

MHRG090005832020

R.C.S. 63/2020



Farid Anis Jalgaonkar

Vs. Sachin Rajendra Tawade and 3

ORDER BELOW EXH.25

(Passed on this 04/02/2023)

By this application, the defendant No.4 is seeking rejection of the plaint under Order-VII Rule -11(d) of the Code of Civil Procedure, 1908 ('CPC') on the ground that suit is barred by law.

2. It is asserted that the Plaintiff has not sent the prior notice to the defendant no. 4 as per section 303 of Maharashtra Municipal Council Nagarpanchayat and Industrial Township Act, 1965 therefore the suit is not maintainable. It is further stated that there is no cause of action shown in the suit against the defendant no.4 and therefore the suit is liable to be rejected against defendant no.4.

3 The Plaintiff opposed the application by filing say at **Exh.29** contending that the said application at Exh 25 has been filed to prolong the matter. The Plaintiff submitted that in para no.10 and 11 of the Plaint he has clearly mentioned the cause of action and he has also sent the notice to the defendant prior to filling of the suit. The suit is based on legal point therefore the present application of the defendant is not tenable under Order-VII Rule-11 of CPC. Hence, the Plaintiff contended that the application being not tenable deserves to be rejected.

4. Heard both sides. Perused the plaint, say and relevant record. Considered submissions. Following points arise for my determination, I have recorded my findings thereon with reasons stated as under :

Sr. No.	Points	Findings
1	Whether in the present suit the plaint can be rejected under Order-VII Rule-11 of Code of Civil Procedure, as prayed by defendant no.4 ?	No
2	What order?	Application is rejected.

::REASONS::

AS TO POINT NO. 1:

5 It is the contention of the defendant No. 4 that the Plaintiff has not sent notice to them as per Section 303 Maharashtra Municipal Council Nagarpanchayat and Industrial Township Act 1965 and there is no cause of action against them. On the other hand it is contended by the Plaintiff that the present application is not tenable.

06. Shri. Gangal the learned advocate for defendant No.4 and Shri.R.B.Sawant for other defendants during the course of their arguments contended that the notice sent by the plaintiff is not in proper format. The notice does not show any cause of action against defendant no.4. the plaintiff has only been kept in Carbon Copy (C.C.) to the defendant no.4 and not made party by addressing the defendant

no.4 therefore it is not a proper service of notice as per General Clauses Act. Therefore, the plaint is liable to be rejected against defendant no.4. Further, defendant no.4 argued that, this court is has jurisdiction to reject the plaint for one of the defendant and for supporting his contention he has drawn attention of the court on Order I Rule 10(2) which states that court may strike out and/or add parties. Hence, he prayed to allow the application.

07. Shri. Farhan Misaric the learned advocate for Plaintiff submitted that, the present suit is filed for seeking the reliefs of removal of encroachment and mandatory injunction. The defendant no.1 to 3 with the help of defendant no.4 made a construction which has not been according to the approved map and plaintiff specifically contended and argued that the defendant no.4 not supposed to allow such type of illegal construction and the defendant no.4 has not objected to unauthorised construction done by the defendant no.1 to 3. It is alleged that there is a collusion between defendant no. 1 o 4. The Plaintiff contended that the bar under Section 303 of Maharashtra Municipal Council Nagarpanchayat and Industrial Township Act,1965 is applicable only when the act of construction was done in good faith and in due compliance of the approved plan, map. But here the action of defendant no.4 is not done in good faith and now it is closing its eyes and thereby trying to give sanctity to the unauthorised construction done by the defendant no.1 to 3. The Plaintiff has sent the notice to defendant no.4 and technicalities should not be permitted to come in the way of grant of justice to the parties Hence, he prayed to reject the application.

8. I have carefully considered the facts and circumstances

and the submissions made. Before proceeding further, it would be necessary to refer the guiding principles to decide an application under Order VII Rule 11 of C.P. C. They can be summarized as follows:

- (i) Rejection of plaint under Order VII Rule 11 of the CPC is a drastic power conferred in the Court to terminate a civil action at the threshold.
- (ii) It is averments in plaint that have to be read as a whole to find out whether it discloses a cause of action or whether suit is barred under any law.
- (iii) When the suit is barred by limitation on a plaint reading of plaint it can be dismissed.
- iv) While deciding whether plaint discloses a cause of action the court has to ascertain whether the plaint created an illusion of cause of action by clever drafting.
- v)Plaint can be rejected at any stage of the suit.

9. Further, Maharashtra Municipal Council Naarpanchayat and Industrial Township Act

Section 303- Bar of suits against Council, its officers, servants, etc. for acts done in good faith

No suit shall lie in respect of anything in good faith done or intended to be done under this Act, against [1] [the Collector, the Director, the Regional Director or any other officer of the State Government or] any Council or against any committee constituted under this Act, or against any officer or servant of a Council or against any person acting under and in accordance with the directions of any such Council, committee, officer or servant or of a Magistrate.

