

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

901 CIVIL REVISION APPLICATION NO.32 OF 2019

- 1) The Superintendent Engineer,
CIDCO Office, Waluj Mahanagar-1,
Aurangabad, Dist.Aurangabad.
- 2) The City & Industrial Development
Corporation Ltd., Through
Superintendent Engineer,
'Udyog Bhavan', New Aurangabad
Office, Aurangabad 431 003.
- 3) The City & Industrial Development
Corporation, Through Executive
Engineer, CIDCO Main Office,
"Nirmal" 2nd Floor, Nariman Point,
Mumbai.

..Applicants
(Ori. Defendants)

VERSUS

- 1) Sara Venkatesh Plot Owners
Co-operative Housing Society,
Gat No.52/1, Wadgaon Kolhati,
Aurangabad.
- 2) Secretary -
Dinanath Dnyaneshwar Rathod
Age: 33 years, Occu.: Business,
R/o. Flat No.14, D-2 building
Sara Venkatesh Apartments,
Waluj, M.I.D.C.,
Aurangabad.
- 3) Member,
Pravin Rohidas Patil
Age: 31 years, Occu.: Business,
R/o. Flat No.6, E-3 Building,
Sara Venkatesh Apartments,
Waluj, M.I.D.C., Aurangabad.
District: Aurangabad.

..Respondents
(Ori. Plaintiffs)

...
Advocate for Applicants : Shri Anil S. Bajaj
Advocate for Respondents : Shri N. Y. Kingaonkar
...

CORAM : P.R.BORA, J.
DATE: 10th July, 2019

ORAL JUDGMENT:-

1. Leave to substitute the Synopsis.
2. Heard finally with consent of the learned Counsel appearing for the parties.
3. The applicants have preferred the present Civil Revision Application in exception to the order dated 12.02.2019 passed by the 4th Civil Judge, Senior Division, Aurangabad, below Exhibit 11 in Regular Civil Suit No.80 of 2019. The present respondents have filed the aforesaid Regular Civil Suit against the present applicants seeking the following reliefs:-

“B) It may be declared that, the open plot shown in Gut no.48 and 52 of Wadgaon Kolhati, adjacent to and towards southern side of Sara Venkatesh Co-operative Society at Gut No.52/1 of Wadgaon Kolhati, Aurangabad is not provided for any accumulation/Collection of drain water and it be further declared that, it is not a place for any pumping station of drain water.

C) It may be further declared that, the letter issued by defendant no.2 vide Jawak Karmank Cidco/Superintendent Engineer/NASJHA/39 dated 04.01.2019 is illegal and arbitrary one the same is not based on legal footing.

D) The Decree of permanent injunction restraining all the defendants, their agents, their servants or anybody on behalf of them shall not obstruct and not to construct any construction for the purpose of accumulation / collection of drain water on the open space which is towards the eastern side of E-3 Building in Sara Venkatesh Co-operative Society at Gut no.52/1 in Wadgaon Kolhati, Aurangabad and also which is towards the western side of Garden Area of Sara Venkatesh Co-operative Society at Gut No.52/1 of Wadgaon Kolati, Aurangabad and which is also north side Road of NRB Chowk to Dwarkanagari Housing Society Road about which a Map is annexed with the present suit may be passed in favour of plaintiff.”

4. The present applicants, after causing their appearance in the aforesaid Regular Civil Suit, filed Application on 05.02.2019 invoking the provisions under Order VII Rule 11(d) of the Code of Civil Procedure praying for rejection of the plaint on the grounds stated in the said application. It was the contention of the applicants in the said application that the City and Industrial Development Corporation Ltd., (CIDCO) being declared as New Town Development Authority under Section 113 (3)(a) under the Maharashtra Regional & Town Planning Act, 1966 (hereinafter

referred to as 'the Act of 1966'), and as such the Special Planning Authority under Section 40 of the said Act, the order passed or direction issued by the said authority under the said Act were final and could not have been questioned by the respondents in a Suit filed before the Civil Court at Aurangabad. The other objection was that for want of statutory notice to CIDCO as provided under clause 9 (1) of the First schedule to Section 159A of the Act of 1966, the Suit was not maintainable. The aforesaid application was resisted by the present respondents i.e. plaintiffs in the Regular Civil Suit. The learned Trial Court, after having considered the submissions advanced by the learned Counsel appearing for the parties, dismissed the said application vide the impugned order. Aggrieved thereby, the applicants have filed the present Civil Revision Application before this Court.

