

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 1122 OF 2010
ALONGWITH
CIVIL REVISION APPLICATION NO. 900 OF 2010
ALONG WITH
WRIT PETITION NO. 8142 OF 2010

Lalman K. Singh .. Appellant/Petitioner
vs.
Shri. Ganesh Prasad
Kalpanath Singh and ors. .. Respondents

Mr. R.A. Thorat, Senior Advocate a/w. Mr. P.J. Thorat for the Appellant/Petitioner.
Mr. Sandesh Patil and Mr. Chintan Shah for Respondent No.1.

CORAM : M. S. SONAK, J.
DATE : 05 JANUARY 2017.

P.C. :-

1] Mr. R.A. Thorat, learned senior advocate along with Mr. P.J. Thorat, learned counsel for the appellant/petitioner/applicant. Mr. Sandesh Patil and Mr. Chintan Shah, learned advocate for respondent No.1.

2] Learned counsel for the parties agree that these three matters, which are directed to be disposed of together, can be so disposed of by common judgment and order.

3] In Appeal from Order No. 1122 of 2010, the appellant challenges the order dated 31 August 2010 made by learned Judge, City Civil Court, Mumbai (Trial Judge) appointing a court receiver in respect of the suit premises.

4] This appeal was admitted on 13 December 2010 and interim relief was granted staying the impugned order. The order dated 13 December 2010 reads thus:

- “1. Heard learned counsel for the appellant.*
- 2. Admit. Ms.Singh appears for respondent no.1 and waives service. Mr.Ashok Kumar Singh appears for respondent no.2 and waives service.*
- 3. The appellant is in possession of the suit property. A court receiver has been appointed for the purpose of taking possession from him. In my view, if during the pendency of an appeal, appellant is dispossessed whether through receiver or otherwise he is likely to suffer irreparable loss. Hence there shall be stay to the impugned order.”*

5] During pendency of this appeal, Civil Application No. 157 of 2015 was filed by a developer, intending to demolish the suit premises and thereafter allot alternate premises to the appellant. This civil application was disposed of by this court by its order dated 23 February 2015. The said order reads thus:

“ The above Civil Application has been filed by the Respondent No.2 in the above Appeal From Order and the original Defendant. The relief sought in the above Civil Application are to the following effect:

“(a) This Court be pleased to direct the Appellant to handover the possession of the suit Shop No.2, Shankar Gawli Chawl No.1, Vakola Masjid, Nehru Road, Santacruz (East), Mumbai 400 055 to the Applicant- Respondent No.2 for demolition.

(b) This Court be pleased to appoint Court Receiver and/or direct Appellant and/or Respondent No.1 to take the possession of the new shop being Shop No.1, “A” Wing, Shankar Dham CHS Ltd., Vakola, Mumbai 400 055 from the Appellant-Respondent No.2 in lieu of Suit Shop.”

2] *The Applicant in the above Civil Application is the developer who is developing the property in question under Regulation 33(10) of the Development Regulation applicable to Mumbai. It seems that the development in so far as the land*

wherein the structure in question is situated is complete and the permanent alternate accommodation is ready for allotment, however, in view of the dispute between the original Appellant and the Respondent No.1 that the alternate premises in question cannot be allotted as a result of which the old structure which is existing on site continues to exist and cannot be demolished in view of the orders passed by the Trial Court. The consequence of the same is that there is an impediment for the Applicant to obtain the occupation certificate in view of the old structure remaining on site. The Applicant has, therefore, sought the aforesaid two reliefs which have been extracted hereinabove. The learned counsel appearing on behalf of the Respondent No.1 Shri Sandesh Patil, on instructions of the Respondent No.1, initially submitted that the Court Receiver be put in charge of the permanent alternate accommodation in respect of the shop in question which is to be allotted as and by way of permanent alternate accommodation. However, the learned counsel on instructions later on fairly conceded that he would leave it to this Court as to how the interest of the Respondent No.1 is to be protected. In view of the fact that the existence of the old structure is causing an impediment to the Applicant in the matter of obtaining occupation certificate, as a result of which, the other occupants of the newly constructed building are also affected. In my view, it would be just and proper if the following directions are issued:-

- 1) The original Appellant i.e. Lalman Kalpnath Singh would handover the possession of the old structure excluding the Tabela to the Applicant within one week from date the Applicant would in turn handover possession of the permanent alternate accommodation i.e. the shop No.1, A Wing, Shankar Dham CHS Ltd., Vakola, Mumbai, simultaneously.
- 2) The original Appellant Lalman Kalpnath Singh would occupy the said Shop No.1, A Wing, Shankar Dham CHS Ltd., Vakola, Mumbai, without prejudice to the rights and contentions of the parties and subject to the result of the above proceedings.
- 3) The Appellant Lalman Kalpnath Singh would file an undertaking in this Court after he is handed over possession to the fact that he undertakes to abide by the decision, that would be rendered in the above proceedings

or in the suit as would be directed.

