

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO. 490 OF 2024

M/s. Marvel Home Makers Pvt. Ltd. through]
Directors]
1) Shri. Kiran Hari Bagad]
Age :- 53 years, Occupation: Business]
2) Shri. Ravindra Shaligram Raut]
Age :- 50 years, Occupation :- Business]
Office Address :- 508, Monark Plaza,]
Flat No. 56, Sector No. 11,]
C.B.D. Belapur, Navi Mumbai.] **...Appellants**

Versus

1) Smt. Manjula Sudam Patil]
(Deceased, name deleted)]
2) Smt. Halibai Laxmi Patil (deceased, name]
deleted) [Amendment carried out as per]
Court's Order]]
3) Shri. Janardan Laxman Patil]
Age : 53 years, Occupation – Agriculture,]
Nos. 1 to 3 residing at Roadpali, Post:-]
Navade, Taluka Panvel, District:- Raigad.]
4) Smt. Beibai Sharad Patil]
Age : 40 years, Occupation – Agriculture,]
Residing at Walwali, Post Padaghe, Taluka –]
Panvel, District – Raigad.]
5) Smt. Ranjana Laxman Patil]
Age : 39 years, Occupation :- Agriculture,]
6) Smt. Rekha Laxman Patil]
Age : 36 years, Occupation :- Agriculture,]
7) Smt. Kunda Laxman Patil]
Age :- 35 years, Occupation :- Agriculture,]
Nos. 5 to 7 residing at Roadpali, Post –]
Navade, Taluka – Panvel, District – Raigad.]
8) Nanda Laxman Patil]

- (since deceased, through Legal Heirs)]
- 8/1) Shri. Rakesh Hiranman Shelke]
Age :- 36 years, Occupation :- Service,]
- 8/2) Kumari. Ritu Rakesh Shelke]
Age :- 8 years, Occupation:- Education,]
- No. 8/1 as legal guardian for 8/2]
Residing at Mugal Plaza, Room No. 402,]
Fourth Floor, Takkagaon, Panvel – 410]
206.]
- 9) Shri. Vasant Sudam Patil]
Age :- 72 years, Occupation :- Agriculture,]
Residing at Block No. 11,]
Prathamesh CHS, Lokhandipada,]
Taluka Panvel, District Raigad.]
- 10) Sou. Hirabai Janu Thakur]
Adult, Occupation :- Agriculture,]
Residing at Kopra, Post – Kharghar,]
Taluka – Panvel, District - Raigad]
- 11) City Industrial Development Corporation]
(Maharashtra) Limited]
Through Managing Director]
CIDCO Limited, CIDCO Bhavan,]
Seventh Floor, CBD Belapur,]
Navi Mumbai – 400 614.]
- 12) M/s. CIDCO Limited through]
Chief Land and Surveying Officer,]
CIDCO Limited, CIDCO Bhavan,]
7th Floor, Land Division, CBD Belapur,]
Navi Mumbai – 400 614.]
- 13) M/s. CIDCO Limited through]
Estate Officer,]
CIDCO Limited, CIDCO Bhavan,]
First Floor, CBD Belapur,]
Navi Mumbai – 400 614.]
- 14) M/s. CIDCO Limited]
Additional Town Planner Authority]
(Construction Permission)]
CIDCO Limited, Raigad Bhavan,]
Fourth Floor, CBD Belapur,]
Navi Mumbai – 400 614.]
- ...Respondents**

Mr. Rohit D. Joshi for Appellant.

Mr. Krishnakant Deshmukh, Mr. Prithviraj Gole i/b Ms. Divya A. Pawar-Patil for Respondent Nos. 8/1 and 8/2.

Mr. Rohit Sakhadeo for Respondent Nos. 11 to 14-CIDCO.

Coram : Sharmila U. Deshmukh, J.

Reserved on : 18th March, 2025.

Pronounced on : 24th March, 2025.