5. Shri A.S.Bajaj, learned Counsel appearing for the applicants submitted that CIDCO has commenced the work of Sewage Pumping Station at Gut Nos.48 and 52 of Wadgaon Kolhati. The learned Counsel submitted that the plots on which the work of Sewage Pumping Station has been commenced were reserved for public utility purpose in the development plan prepared and sanctioned in the year 2001. The learned Counsel submitted that CIDCO being the Special Planning Authority is cast with the

responsibility of carrying out this work in the area under its domain. The work so commenced of the Sewage Pumping Station is opposed by the present respondents. It is the contention of the respondents that without giving a prior notice or without any declaration in advance that the site which is stated to be reserved for public utility is intended to be used for erection of the Sewage Plant or Sewage Pumping Station, CIDCO could not have commenced the work of the Sewage Pumping Station over the said plot.

6. Shri N.Y.Kingaonkar, learned Counsel appearing for respondents submitted that the respondent No.1, which is a registered Co-operative Housing Society and its office bearers did make all genuine efforts to convince the CIDCO authorities to change the site for construction of Sewage Pumping Station since the site selected by them was not suitable for that purpose and particularly, it will be causing great nuisance for the residents of the houses and flats constructed by respondent No.1 housing society. The learned Counsel submitted that it was brought to the notice of CIDCO authorities that thousands of people will be affected by construction of Sewage Pumping Station at the given site. The learned Counsel further submitted that the respondents have serious apprehension that the

underground water of the adjacent area is likely to be polluted if the Sewage Pumping Station is allowed to be erected on the subject site. The learned Counsel submitted that in the circumstances the correspondence was made with the CIDCO authorities and the authorities were requested to change the site and select some such site which may not have hazardous effects as are apprehended if the same is constructed at the present site. The learned Counsel submitted that since all the efforts made by the respondent Society failed, the respondents were constrained to file the aforesaid Regular Civil Suit, seeking declaration and restraint order against the CIDCO authorities.

7. The learned Counsel further submitted that the application filed by the applicants under Order VII Rule 11(d) of the Code of Civil Procedure has been rightly rejected by the Trial Court. The learned Counsel submitted that, neither the bar under Section 149 of the Act of 1966 would apply nor there was requirement of any prior notice as provided under Clause 9(1) of First Schedule to Section 159-A of the Act of 1966. The learned Counsel, in the circumstances, prayed for rejecting the Civil Revision Application.

8. Both the parties have made certain submissions on merits

raising the issues (i) Whether it would be permissible to erect the Sewage Pumping Station on the subject site ? (ii) Whether it can be said to be public utility ? (iii) Whether it was mandatory on part of CIDCO authorities to first declare the purpose for which the subject site was reserved in the development plan ? (iv) Will there be any adverse effect of the construction of Sewage Pumping Station on the subject site as alleged by the respondents ? etc. I, however, do not wish to enter into the said controversy. The present Civil Revision Application has to be restricted only to two issues; (i) Whether filing of the Suit by the respondents can be held to be barred by any law in force ? and (ii) Whether service of notice on CIDCO before filing the Suit was mandatory ? so as to reject the application under Order VII Rule 11(d) of the Act ?

