

IN THE HIGH COURT OF JUDICATURE AT BOMBAY***CIVIL APPELLATE JURISDICTION*****WRIT PETITION NO. 5007 OF 2017****Mohd. Kunju Kamaluddin****..... Petitioner****VERSUS****Mohd.Abbas Mohd.Hussain Patel & Ors.****..... Respondents**

Mr.Prasad S.Dani, Senior Advocate, i/b. Mr.Prasad B.Kulkarni for the Petitioner.

Mr.Anukul B. Seth, i/b. Mr.M.V.Thorat for the Respondent nos.1 and 2.

Mr.B.B.Sharma for the Respondent nos. 3 to 5, CIDCO.

CORAM : R.D. DHANUKA, J.**DATE : 22nd OCTOBER, 2018****P.C.**

By this petition filed under Article 227 of the Constitution of India, the petitioners (original plaintiffs) have impugned the order dated 25th January,2017 passed by the learned Civil Judge, Senior Division, Panvel below Exs.1 and 147 filed by the defendant no.3 to 5 under Order VII Rule 11(d) of the Code of Civil Procedure, 1908 alleging non compliance of section 159A of the M.R.T.P.Act, 1966. There is also a prayer for recalling of the order below Ex. dispensing with the notice required to be issued under section 159A of the M.R.T.P.Act, 1966.

2. The suit was filed by the plaintiffs *inter alia* praying for an order and declaration that the suit agreement was legal, valid, subsisting and

was binding on defendant nos. 1 and 2 and for other reliefs. A suit was filed in the month of October 2005. On 20th October, 2005, the trial court waived the notice under section 159A of the M.R.T.P. Act on the application filed by the original plaintiff seeking waiver on the ground that the suit was required to be filed urgently in view of the apprehension of the plaintiff set out in the plaint. Based on the said application, the learned trial judge passed the said order of waiver on 20th October, 2005. All the defendants thereafter filed written statement. Insofar as defendant nos. 3 to 5 are concerned, written statement was filed on 31st March, 2006 raising various issues. The plaintiff had thereafter filed an application below Ex.5 against all the defendants. No application under Order VII Rule 11(d) was filed by the CIDCO or by the other defendants. CIDCO did not file any application for seeking recall of the order of waiver granted by the trial court till date.

3. The oral evidence has already commenced. The defendant nos. 3 to 5 has filed application for recall of the order granting waiver under section 159A of the M.R.T.P. Act after 11 years. The said application has been allowed by the learned trial judge by the impugned order dated 25th January, 2017. The learned trial judge has recalled the said order of waiver passed by the trial court and had held that the suit against the defendant nos. 3 to 5 was based on no cause of action as well as without compliance of Section 159A of the M.R.T.P. Act. The learned trial judge directed the plaintiff to strike off the names of the defendant nos. 3 to 5 from the cause title of the plaint and to delete the prayers insofar as defendant nos. 3 to 5 are concerned.

4. Mr.Dani, learned senior counsel for the plaintiff invited my attention to the prayers in the plaint, the application filed by the defendant nos. 3 to 5 and the order dated 25th January,2017 passed by the trial court and the order passed by the trial judge granting waiver of notice under section 159A of the M.R.T.P.Act. He submits that the oral evidence has already commenced. The said applications (Exs.1 and 147) were filed after 11 years from the date of filing the written statement.

5. Learned counsel for the respondent nos. 3 to 5 on the other hand submits that application under Order VII Rule 11(d) can be filed by any of the defendants at any stage. He does not dispute that the leave was granted by the trial court in the month of October 2005. The trial court had thereafter heard the application below Ex.5.

6. Learned counsel placed reliance on the judgment of this court in case of ***Akash Impex, Mumbai vs. Municipal Corporation of Greater Mumbai, 2014(1) Mh.L.J. 498*** in support of the submission that the notice under section 159A of the M.R.T.P.Act, 1966 could not have been waived by the learned trial judge.

7. It is not in dispute that the plaintiff had averred in the plaint that the said notice under section 159A of the M.R.T.P.Act, 1966 was required to be waived in view of the extreme urgency and in view of the action of the authority being bad in law and against the provisions of M.R.T.P.Act. Considering the urgency, the learned trial judge has

waived this notice in the month of October 2005. It is not in dispute that the defendant nos. 3 to 5 have filed written statement and raised various objections. It is also not in dispute that the CIDCO against whom the said notice was waived by the trial court did not apply for recall of the said order passed by the trial court on 20th October, 2005 nor filed any application under Order VII Rule 11(d) on that ground.

8. In my view, the defendant nos. 1 and 2 being a private party could not have applied for recall of the order granting waiver of notice under section 159 of the M.R.T.P.Act.

9. Be that as it may, though the written statement was also filed as far back as in the year 2006, no such application was filed for a period of 11 years. Admittedly, the trial has already commenced. The oral evidence is going on. In my view at this stage the learned trial judge thus could not have even otherwise entertain such application for recall of the order granting waiver or notice under section 159A of the M.R.T.P.Act and for striking of the names of the defendant nos. 3 to 5 from the plaint and the consequential prayer against them.

10. A perusal of the impugned order passed by the learned trial judge allowing the application (exhibit) 147 indicates that the learned trial judge was under impression that such application for waiver of notice was allowed against the private party. The learned trial judge failed to appreciate that the oral evidence was already commenced and the said application under Order VII Rule 11(d) was filed after gross delay of 11 years. In my view, the impugned order passed by the

learned trial judge on 25th January, 2017 is thus contrary to section 159A of the Act and also contrary to law. The impugned order thus deserves to be set aside.

11. Insofar as the application for dismissal of the suit on the ground that there was no cause of action against defendant nos. 3 to 5 is concerned, a perusal of the plaint clearly indicates that there was a cause action against the defendant nos. 3 to 5 and thus the learned trial judge was wrong on that part also in the impugned order.

12. Mr.Sharma, learned counsel for the CIDCO states that there was no cause of action against CIDCO also. The learned trial judge did not consider the said issue in view of the fact that there was no separate application filed by the CIDCO under Order 7 Rule 11(a) of the Code of Civil Procedure, 1908 filed by CIDCO. If any such issue is already raised by the CIDCO in the written statement, the trial court will consider the same on its own merits.

13. I, therefore, pass the following order :-

- (a) The impugned order dated 25th January,2017 passed by the learned trial judge below Exhibit 147 is quashed and set aside.
- (b) Application (Exhibit 147) is rejected.
- (c) The learned trial judge shall proceed with the suit

expeditiously and shall not grant adjournment to any of the parties unnecessarily.

14. Writ petition is disposed of in the aforesaid terms. No order as to costs.

[R.D. DHANUKA, J.]