Judgment :

1. The First Appeal is preferred by the Original Plaintiff challenging the impugned judgment and order dated 6th November, 2023 passed by the Civil Judge, Senior Division, Panvel in Special Civil Suit No. 142 of 2010 allowing the Application filed under Order VII, Rule 11 of Code of Civil Procedure, 1908 [for short, "**CPC**"] resulting in dismissal of the suit. For sake of convenience, the parties are referred to by their status before the Trial Court.

2. The facts of the case are that Suit was instituted seeking specific performance of Agreement to Sell dated 4th April, 2007 against Defendant Nos. 1 to 10, who are the original allottees of the property under 12.5% Scheme of CIDCO. In the alternative, compensation of Rs. 1,00,00,000/- was sought. Being the allottees of the land from CIDCO, as per the procedure, the Defendant Nos. 1 to 10 were required to enter into Lease Agreement with CIDCO. And thereafter, for purpose

of transfer of leasehold rights to Plaintiff, a tripartite agreement was to be entered into between Plaintiffs, Defendant Nos. 1 to 10 and CIDCO. As and by way of interim relief, the relief sought was that Defendant Nos. 11 to 14 who were officials of City and Industrial Development Corporation Limited be restrained from executing any Lease Agreement or Tripartite Agreement in respect of subject plot with Defendant Nos. 1 to 10 and any third-party and from granting any development permission in respect of subject plot.

3. The suit came to be resisted by Defendant Nos. 1 to 10, however, CIDCO did not file Written Statement. The suit proceeded and Issues came to be framed. The plaintiff filed its Affidavit-of-evidence. On 31st August, 2019, the Defendant Nos. 1 to 10 filed an Application for framing of Issue as to the maintainability of the suit without issuance of pre-suit statutory notice to CIDCO. Vide order dated 21st November, 2019, the Application came to be rejected by the Trial Court.

4. On 27th September, 2019, CIDCO filed an Application under Order VII, Rule 11 of CPC seeking rejection of plaint under Order VII, Rule 11, clauses (a) and (d) of CPC as the suit was filed without issuing pre-suit statutory notice as contemplated under Clause 9 of First Schedule of Section 159A of Maharashtra Regional and Town Planning Act, 1966 [for short, "**MRTA Act**"]. It was contended that there is no power to waive the notice or waive the period of 60 days of notice and

as there is non-compliance of mandatory provisions, the Hon'ble Court has no jurisdiction to try and entertain the suit.

5. The Application came to be resisted by the plaintiff contending that previous Application filed by Defendant Nos. 1 to 10 has already been rejected by this Court by order dated 21st November, 2019, and therefore, the second Application on the same ground is not maintainable. It was contended that Application is filed at the belated stage at the instance of Defendant Nos. 1 to 10. It was further contended that prior to filing of the suit, the plaintiff had given notice on 30th September, 2008 and therefore, the Application is not maintainable.

6. After hearing the parties, the Trial Court allowed the Application. It held that as per Clause 9 of First Schedule of Section 159A of the MRTP Act, no suit against the relevant authority can be instituted without issuing notice and after issuance of notice, within a period of 6 months, the suit has to be filed. It was contended that as per the plaintiff, the cause of action arose after issuance of notice and therefore, the suit has to be filed two months after issuance of notice and within six months from the date of notice. The Trial Court held that the notice was issued on 30th September, 2008 and plaint was presented on 29th March, 2010 and therefore, the suit is liable to be rejected.

