

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**FIRST APPEAL NO. 313 OF 2016
WITH
CIVIL APPLICATION NO. 805 OF 2016
IN
FIRST APPEAL NO. 313 OF 2016**

Mr.Baban Yashwant Durafe & Anr.

...Applicants/
Appellants

Versus

Mrs.Sharda Pandurang Durafe & Ors.

...Respondents

.....

Mr. Santosh M.Suryawanshi for the Appellants.

Mr. Manmohan A. Dudhane for Respondent No.1.

Mr. Susmit Phatale i/b. Mr.Yadunath M. Chaudhari for Respondent No.3.

.....

CORAM: MRS.MRIDULA BHATKAR, J.

DATED: AUGUST 31, 2017

P.C. :

1. Heard. Admitted.

2. By consent of the parties, this appeal is heard finally and disposed of at the stage of admission, as a short issue is involved

3. This Appeal is directed against the order dated 20.01.2016 passed by the learned 2nd Addl. Principal Judge, City Civil Court, Mumbai, in

S.C.Suit No. 2135 of 2012. The appellants/original plaintiffs have filed the Suit for simplicitor declaration that the plaintiffs and their family members are entitled to a right to reside, occupy and enjoy jointly the permanent alternate accommodation to be provided by defendant no.2 / builder in lieu of the suit premises i.e. room no.2, admeasuring 18 X 20 sq. ft. in Samadhan Wadi, Behind Plaza Cinema, Dadar, Mumbai, in Slum Rehabilitation Scheme alongwith defendant no.1. In the said suit, after issuance of notices, defendant no.2 i.e. sister –in-law of plaintiff no.1 and paternal aunt of plaintiff no.2 appeared. Defendant no.2 though served did not appear. Defendant no.3 i.e.Slum Rehabilitation Authority appeared. Defendant no.1 was main contesting party, as her entitlement was accepted by Slum Rehabilitation Authority in the development of the suit room in the SRA scheme. Written Statement has been filed by defendant no.1. Defendant no.2 though served, did not file Written Statement. Defendant no.2 gave separate rent for temporary alternate accommodation to the plaintiffs as well as defendant no.1. In the Written Statement, defendant no.1 had raised issue in respect of jurisdiction of the appeal on the ground of Section 42 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (hereinafter referred to as “the said Act”). Other contentions were also raised in the Written Statement on the point

of entitlement of the plaintiffs. Defendant no.1 is the wife of Pandurang Durafe, who is the brother of plaintiff no.1 and the uncle of Plaintiff no.2, and were staying in the same room from the beginning and, therefore, the plaintiffs have their claim in the said room. The following issues were framed by the trial Court, which are as under :

ISSUES	FINDINGS
1.Whether plaintiffs prove that they are jointly entitled to reside occupy and enjoy permanent alternate accommodation to be provided to Defendant No.1?	...Does not survive.
2. Whether plaintiff is entitled for declaration and injunction as prayed?	...Does not survive.
3. Whether there is any legal impediment to try present suit by this Court?	...Yes.
4. What order and decree?	...As per final order.

4. After considering the evidence, the trial Court did not give finding on issue nos. 1 and 2, but gave finding on issue no. 3, which was basically on the point of deciding the jurisdiction of the trial Court in view of bar under Section 42 of the said Act. The trial Court has held that it has no jurisdiction to try and entertain the Suit in view of provisions under Section 42 of the said Act and, therefore, rejected the plaint under Order VII Rule 11 (d) of the Code of Civil Procedure (hereinafter referred to as the “C.P.C.”). Hence, this First Appeal.

5. The issue involved in the present matter is that the Suit was dismissed on the ground of maintainability under Order VII Rule 11 (d) of C.P.C. After perusal of evidence and the impugned order, it is found that the issue is short and, therefore, it is disposed of at the stage of admission. It is an admitted fact that the suit premise is a room, in which all three brothers and their family members were staying before the chawl where the suit room was demolished. It is also an admitted fact that the said chawl was also demolished for redevelopment under DCR 33 (10) of Development Control Regulations. Defendant no.2 is a developer, who in the course of implementation of SRA scheme had entered into an agreement with defendant no.1. The name of defendant no.1 is appearing in the index. It is also admitted that earlier the suit room was not in the name of either of the three brothers. However, at the time of implementation of SRA scheme, Pratap Durafe, the eldest one, had expired and, therefore, the name of Pandurang Durafe was entered as eligible against the suit room. In between, Pandurang Durafe had also expired and, therefore, at the time of execution of the agreement with SRA, the name of his widow i.e. defendant no.1 was entered in index no.2 as a nominee of the deceased Pandurang Durafe. The plaintiffs have no grievance about all these facts, as these facts are

admitted and they do not want to challenge the entitlement of defendant no.1. However, they claimed that they are also to be declared having a common and joint interest in the alternate permanent accommodation, which is going to be constructed and handed over to defendant no.1 pursuant to the agreement. Thus, the plaintiffs do not want to challenge the agreement entered into between defendant no.1 and defendant no.2. They want to establish their right and interest in the newly constructed room, which is to be provided in lieu of the old suit room equally to defendant no.1.