9. The emphasis of the applicants is on the issue that, 'CIDCO' being planning authority, the development plan published by it in the year 2001, wherein the subject site is reserved for public utility purpose cannot be questioned in any Suit or any other legal proceedings. The second objection raised by the applicants is that no Suit could have been instituted against CIDCO in respect of any act purported to have been done in execution of the act without giving a notice in writing to it giving reasonable

particulars as about cause of action, the name of place of respondents – plaintiffs etc.

10. If the order of the Trial Court is perused, it appears that there is no dispute between the plaintiffs and defendants on the following issues:-

- a) That the CIDCO is Special Planning Authority and Development Authority under the Act of 1966.
- b) That the development plan was sanctioned on 14.08.2001.
- c) That the Suit plots i.e. open plots in Gut Nos.48 and 52 at Wadgaon Kolhati adjacent to southern side of respondent Housing Society are reserved for general public utility purpose.

11. In background of the admitted facts as above, now it has to be examined whether the work of the construction of Sewage Pumping Station which is being carried out by CIDCO can be held to be a work in pursuance of execution of the Act of 1966, so as to attract the bar under Clause 9(1) of First Schedule under Section 159A of the Act of 1966, for filing the Suit by the respondents against CIDCO without issuance of pre-suit statutory notice.

12. Section 42F of the Act of 1966 prescribes the powers and functions of the Area Development Authority i.e. CIDCO in the

present case. Clause (vii) of Sub-section(1) of Section 42F obligates the Area Development Authority to execute the works in connection with supply of water, disposal of sewerage and provisions of other services and amenities. In view of the provision as aforesaid, there shall not be any doubt that CIDCO, being Area Development Authority for the area, was under an obligation to execute the work of Sewage Pumping Station for disposal of sewerage.

13. The next question arises whether CIDCO was having any right and authority to erect the Sewage Pumping Station on the site, which is shown in the development area as the site reserved for 'public utilities and amenities'. The term public utility is not defined in the Act of 1966, however, the term 'amenity' is defined in the Act of 1966. As defined under Section 2(2) of the Act of 1966, amenity means;

“2(2) 'Amenity' means roads, streets, open spaces, parks, recreational grounds, play grounds, sports complex, parade grounds, gardens, markets, parking lots, primary and secondary schools and colleges and polytechnics, clinics, dispensaries and hospitals, water supply, electricity supply, street lighting, sewerage, drainage, public works and includes other utilities, services and conveniences”

14. Section 22 of the Act of 1966 pertains to contents of

development plan. This Section is intended to indicate the manner in which the use of land in the area of planning authority shall be regulated. As provided in the said Section, the contents of the development plan shall include all or any of the matters enumerated in Clause (a) to (l) therein. Clause (e) thereof envisages the provision for water supply, drainage, sewerage, sewage disposal, other public utilities and amenities and services including electricity and gas.

15. It is thus evident that the site which is reserved in the development plan published in the year 2001 for general public utility purpose is liable to be used by CIDCO for erection of Sewage Pumping Station.

16. As noted herein above, it is not in dispute that open plots in Gut Nos.48 and 52 at Wadgaon Kolhati are earmarked and shown to have been reserved in the sanctioned development plan published in the official Gazette on 14.08.2001, for general public utility. CIDCO is thus having every right and authority to use and utilize the said reserved site for the purpose of erecting Sewage Pumping Station since it falls within the definition of 'amenity'.

17. In view of the facts noted herein above, it is quite evident that the work of Sewage Pumping Station is being carried out by CIDCO as a part of its functions as enumerated in Section 42F (1) (vii) of the Act of 1966, on the site which is reserved for public utility. The work of Sewage Pumping Station, thus, is being carried out by CIDCO in fulfillment of its obligation cast upon it under the provisions of Act of 1966. In the above circumstances, the respondents could not have filed Regular Civil Suit No.80 of 2009 against CIDCO and its officials until expiration of two months next after notice in writing has been given to CIDCO stating with reasonable particularity, the cause of action and the name and place of residence of the intending plaintiff and his attorney or agent, if any, for the purpose of such Suit and the relief which is claimed. In the instant matter, the respondents have admittedly not served any such notice to CIDCO. In the circumstances, it has been argued by Shri Bajaj that the Suit itself could not have been entertained by the Trial Court and Suit plaint was liable to be rejected on that sole ground.

