Needless to state that the contentions of the parties on merits are kept open for being urged before the Trial Court. Further needless to state that the application would be tried on its own merits and in accordance with law.

[R.M.SAVANT, J]