6. In the opening of the arguments the learned counsel made it clear that the plaintiffs do not seek any relief against the authority even though it is prayed to certain extent in the prayer clause. Learned counsel for the appellants has submitted that the view taken by the trial Court that it has no jurisdiction to try, entertain and decide the Suit in view of the provisions under Section 42 of the said Act is illegal and, therefore, the order passed by the trial Court is required to be set aside. He has further submitted that the learned Judge has not considered the ratio laid down in the case of *Tulsiwadi Navnirman Coop Housing Society Ltd. & Anr. Versus State of Maharashtra*, reported in **2008 (1) Bom. C.R.1**. He has further submitted that the plaintiffs have other

claims against defendant no.1 in respect of the suit that ought to have been appreciated by the trial Court. In support of his submission, he relied on the judgment in the case of *Naresh Lachmandas Aswani Versus Haridas alias Hardas Lachmandad* reported in *2013 DGLS(Bom) 77*. He also heavily relied on the judgment passed by the learned Single Judge of this Court in the case of *Ashok B.Nigudkar vs. Subhadra P. Nirgudkar & Others* reported in *2013 (4) Mh.L.J.175*. He has further submitted that the plaintiffs are not challenging the eligibility of the deceased Pandurang and defendant no.1 and also not claiming their eligibility in index no.2 and, therefore, this case cannot be covered under SRA and there is no bar of Section 42 of the said Act. The nature of reliefs claimed by the plaintiffs is of civil nature and it is to be decided by the Civil Court, which is the only Competent Court to adjudicate upon the issue of title, interest and right.

7. Per contra, learned counsel for respondent no.3, who is the main contesting party, has argued that the order passed by the learned Judge is legal and correct, as there is an express bar of Section 42 of the said Act to try, entertain and decide the issue on the point of eligibility of any person, who claims under SRA. He mainly relied on the judgment of the Full Bench of this Court in the case of *Tulsiwadi Navnirman Coop*

Housing Society Ltd. (supra), by which the Full Bench has created a High Power Committee and has submitted that any issue or dispute regarding the eligibility of the claim in respect of the premises, which is covered under SRA is to be referred to a High Power Committee. He has further submitted that when a particular forum is created, then the first approach should have been before the said forum. He has further submitted that the High Power Committee is a competent authority to deal with the documentary evidence produced by the parties in respect of their claims on the point of eligibility. He argued that before approaching the Civil Court, the appellants should have first approached the Grievance Redressal Forum or High Power Committee and ought to have put their case and got that issue decided by the High Power Committee. If at all the decision of the High Power Committee is against them, then the appellants can challenge the said decision before the High Court and subsequently if directed, then they may go before the Civil Court. He has further submitted that the appellants are not remedy-less, but they are required to approach first before the High Power Committee, constituted as per the directions of this Court. He has further submitted that even if the case of the plaintiffs is taken into account and the pleadings and prayers in the plaint are considered, it can be easily inferred that the issue whether the plaintiffs were eligible

or not was to be decided by the competent authority and, for that the High Power Committee is the only forum. The bar of Section 42 of the said Act thus come into play when such prayers are made before the Civil Court. Learned counsel while placing reliance on the judgment in the case of *Ashok B. Nigudkar (supra)* has pointed out the portion reproduced in the said judgment from the case of *Rajasthan State Road Transport Corporation and anr. vs. Bal Mukund Bairwa*, reported in *(2009) 4 SCC 299*. He argued that the Supreme Court in the case of *Rajasthan State Road Transport Corporation and Anr. (supra)* held that while deciding jurisdiction of the Civil Court, the High Court has to take a note of caution as to whether the plaintiffs have tried to circumvent the provisions of law in order to invest jurisdiction on the Civil Court although it otherwise may not possess. Therefore, the rulings in the cases of *Ashok B. Nigudkar (supra)* and *Naresh Lachmandas Aswani (supra)* decided by this Court are not applicable to the case of the plaintiffs.

8. Heard. Perused the impugned order. Section 42 of the said Act reads as follows:

“42. Bar of jurisdiction: Save as otherwise expressly provided in this Act, no Civil Court shall have jurisdiction in respect of any matter which the (appellate Authority, Competent Authority, Grievance

redressal Committee) or Tribunal is empowered by or under this Act, to determine; and no injunction 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 by or under this Act”.