4) The Civil Application is allowed in the aforesaid terms and to accordingly stand disposed of.

5) List the Appeal From Order, the Civil Revision Application No.900/2010 and Writ Petition No.8142/2010 on 9th March, 2015.

6) The parties are put to notice that the above proceedings may be finally heard on the said date.”

6] This means that the original suit premises are no longer in existence and the appellant, in terms of the order dated 23 February 2015 is to be put in possession of alternate premises. The appellant is required to possess such alternate premises, subject to any final orders that may be made in the pending suit. Necessary undertakings to this effect are stated to have been filed by the appellant.

7] In view of the aforesaid subsequent development, no useful purpose would be served in reviving the order for appointment of court receiver. The undertaking furnished by the appellant affords sufficient security to respondent No.1-plaintiff. In addition to the same, the appellant is directed not to part with the possession of the alternate premises or to create any third party rights in respect of the same, during pendency and final disposal of the suit.

8] The Appeal from Order No. 1122 of 2010 is accordingly, disposed of by setting aside the impugned order. However, the appellant is restrained from parting with the possession of the alternate premises or creating any third party rights in respect of thereof during pendency and final disposal of the suit. The undertaking furnished by the appellant in pursuance of the order

dated 23 February 2015, shall continue to bind the appellant and shall operate until final disposal of the suit. The status of such alternate premises shall abide by final orders, which shall be made in the suit.

9] In Civil Revision Application No. 900 of 2010, the petitioner challenges the order dated 27 August 2010 made by the learned Trial Judge dismissing the appellant's preliminary objection to the maintainability of the suit on the ground of bar under section 42 of the Maharashtra Slum Areas (Improvement, Clearance and Redevelopment) Act, 1971 (Slum Act).

10] Section 42 of the Slum Act reads thus:

“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 Administrator, Competent Authority 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.”

11] The main reliefs prayed for in the suit read thus:

“(a) This Hon'ble Court be pleased to declare that the Family Settlement dated 9th June, 2005 executed between the Plaintiff and the Defendant No.1 is valid, subsisting and binding upon the Plaintiff and the Defendant No.1.

(b) The Honourable Court be pleased to restrain the Defendant No.1 by an Order and Injunction from this Honourable Court from selling, transferring, assigning, parting with joint possession and or creating third party right in favour of any third person or persons including the Defendant No.2 and 3 respect of shop No.2, Shankar Gawli Chawl No.1, Nehru Road, Vakola, Santacruz (East), Mumbai – 400 055 admeasuring 260 square feet and Tabela admeasuring 3000 sq.

ft. at Pandurang Vakil Wadiki Chawl, Vakola Village Road, Santacruz (East), Mumbai-400 055.”

12] In Roznama dated 6 October 2009, it is recorded that the plaintiff has withdrawn relief in terms of prayer clause (a). However, there is subsequent order dated 27 August 2010, by which, learned Trial Judge has permitted the plaintiff to amend the plaint and to revive prayer clause (a). The said order is subject matter of challenge in Writ Petition No. 8142 of 2010.

13] From the perusal of the plaint and the reliefs prayed for therein, there is no reason to interfere with the impugned order, when it holds that the suit is not barred under section 42 of the Slum Act. From the allegation in the plaint, is quite clear that this is basically a dispute between two brothers in relation to their claim to the suit premises. This is not a a suit where any scheme under the Slum Act is being challenged. This is not a case where inaction of the authority under the Slum Act is being questioned. Therefore, learned Trial Judge was right in holding that the bar under section 42 of the Slum Act was not attracted and the preliminary objection raised, lacked merit.