Section 304 Limitation of suits against Council, its committees, officers and servants for acts done in pursuance or executing of this Act :

- (1) No suit shall lie against a Council or against any committee constituted under this Act, or against any officer or servant of a Council in respect of any act done in pursuance or executing or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act -
 - (a) unless it is commenced within six months next after the accrual of the cause of action; and
 - (b) until the expiration of one month after notice in writing has been, in the case of a Council or its committee, delivered or left at the municipal office and, in the case of an officer or servant of a Council, delivered to him or left at his office or place of abode; and all such notices shall state with reasonable particularity the causes of action and the name and piece of abode of the intending plaintiff and of his advocate, pleader or agent, if any, for the purpose of the suit.
- (2) At the trial of any such suit
 - (a) the plaintiff shall not be permitted to adduce evidence relating to any cause of action save such as is set forth in the notice delivered or left by him as aforesaid;
 - (b) if the suit be for damages and if tender of sufficient amends shall have been made before the action was brought, the plaintiff shall not recover more than the amount so tendered and shall pay all costs incurred by the defendant after such tender.
- (3) If the defendant in any such suit is an officer or servant of a Council, payment of any sum or part thereof payable by him in or in consequence of the suit may, with the sanction of the Council, be made from the municipal fund.

(4) Nothing in clauses (a) and (b) of sub-section (1) shall apply to any suit under section 38 of the Specific Relief Act, 1963 (XLVII of 1963) or under sub-sections (1) or (2) of Section 96 of this Act.

10. Since the controversy in the present suit arises out of the application under Order-VII Rule-11 of C.P.C, it would be imperative to see the plaint minutely. In brief the claim of plaintiff is that, the suit property of the Plaintiff bearing City no.615/14 area admeasuring 13.14 sq.meter and adjacent to this land there is land owned by defendant no.1 City Survey no.615/8 area admeasuring 58.5 Sq.meter. Further City Survey No. 615/9 admeasuring 56.9 jointly owned by defendant no.2 and 3. Further the defendant no.2 and 3 have not given prior intimidation to plaintiff about construction on adjacent land of City survey no.615/14. City Survey no.615/8,615/9 regarding this land, it came to be known that the map was approved by the office of the defendant no.4 Roha Municipal Council and also the terms and conditions mentioned in the building permit mentioned in the point no.4,10,and 34 B and the construction being done in an unauthorised manner by flouting the applicable plan,map and further, but the defendant no.4 Roha Municipal Council has also lazily helped to complete the said unauthorised construction without conducting any inquiry as to whether the said construction is being done strictly in compliance of the approved plan map or not and also on dated 02.11.2020 the Plaintiff has filed an application in an office of defendant no.4 to take any action but defendant no.4 has not taken any action against defendant no.1 to 3 and not sent any reply to the application of the Plaintiff. The defendant no. 1 to 3 has constructed a safety slab on top of the tile roof of the shop owned by the plaintiff

and placed an iron grill window and encroached an area of about 2 to 2.5 feet. Therefore, the Plaintiff prayed that the encroached area be cleared and removed by taking out the existing safety slab measuring 2 ft X 2.5 ft and by demolishing the illegal encroachment in the area owned by plaintiff.

11. On the other hand defendant no. 4 contended that the suit is not maintainable as plaintiff has not shown any cause of action and not sent the notice required under section 303 of Maharashtra Municipal Council Nagarpanchayat and Industrial Township Act 1965.

12. In the present case, a meaningful reading of the plaint makes it abundantly clear that the Plaintiff filed suit for removal of encroachment and mandatory injunction. The Plaintiff has sent notice to defendant no.4 prior to filling of the suit. But the said notice is not sent by the plaintiff by keeping in C.C to the defendant no.4 which is not proper notice as per General Clauses Act. However, the suit is not filed against any official of the Defendant no.4 in his personal capacity.

13. On the contrary the Plaintiff argued that the work of the plaintiff is not done in good faith therefore the defendant no.4 cannot take defence of Section 303 of the Maharashtra Municipal Council Nagar panchayat and Industrial Township Act. After considering the plaint and documents on record it is seen that prima facie notice has been sent and supporting acknowledgment is there on record. At least the defendant no.4 had a knowledge about the allegation of illegal construction by defendant no.1 to 3. again the act of approving construction in good faith or not is subject of trial. Whether it is proper

notice or not that will be decided at the time of trial as a mixed question of law and fact. The issue is being kept open for the time being. This is not the proper stage to decide in which format the plaintiff should have send notice to the defendant no.4. The plaintiff has to get a fair opportunity to put up his claim and defendant no.4 has to show as to what steps it has taken till now after getting the information of unauthorised construction by the defendant no. 1 to 3. Further, no prejudice will be caused to any party if the Plaintiff has arrayed defendant no.4. Even the court would be required to pass necessary directions to the defendant no.4 to get all the required details of approved plan,map etc.,and action if any initiated by the defendant no.4 during the course of trial. Even otherwise , the Court belives that it is necessary to implead the defendant no.4 to properly adjudicate the present dispute and for passing necessary orders to ensure compliance with the applicable plan,map of the defendant no.4.

14. The defendant no.4 will have a fair opportunity to put its defence and to assist the Court in ascertaining certain technical aspects of the approved plan, map etc. at the time of trial. Only on the count that the notice is not in a proper format this court is not inclined to reject the plaint at the threshold. Further the argument by the Ld. Advocate for defendant no.4 on the power to use Order I Rule 10 of the Code of Civil Procedure is not required for deciding the present application of the defendant no.4 for rejection of the plaint.

15. For all the reasons above stated,it is held that the defendant No. 4 has not made out a case for rejection of plaint. Therefore, I answer point No.1 in negative. In the result, I pass following order.

: O R D E R :

1. The application for rejection of plaint is rejected.
2. No order as to cost.

Place : Roha.
Date : 04.02.2023

(Megha C. Hasge)
Jt. Civil Judge Jr. Division,
Roha-Raigad.