18. In the case of ***Suprabhat Co-operative Housing Society Ltd. And another Vs. Span Builders and another [2002 (3) Mh.L.J., 837]*** this Court has held that plaint in said matter was liable to be rejected for want of notice under Section 164 of the Maharashtra

Co-operative Housing Societies Act (24 of 1961). The provision under Section 164 of the said Act and the provision in Clause 9(1) of First Schedule under Section 159A of the Act of 1966 are *pari materia*.

19. In the matter of ***Suprabhat Co-operative Housing Society Ltd. and another*** (supra), a suit was instituted against the said co-operative housing society for recovery of certain amount in the Court of Civil Judge, Senior Division, Panvel. An Application was filed in the said civil suit on behalf of the Suprabhat Co-operative Housing Society under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint for non-compliance of the mandatory provision under Section 164 of the Maharashtra Co-operative Housing Societies Act. The said application was rejected by the learned Civil Judge. The said order was challenged before this Court. While rejecting the application, the learned Civil Judge had observed that there was no act on the part of the plaintiffs in the said case by which they were interfering with the constitution or management of the society. According to the learned Civil Judge, the dispute raised was of civil nature and there was no bar to the institution of the said suit without complying with the provisions under Section 164 of the Maharashtra Co-operative Societies Act.

Disapproving the observations made as above and the finding recorded by the Trial Court, this Court held that the dispute which had arisen between the plaintiffs and defendants in the said matter was as about the performance of the contract, which was entered into by them and as such the suit which was instituted by the respondents was clearly one which was touching to the business of the society. This Court has further observed that the said suit therefore could not have been filed without serving the statutory notice on Suprabhat Co-operative Housing Society Ltd. under Section 164 of the Maharashtra Co-operative Housing Societies Act and the learned Trial Judge clearly erred in not accepting the request of the said Housing Society to reject the plaint under Order VII Rule 11(d) of the Code of Civil Procedure.

20. In the case of **Noor Mohd. Shami Shaikh and nother Vs. Maharashtra Housing and Development Board and others [2014 (1) Mh.L.J., 92]** this Court had upheld the decision of the learned Civil Judge of rejecting the plaint under Order VII Rule 11(d) of the Code of Civil Procedure, on the ground that pre-suit statutory notices as mandatorily required under Section 527 of the Mumbai Municipal Corporation Act (3 of 1988) and as required under Section 164 of the Maharashtra Co-operative Societies Act, were not issued and served upon the public authorities namely Municipal Corporation of Greater Mumbai and Registrar of the

Co-operative Societies.

21. In the case of ***V.M.Salgaocar and Bros. Vs. Board of Trustees of Port of Mormugao and another [(2005) 4 Supreme Court Cases 613]***, the suit was filed against the Board of Trustees of the Port of Mormugao without giving a notice under Section 120 of the Major Port Trusts Act, 1963. The said suit was dismissed by District Judge, South Goa on the ground that the same was not maintainable for want of notice under Section 120 of the Major Port Trusts Act, 1963 and that it was barred by limitation. The said Judgment though was challenged in the First Appeal before the High Court, no interference was caused. The matter was, then taken to the Honourable Apex Court. The Honourable Apex Court upheld the finding recorded by the District Court and dismissed the Appeals. The Honourable Apex Court has held that when it was a statutory requirement as per Section 120 of the Major Port Trusts Act, 1963, that the suit has to be filed within six months of accrual of cause of action and it has to be preceded with one months notice, the same could not have been filed without issuance of notice. The Honourable Apex Court in paragraph 28 has observed that requirement of giving notice under Section 120 was mandatory and precondition to the filing of the suit and since the suit was filed without giving notice, the same was not maintainable.