14] In ***Abdul Sattar Haji Usman and anr. Vs. The Archbishop of Bombay & ors – 2016 SCC OnLine Bom 2039***, learned Single Judge of this Court upon analysis of the provisions of Section 42 of the Slum Act has held that private disputes between the occupants of the slum and the developer, do not, under all circumstances, attract the bar under section 42 of the Slum Act. In fact, in the said case, apart from the civil disputes between the parties, there was a further

challenge to the acquisition of the property by invoking the provisions of the Slum Act and it was alleged in the plaint that even in such acquisition is fraudulent. In paragraphs 8 to 12, learned Single Judge has observed thus:

“8. Section 42, as is plain from its language, ousts the jurisdiction of the civil court in respect of all matters which the authorities named therein are empowered to determine by or under the Act. Exceptions, if any, must be found in the Slum Act itself, as this ouster is subject to what is otherwise expressly provided therein. Section 42 has a second part, which prohibits grant of any injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Slum Act.

9. Let us first consider if on the terms of Section 42, the present suit is barred or granting of any particular relief claimed in the suit (i.e. injunction) is prohibited. The matters which the authorities named in Section 42 are empowered to determine are the following : The competent authority, upon a complaint from any person or report from its officer, police, etc. is empowered to order demolition of any structure, which is unauthorised or illegal in terms of Sections 3Z-1 and 3Z-2 of the Slum Act. It is also empowered to declare any area or buildings in any area to be a slum area under Section 4 of the Slum Act. The competent authority has also power to execute any work of improvement under Section 5 and to require occupiers of premises within such area to vacate the premises or require improvement of buildings unfit for human habitation and of areas which are source of danger to public health, respectively, under Sections 5A, 5B and 5C of the Slum Act. It may also direct restrictions on erection of buildings in slum areas except with its previous permission under Section 8. The competent authority also has power to order demolition of buildings unfit for human habitation in pursuance of Section 9 of the Slum Act. With the previous approval of the State Government, the competent authority is empowered to entrust to any agency recognised by it the work of execution of any improvement, clearance of redevelopment work or maintenance or repairs, etc. under Section 10A. The competent authority is also empowered to declare any slum area to be a clearance area under Section 11 of the Act and make a clearance order under Section 12. It has power to redevelop such

clearance area under Section 14. So also, the competent authority has powers to determine compensation payable to any person having interest in any such acquired land under the Act, decide the apportionment of such compensation and order payment thereof, respectively, under Sections 17, 18 and 19 of the Act. The competent authority may also grant permissions for institution of suits or proceedings under Section 22 of the Act. The competent authority also has power to determine rent of any building in any slum area. It has various other miscellaneous powers of entry, inspection, etc. under Chapter 7 of the Slum Act. Appeals by persons aggrieved by any notice, order or direction issued or given by the competent authority lie before the Appellate Authority under Section 35 of the Act. So also, appeals by persons aggrieved by notices, orders or directions of the Appellate Authority or appeals for the purpose of resolving disputes in relation to matters about eligibility of a slum dweller or his entitlement, etc. lie before the Grievance Redressal Committee constituted by the State Government under Section 35(1)(a) of the Slum Act. The decisions of this Grievance Redressal Committee have been made final by virtue of sub-section (5) of Section 35. The Tribunal appointed under Section 2(i) of the Act is empowered to determine questions in respect of expenses to be recovered as arrears of land revenue and disputes in respect of such claims, under Section 44 of the Slum Act. These are the only matters which the authorities named under Section 42 are empowered to determine. Apart from these named authorities, there are other authorities including the Slum Rehabilitation Authority as well as the State Government who are empowered to exercise powers and determine various matters under the Slum Act. The first part of Section 42 does not apply to these powers or matters. For example, the Slum Rehabilitation Authority appointed under Section 3A of the Act is empowered to exercise various functions and perform duties under sub-section (3) of Section 3A, namely, formulation of schemes for rehabilitation of slum areas and getting the same implemented and doing of all acts and things as may be necessary for achieving the object of rehabilitation of slums. So also, the State Government is empowered to acquire land to enable the Authority to execute any work of improvement or to redevelop any slum area or any structure in such area. The first part of Section 42 does not apply to any of these matters to be decided