7. Mr. Joshi, learned counsel appearing for Plaintiff would submit that Application was filed at belated stage after the Affidavit-of-evidence was filed. He would further submit that under the provisions of Section 159A of MRTP Act, the pre-suit statutory notice is liable to be given only where the act of statutory authority is questioned. He submits that in the present case, the plaintiff seeks specific performance of Agreement to Sell and therefore, considering the substantive reliefs, no notice under Section 159A was required to be given to CIDCO. He would further submit that the reliefs sought against CIDCO were by way of interim relief. He would further submit that the plaintiff is neither challenging the Allotment Letter issued to the original owners and nor seeking any substantive relief against CIDCO. He would further submit that pleadings in the plaint when read along with the prayers in the plaint, makes it clear that the suit is for specific performance of Agreement against the Defendant Nos. 1 to 10. He would further submit that the settled position in law is that the plaint cannot be rejected in part, even if it is held, that for the purpose of seeking interim relief against CIDCO, pre-suit statutory notice is mandatory. In support, he relies upon the following decisions :

Mohd. Kunju Kamaluddin vs. Mohd. Abbas Mohd. Hussain Patel'

Sabira Aslam Sikwani vs. Mohammed Yusuf

1 2018 SCC OnLine Bom 18362.

Hussain²

Sakharam G. Mahadik vs. Swagat Builders and Developers through its Partner Manjusha³

Aurangabad Smart City Development Corporation Limited vs. Maharashtra State Board of Waqf⁴

Sejal Glass Limited vs. Navilan Merchants Private Limited⁵

Central Bank of India vs. Smt. Prabha Jain⁶

Sabira Aslam Sikwani vs. Mohammed Yusuf Hussain⁷

8. *Per contra*, Mr. Sakhadeo, learned counsel appearing for Respondents would submit that it is plaintiff's own case in the plaint that cause of action arose after issuance of notice dated 30th September, 2008 and therefore, the suit had to be filed within a period of 6 months from the date of cause of action. He submits that the plaintiff seeks interim relief against CIDCO restraining CIDCO from executing Tripartite Agreement which is an act of CIDCO under the statutory provisions and therefore, this act requires issuance of the notice. He submits that it is immaterial whether the relief sought is interim relief or final relief. He would further submit that provisions of Section 159A refers not only to an act, which has been done, but also

2 2003 SCC OnLine Bom 230.

3 2023 SCC OnLine Bom 1707.

4 2021 SCC OnLine Bom 630.

5 (2018) 11 SCC 780.

6 2025 SCC OnLine SC 121.

7 2003 SCC OnLine Bom 230.

purported to have been done, which would denote that even an intended act by the officers of CIDCO are covered by the said provision. He submits that when the plaint is read as a whole, the same refers to the Tripartite Agreement to be executed between the parties, which is an act under the provisions of MRTP Act. He would further submit that the legislative intent is to prescribe a special period of limitation in respect of suit instituted against CIDCO and legislative intent has to be protected. He would further submit that the plaint as a whole must be rejected and even if it is held that it cannot be rejected in part then the suit must be held to be not maintainable against CIDCO. He would further submit that in the reply to the Application under Order VII, Rule 11 of CPC, the contention is that the notice has been given on 30th September, 2008. He would further submit that as the notice is stated to have been given in 2008 and cause of action is stated to have arisen upon the issuance of notice, the suit must necessarily has to be filed within a period of 6 months from the date of accrual of cause of action.

9. In rejoinder, Mr. Joshi would contend that the suit does not seek specific performance of Agreement against CIDCO. He submits that notice of 30th September, 2008 is standard notice given not only to CIDCO, but also to other defendants calling upon them to specifically perform their part of the Agreement. He submits that in any event, there was no Written Statement filed by CIDCO and it is only after

witness steps into the box that, at the instance of Defendant Nos. 1 to 10, the present Application came to be filed. He would submit that he is not pressing the submission as regards the earlier order having been passed rejecting the same Application for maintainability as a ground for assailing the impugned judgment and order.

10. The following points would arise for consideration :-

(i) Whether in facts of the present case, it was mandatory for the Plaintiff to issue pre-suit statutory notice to CIDCO under Clause 9 of First Schedule of Section 159A of MRTP Act?

(ii) Whether the suit could have been rejected under Order 7, Rule 11 of CPC?

(iii) Whether the impugned judgment and order is liable to be quashed and set aside as the plaint cannot be rejected as a whole even if the pre-suit statutory notice was mandated?