The issue in respect of entitlement of the premises, which is going to be redeveloped under the said Act, is to be decided by the Grievance Redressal Committee and, therefore, the jurisdiction of the Civil Court is ousted. To that extent, this matter, which is referred to and the matters for which the Redressal Committee or High Power Committee or Appellate Authority are empowered to decide, cannot be taken up before the Civil Court under Section 9 of C.P.C. In fact, the Civil Court enjoys wide powers covering all disputes or issues between the parties of civil nature and can be decided by it. Section 9 of C.P.C. is worded in a very peculiar manner by which the legislature in fact vested upon the Civil Courts all the powers to adjudicate and decide all the civil matters relating to all disputes between the parties. The only qualification to this power is that unless it is explicitly or impliedly barred by specific statute. Section 42 of the said Act ousts the jurisdiction of the Civil Court to decide the matters, wherein action taken under the Act are challenged and to be decided by the Grievance Redressal Committee or the High Power Committee. The Maharashtra Slums Areas Act was need of the time, especially for the city like Mumbai, where there was

continuous unstoppable growth of the slums, so the development of these slums was a basic requirement of township of the City and, therefore, this legislation has come into existence. In response to the legislation, the Full Bench has laid down certain directions in the case of *Tulsiwadi Navnirman Coop Housing Society Ltd. & Anr (supra)* in respect of formation of High Power Committee. The Full Bench has directed that all the issues in respect of deciding the eligibility between the parties are to be taken up, considered and decided by such forum, so that the Civil Courts shall not be overburdened and they can deal with the regular other work smoothly. Under the said Act, otherwise there would have been continuous flow of the matters before the Civil Courts. Thus, Section 42 of the said Act has in fact off loaded the burden of the Civil Courts and the creation of the High Power Committee and as per ratio laid down in the case, in fact supports the working of the Civil Courts. However, there are certain issues in the proprietary rights where it is not possible for the Grievance Redressal Committee or High Power Committee to adjudicate upon though it can decide the eligibility of a particular person in respect of the tenements of the premises in a slum possibly on the basis of the documents i.e. ration card, electricity bill, water connection, gas connection and telephone connection etc. Apart from the eligibility, something more is required to be looked into

to establish the rights and interest of the parties or between the parties in order to ascertain proprietary rights and interests between the parties. Parties need to tender the documentary, oral and circumstantial evidence before the authority and that evidence is to be assessed. Only after marshalling the evidence, the authority can come to a conclusion about the nature of the right and interest. So, the procedural exercise based on the Evidence Act is required to be done and this cannot be done at the stage of High Power Committee or Grievance Redressal Cell. This right can be determined by the Civil Court only. In the case of ***Ashok B.Nigudkar*** (*supra*), the facts of the present case are more or less same. In the said case the plaintiff maintained his right as a legal heir of the original occupant in the suit hut and thus the learned Single Judge of this Court has held that main claim in the plaint was against defendant no.1, the private party, contending that the plaintiff and defendant no.1 are entitled to the joint use of the rights in respect of the said hut, being legal heirs of the deceased and it was also held that the learned Judge has erred in rejecting the plaint under Order VII Rule 11 (d) of C.P.C. and the appeal was allowed. The judgment of ***Rajasthan State Road Transport Corporation and anr.*** (*supra*) relief by the respondent is not useful in this case.

9. In the present case, the plaintiffs have no claim against SRA, but they want to establish their joint and common interest in the suit premises i.e. old suit premises alongwith defendant no.1 and, therefore, they do not challenge her eligibility. It is a challenge to her exclusive right of occupation/possession and if they are successful in establishing their other rights in the suit premises, then only they are entitle to get declaration from the Civil Court.

10. It is specifically mentioned that this Court is not holding whether the plaintiffs have established their case that they have joint right in the suit property or not, as the trial Court has not given findings on the said issue. Thus Court cannot give any finding on issue nos. 1 and 2. This discussion is limited only on the point of maintainability of the Suit under Order VII Rule 11 (d) of C.P.C., which was considered as barred under Section 42 of the said Act. The view taken by the learned Judge of the trial Court is illegal. In view of the dispute between the parties and the case of the plaintiffs, this case cannot be covered under Section 42 of the said Act and, therefore, I set aside the order passed by the learned Judge and hold that the Civil Court has jurisdiction to try, entertain, decide and adjudicate the suit. Accordingly, I pass the following order.

ORDER

- (i) Appeal is allowed.
- (ii) The entire evidence is recorded and arguments are heard by the trial Court, however, the parties are allowed to advance their further submissions before the trial Court on the basis of their oral and documentary evidence.
- (iii) The suit is restored and shall be listed before the trial Court on 14.09.2017 at 11.00 a.m., and the trial Court after considering its time table, give time to both the parties. The matter be concluded till 31.12.2017. Parties to co-operate with the trial Court.
- (iv) Till the final disposal of the suit, interim order granted on 26.06.2014 is continued.

11. First Appeal is allowed and disposed of accordingly.

12. In view of disposal of the First Appeal, nothing survives in the Civil Application and the same is disposed of as such.

(MRIDULA BHATKAR, J.)