by these authorities, though no court or authority can grant any injunction in respect of any action taken or to be taken in respect of these matters by virtue of second part of Section 42. In other words, though jurisdiction of the civil court is not barred in respect of any of these latter matters, no injunction can be granted by any civil court in respect of those. On this analysis, let us consider the present suit and the reliefs which it asks for. The present suit, in the first place, seeks a declaration of ownership of the suit property. Secondly, it seeks recovery of possession of the suit property on the basis of such declaration. Thirdly, it prays for a declaration that the acquisition of the suit property under the Slum Act is vitiated by fraud and liable to be struck down. Lastly, it seeks a permanent injunction restraining the Defendant State as well as the former owner of the suit property and the society of slum-dwellers and occupants from interfering with the use, occupation and enjoyment of the suit property by the Plaintiffs. None of these matters are to be decided by the Competent Authority, Appellate Authority, Grievance Redressal Committee or Tribunal under the Slum Act. As regards the injunction prayed for in the suit, the same is merely consequential upon the Plaintiffs' ownership and possession of the suit property claimed in the suit. It does not seek to directly affect any action taken or to be taken in pursuance of any power conferred by or under the Slum Act. In the event the Plaintiffs' ownership and possession are decreed by the Court and the acquisition is struck down, and possession restored to the Plaintiffs, the Plaintiffs would be entitled to the permanent injunction prayed for in the suit. No exception, thus, can be taken to any of the prayers in the suit on the plain terms of Section 42.

10. *Learned Counsel for the Defendants rely on the judgments of this Court in the cases of Housing Development and Improvement India Pvt. Ltd. Vs. Narendra L. Aswani & Others, Lokhandwala Infrastructure Pvt. Ltd. Vs. Dhobighat Compound Rahiwasi Seva Sangh and others, and Naresh Lachmandas Aswani Vs. Haridas alias Hardas Lachmandas in support of their contention that the suit is barred under Section 42. In the case of Housing Development & Improvement India Pvt. Ltd. (supra), an injunction was claimed in respect of disposal of, or creation of third party rights in, premises in the buildings which were under construction in an SRA project. The ad-interim injunction*

granted by the learned Single Judge was set aside by the Appeal Court. In that case, there was no challenge to the notice issued by the Slum Authority as well as the acquisition notification. The prayer for injunction directly interfered with the possession and third party rights to be created in buildings which were being constructed under an LOI issued by the Slum Authority for an SRA project sanctioned under the Slum Act. When this matter came up before a learned Single Judge (Dhanuka, J.) for consideration of interim relief, after the ad-interim injunction was rejected by the Appeal Court, the learned Judge in Naresh Lachmandas Aswani (supra), specifically held that prayers (a) to (c), and (e) to (h), which inter alia dealt with the title of the Plaintiff and cancellation of various documents executed by the Defendant in breach of that title, were very much within the jurisdiction of the Civil Court and it was only the prayer for delivery of possession which was barred, since LOI was already issued in respect of the Slum Rehabilitation Scheme, which was being implemented on the property. The suit, in that case, was, however, dismissed by the learned Single Judge on the ground of bar of limitation. Even in Lokhandwala Infrastructure (supra), this Court held that having regard to the powers, duties and functions of the Authority, it was clear that the Authority was not empowered to determine private rights or liabilities as between the Slum dwellers and the developer vis-avis any development agreement entered into between them for redevelopment of any slum. The court held that whether or not such development agreement is binding on the parties thereto, whether or not any party has breached such development agreement, and whether or not the party complaining of such breach is entitled to specific performance of the development agreement, all of which were matters arising for the determination in that suit, were not matters which the Authorities under the Slum Act were empowered to decide. This Court further held that as for the particular relief, namely, permanent or temporary injunction restraining Defendant No.26 from carrying on any development or directly or indirectly preventing it from acting as a developer of the particular Slum Rehabilitation Scheme, which the Authority authorized it to do, whether or not such relief can be granted would be considered on merits at the hearing of the suit or the Notice of Motion, as the case may be. But such consideration did not reflect on the jurisdiction of this Court to

entertain the suit as a whole. The Court might entertain the suit and yet not grant the particular relief, if it considered the same to be barred under Section 42 of the Slum Act.

11. The main dispute in the present suit is between the Plaintiffs and Defendant No.1, on the one hand, concerning the title of the suit property. This dispute is clearly out of bounds for the authorities under the Slum Act. It is for determination of private rights as between two rival claimants, which the authorities under the Act are not empowered to determine. On the other hand, the suit is also between the purported owner of the property and the acquiring authority, alleging fraud on the part of the latter. Even this dispute does not lie before any of the authorities named in Section 42.

12. Secondly, as this Court held in Lokhandwala Infrastructure, whether a particular relief, whether of permanent or temporary injunction, can or cannot be granted, does not reflect on the jurisdiction of the Court to entertain the suit as a whole. This Court may entertain the suit and yet not grant any particular relief amongst the many reliefs claimed in the suit on account of a legal bar, in this case under Section 42 of the Slum Act.”