22. It was sought to be contended by Shri Kingaonkar that several correspondence was made on the subject matter by the respondents with CIDCO authorities. The learned Counsel further submitted that a detail representation was also made to CIDCO authority and the same came to be rejected by the said authority on 04.01.2019. The learned Counsel submitted that the correspondence so made and the representation so given has to be held as sufficient notice to CIDCO authorities of the intention of the respondents – plaintiffs of filing a Suit against them for redressal of their grievance. The contention so raised is liable to be rejected. Similar argument was made in the case of **V.M.Salgaocar and Bros.** (supra) to treat the letter dated 12.04.1984 as a notice under Section 120 of the Major Port Trusts Act, 1963. However, the contention so raised was rejected by the Honourable Apex Court by observing that the said letter cannot be said to be a notice, which requires the cause of action to be set out in the said statutory notice. In the present case also the correspondence made earlier and the representation made cannot be said to be a notice under Clause 9(1) of First Schedule under Section 159A of the Act of 1966.

23. Having regard to the law laid down in the Judgments discussed herein above, requirement of giving notice under

Clause 9(1) of First Schedule under Section 159A of the Act of 1966 was mandatory and a pre-condition for filing of the Suit against CIDCO and its officials. It is not in dispute that the respondents have filed Regular Civil Suit No.80 of 2019 against CIDCO and its officials without serving upon them such pre-suit statutory notice. In the circumstances, the application filed by the present applicants under Order VII Rule 11(d) of the Code of Civil Procedure for rejection of the plaint, there being non-compliance of the mandatory provision under Clause 9(1) of First Schedule under Section 159A of the Act of 1966, must have been allowed by the Trial Court. The Trial Court has committed an error in rejecting the said application. The impugned order, therefore, cannot be sustained and deserves to be quashed and set aside.

24. The next question which falls for consideration is whether any such declaration could have been sought against CIDCO that the open plots shown in Gut Nos.48 and 52 at Wadgaon Kolhati are not provided for accumulation/collection of drained water or for erection of the Pumping Station for drained water. As has been elaborately discussed herein above, in the development plan, which was sanctioned and was duly published in official Gazette on 14.08.2011, the Suit plots were shown to be

reserved for general public utility. It is not in dispute that no objections were raised against the development plan so published. As has been discussed herein before, the work of erecting Sewage Pumping Station falls in the definition of 'amenity' as defined under Section 2(2) of the Act of 1966, the CIDCO was therefore having every authority to use the site which was reserved for public utility, for erection of the Sewage Pumping Station. The development plan was published by CIDCO under the provisions of the Act of 1966. In the circumstances, it does not appear to me that any Suit could have been filed taking exception to the provision made in the said development plan in view of the provisions under Section 149 of the Act of 1966. However, I do not intend to elaborate said issue for the reason that even otherwise for want of statutory notice, the plaint in Regular Civil Suit No.80 of 2019, was liable to be rejected under Order VII Rule 11(d) of the Code of Civil Procedure. For the reasons recorded above, the following order is passed:-

ORDER

I) The order passed by 4th Civil Judge (S.D.), Aurangabad on 12.02.2019, below Exhibit-11 in Regular Civil Suit No.80 of 2019, is set aside.

II) The application filed by the applicants at Exhibit-11 in Regular Civil Suit No.80 of 2019 shall in the circumstances stands allowed. In view of the provisions contained in the Order VII Rule 11(d) of the Code of Civil Procedure, the plaint is liable to be rejected and is accordingly rejected for want of statutory notice under Clause 9(1) of First Schedule under Section 159A of the Act of 1966.

III) It is needless to add that it would be open to the respondents to institute a fresh Suit, if otherwise permissible, after due notice as required under the provisions of the Act of 1966.

IV) Civil Revision Application is allowed in the aforesaid terms.

(P.R.BORA)
JUDGE

SPT