As to Point No. (i) :

11. Before proceeding further, it will be necessary to take a look at Clause 9 of First Schedule of Section 159A of the MRTP Act, which reads as under:-

“9. (1) No suit shall be instituted against the relevant authority or against any officer or servant thereof or any person acting, under the orders of the relevant authority, in respect of any act done or purporting to have been done, in pursuance of execution or intended execution of this Act or in respect of any alleged neglect or default in the execution of this Act,—

(a) until the expiration of two months next after notice

in writing has been given to the relevant authority stating with reasonable particularity the cause of action and the name and place of residence of the intending plaintiff and of his attorney or agent, if any, for the purpose of such suit and the relief which he claims ; nor

(b) unless it is commenced within six months next after the accrual of the cause of action.

(2) At the trial of any such suit,—

(a) the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice given as aforesaid;

(b) the claim, if it be for damages, shall be dismissed if tender of sufficient amends shall have been made before the suit was instituted or if, after the institution of the suit, a sufficient sum of money is paid into Court with costs.

(3) Where the defendant in any such suit is an officer or servant of the relevant authority, payment of the sum or of any part of any sum payable by him in or in consequence of the suit, whether in respect of cost, charges, expenses, compensation for damages or otherwise may be made, with the sanction of the relevant authority."

12. The above provision would indicate that pre-suit statutory notice is mandated where the suit is instituted against the relevant authority or officer questioning any act done or purporting to have been done in execution or intended execution of the Act or for alleged neglect or default in execution of the Act. The suit must essentially question the act of the authority or the officers done or proposed to be done in execution of MRTP Act or must question the neglect or defect in execution of the Act. Clause 9(1)(b) of the First Schedule prescribes a special period of limitation of six months from the date of accrual of cause of action and the suit is to be filed after expiration of two

months from date of notice.

13. Clause 9(2) of First Schedule provides that in the trial of the suit, the plaintiff shall not be permitted to go into evidence of any cause of action except such as is set forth in the notice given. The Plaintiff is therefore bound to the cause of action which he sets forth in the notice. Conjoint reading of Clause 9(1) and (2) of First Schedule makes it evident that the notice has to be given where the act or omission of the relevant authority or officers in execution or intended execution of the MRTP Act is questioned in the suit and the Plaintiff is bound by the cause of action stated in the notice. The cause of action must necessarily arise against the authority or its officers. It is only where the suit essentially questions the act of the relevant authority or officers, though there might be other incidental reliefs sought, that the provisions of Clause 9 of First Schedule of Section 159A of MRTP Act applies.

14. The Trial Court while rejecting the plaint has accepted that the notice issued on 30th September, 2008 is notice issued under Clause 9(1)(a) and that the suit was presented on 29th March, 2010 and thereafter, proceeds to dismiss the suit for want of notice. The exercise, which was required to be conducted by the Trial Court was whether the the suit essentially questions the act of CIDCO or its officers by examining the averments in the plaint and the relief sought.

When so examined, the plaint pleads the manner in which the Defendant Nos. 1 to 10 have acquired the ownership of the plot having been allotted the same under 12.5% Gaothan scheme of CIDCO. The plaint further pleads that the Agreement to Sell was executed between the Plaintiffs and Defendant Nos. 1 to 10 for transfer of the lease hold rights to be granted by CIDCO to the Defendant Nos 1 to 10 and the purported breach by Defendant Nos. 1 to 10.

15. The cause of action is pleaded in Paragraph 21 of the plaint referring to the notice dated 30th September, 2008 as starting point of cause of action. If the notice of 30th September, 2008 is perused, the notice has been issued to Defendant Nos. 1 to 10, who were the owners as well as the Defendant Nos. 11 and 12 who are the officials of CIDCO. By the said notice, the Defendants were called upon to accept the balance consideration and to perform their obligations under the Agreement dated 4th April, 2007 and to transfer the suit plot in favor of plaintiffs. As far as Defendant Nos. 11 and 12 is concerned, the notice called upon the Defendant Nos. 11 and 12 not to execute any Tripartite Agreement. Perusal of the said notice would indicate that the notice essentially called upon the Defendants to specifically perform their obligations under the contract and Defendant Nos. 11 and 12 to take note of the said Agreement. Paragraph 21 of the plaint though refers to the said notice as the starting point of cause of action,

the same is with regard to the relief of specific performance, which was the substantive relief, which was sought in the plaint.