15] Accordingly, no case is made out to interfere with the impugned order. The civil revision application is liable to be dismissed and is hereby dismissed.

16] In Writ Petition No. 8142 of 2010, as noted earlier, the challenge is to the order dated 27 August 2010 made by the learned Trial Judge granting leave to respondent No.1 – plaintiff to amend the plaint.

17] Mr. Thorat, learned senior advocate for the petitioner, has submitted that Chamber Summons No. 375 of 2010 seeking leave to amend the plaint was considered and allowed at the stage when

adjudication upon the preliminary issue raised under section 9A of the CPC was pending. Relying upon the decision of learned Single Judge of this Court in *Arjun Dada Gadage Vs. Mallappa Gurappa Chougule and anr. - 2004 (1) Bom.C.R. 741*, Mr. Thorat submitted that even an application for amendment of the plaint cannot be considered before application under section 9A of the CPC is decided. In the alternate, Mr. Thorat submitted that from the perusal of the impugned order, it is quite clear that none of the other objections raised by the petitioner have been considered or dealt with. Mr. Thorat submitted that the prayer clause (a) of the plaint was unconditionally withdrawn. Thereafter, without assigning any reason, leave has been granted to revive such prayer clause. This, he submits, was quite impermissible. For all these reasons, Mr. Thorat submits that the impugned order dated 27 August 2010 is liable to be set aside.

18] Mr. Sandesh Patil, learned counsel for respondent No.1 (plaintiff), submits that there is no bar to consider an application for amendment of plaint before issue under section 9A of the CPC is decided. In support of such subsequent, Mr. Patil relies upon the decision of learned Single Judge of this court in *The Immigrants Ideal Producers Co-operative Society Ltd. and anr. Vs Mrs. Jahanara Moiz Dalal – 2004(2) BomCR 597* and the order dated 28 July 2014 in *Chamber Summons No. 585 of 2013 in Suit No. 553 of 2012 (M/s. Tirupati Balaji Enterprises Vs. Anthony Patrick Lewis and ors.)*. He submits that the order dated 28 July 2014 has in fact been upheld by the Division Bench in *Appeal (L) No. 503 of 2014 disposed of on 23 September 2014*.

19] In *Arjun Dada Gadage (supra)* learned Single Judge of this Court has taken the view that unless issue of jurisdiction decided in first instance court could not proceed to decide any other issue including any application seeking leave to amend the plaint. However, in *Immigrants Ideal Producers Cooperative Society Ltd. (supra)*, another learned Single Judge of this court, after referring to the decision in *Arjun Dada Gadage (supra)*, has held that there is no absolute bar to the court allowing an application for amendment of the plaint even before the preliminary issue under section 9A of the CPC is disposed of.

20] Both the aforesaid decisions were once again considered by learned Single Judge in *M/s. Tirupati Balaji Enterprises (supra)* and it was held that there is no absolute bar in such a matter. The appeal, i.e., Appeal (L) No. 503 of 2014 was dismissed by the Division Bench on 23 September 2014, though, it appears that this particular issue was not raised or decided in the appeal.

21] In the light of the decisions of this court in *Immigrants Ideal Producers Cooperative Society Ltd. (supra)* and *M/s. Tirupati Balaji Enterprises (supra)*, it cannot be said that there was any jurisdictional bar as such for the consideration of the application for amendment of the plaint. That apart, now that the civil court has already dismissed the objection to jurisdiction of the court and such dismissal has been upheld by this court, no useful purpose will be served in holding that the application seeking leave to amend would not have been considered by learned Trial Judge before the issue

under section 9A of the CPC was disposed of. To that extent, therefore, there is no infirmity in the impugned order.

22] However, if the impugned order is perused, it is clear that there is virtually no discussion whatsoever upon other objections raised by the appellants to the chamber summons seeking leave to amend. For example, Mr. Thorat, learned senior counsel for the petitioner, has contended that there was no reason to permit the plaintiff to revive prayer clause (a), which he had unconditionally given up. All these objections were required to be considered. On this ground and not on the ground of any lack of jurisdiction, the impugned order dated 27 August 2010 in Chamber Summons No. 375 of 2010 is set aside. Chamber Summons No. 375 of 2010 is restored to the file of learned Trial Judge, who shall dispose of the same after afford of opportunity of hearing to all the concerned parties.

23] Accordingly, the appeal, civil revision application and writ petition are disposed of, in the aforesaid terms. There shall be no order as to costs.

24] All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)