16. The averments in the plaint makes it evident that the essence of the suit is non-performance of the obligations under the Agreement to Sell by Defendant Nos. 1 to 10. The substantive relief of specific performance of the Agreement is not dependent on any act or omission by the officers of CIDCO and is an independent relief *qua* the Defendant Nos. 1 to 10. Any action of CIDCO or its officers do not constitute the foundation of the substantive reliefs sought. Even if the interim relief sought against CIDCO is deleted from the plaint, the suit will still survive. The non-issuance of the pre-suit statutory notice tests the jurisdiction of the Civil Court to entertain the suit. Viewed from this aspect, considering the substantive relief of specific performance, the jurisdiction of Civil Court is not ousted.

17. It is well-settled that the purpose for issuance of notice is that the relevant authority gets a reasonable opportunity to avoid unnecessary litigation and unnecessary expenditure involved in long-drawn legal battle. The whole object is to let the public authority know the cause of action so that it can consider its position and take necessary steps, if possible, to resolve the issue at pre-litigation stage. The intention is to save the public money which would otherwise be spent in litigating the issue which could have been resolved at pre-

litigation stage. The purpose of the said provision is for benefit of Authority against any action for any of its act done in good faith. In the background of this legislative purpose for introducing pre-suit statutory notice provision, if the facts of the present case are seen, where the relief of specific performance of Agreement by Defendant Nos. 1 to 10 is sought, the service of pre-suit statutory notice cannot serve any purpose as there is no cause of action against CIDCO, which can be resolved at pre-litigation stage. The underlying object is to curtail litigation, scope of dispute and controversy and this is a test, which is required to be applied while deciding the applicability of issuance of pre-suit statutory notice.

18. The interpretation, which has been placed by Mr. Sakhadeo that the purported execution of Lease Deed and Tripartite Agreement is questioned overlooks the fact that the purported intended act is not questioned but only by way of interim relief, the prohibitory injunction is sought against CIDCO from executing any Lease Deed or Tripartite Agreement.

19. In light of the above discussion, Clause 9 of First Schedule of Section 159A is clearly inapplicable to the facts of present case. Upon reading of the plaint, it cannot be said that the suit questions any act done or purported to be done in pursuance of execution or intended execution of provisions of MRTP Act.

20. Point No. (i) is accordingly answered in favor of Plaintiff.

As to Point No. (ii) :

21. The application was filed by CIDCO under Order VII, Rule 11 of CPC. Admittedly, no written statement was filed by CIDCO and after the Plaintiff's evidence had started, the Application came to be filed seeking rejection of plaint on ground of absence of pre-suit statutory notice. The objection was to jurisdiction of Civil Court to entertain and try the suit.

22. Whether the notice could be waived and whether it is permissible to reject the plaint if the notice could be waived was considered by the Full Bench of this Court in ***Vasant Ambadas Pandit vs. Bombay Municipal Corporation***⁸. The Full Bench was considering the provisions of Section 527 of Mumbai Municipal Corporation Act, 1888 which is *pari materia* with Clause 9(1) of First Schedule to Section 159A of MRTP Act. The Full Bench considered the mandatory character of the notice, but also held that the notice could be waived and held as under:

"The true legal position in this behalf is that no suit can be instituted without service of the notice if such service of the notice is required statutorily as a condition precedent. The giving of the notice is a condition precedent to the exercise of jurisdiction. But, this being a mere procedural requirement, the same does not go to the root of jurisdiction in a true sense of the term. The same is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit. The plea of waiver can always be tried by the civil court. In fact, it is not suggested who else can try. The question whether, in fact, there is waiver or not would necessarily depend on facts of each case, and is liable to be

8 1981 Mh.L.J. 706.

tried by the same Court if raised.”

23. The decision was followed in ***Sabira Asliam Sikwani vs. Mohammed Yusuf Hussain*** (supra), where the Co-ordinate Bench noted that it was held that it was no longer permissible to reject the plaint under Order 7, Rule 11 as the requirement of notice could be waived and as such the issue then would be decided as an issue of jurisdiction considering the facts and circumstances on record. The law was summarized by the Co-ordinate Bench in Paragraph 15 as under:

“15. Considering the above judgments both under Section 80 of C.P.C. and Section 527 of the B.M.C. Act the law as laid down can be summarised as under:-

- (a) That no suit can be filed without complying with the mandatory requirement of serving a notice under Section 527 of the B.M.C. Act.
- (b) Though the notice is mandatory yet the authorities on whom the notice has to be given before filing a suit can waive the notice. Considering that the plaint cannot be rejected under Order 7 Rule 11 of C.P.C. but the issue can be decided as an issue of jurisdiction and in the State of Maharashtra considering Section 9A if there be an interim application, otherwise on framing an issue and deciding the same as preliminary issue.
- (c) Want of notice cannot be raised by a defendant other than the public authority to whom the notice is required to be given. If an objection is raised by a person other than public authority then the suit cannot be dismissed on the ground of want of jurisdiction.
- (d) Insofar as public authorities are concerned in the matter of waiver of notice they are bound to follow and comply with the order of this Court passed in *Mohamed Arif H. Modan v. Municipal Corporation of Greater Mumbai* [1999 (4) L.J. 109].
- (e) The public authorities, however, cannot be estopped if at the threshold they have not raised objection of non-service of notice to raise such an objection at a later stage atleast till the filing of written statement. If objection is raised after the filing of the written statement it will be open to the Court to consider whether failure to raise the objection in the written statement amounts to waiver.”

24. In light of the settled position in law, the plaint could not have been rejected under Order 7, Rule 11 of CPC especially when CIDCO did not raise objection till the trial had commenced. The Co-ordinate Bench has held that in such case it will be open to the Court to consider whether failure to raise the objection in the Written Statement amounts to waiver.

25. Point No (ii) is answered accordingly.

As to Point No. (iii) :

26. The substantive relief sought in the plaint is the specific performance of Agreement to Sell dated 4th April, 2007 executed between Plaintiff and Defendant Nos. 1 to 10 and the Trial Court on the basis of non-compliance of pre-suit statutory notice has rejected the plaint as a whole. Assuming *arguendo* that pre-suit notice statutory notice was required to be issued to CIDCO, the suit essentially was one for specific performance of the Agreement to Sell against a private party and therefore, *qua* the said reliefs and said defendants, the plaint could not have been rejected. The Application was filed under Order VII, Rule 11 of CPC and the position in law is well-settled that if the plaint survives against certain defendants and certain reliefs then Order VII, Rule 11 of CPC will have no application at all and the suit as a whole must proceed to trial. The Hon'ble Apex Court in the case of ***Central Bank of India vs. Prabha Jain*** (supra) in the context of rejection of plaint under Order VII, Rule 11 of CPC, in the background

of Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 that even if one relief survives, the plaint cannot be rejected under Order VII, Rule 11 of CPC.

27. In the present case, considering that the Civil Court would have jurisdiction to adjudicate the relief of specific performance *qua* the Defendant Nos 1 to 10, the plaint could not have been rejected as a whole under Order VII, Rule 11 of CPC.

28. Point No. (iii) is accordingly answered in favor of Plaintiff.

29. Resultantly, following order is passed :

: O R D E R :

(i) The First Appeal is allowed.

(ii) The impugned judgment and order dated 6th November, 2023 is hereby quashed and set aside.

(ii) Special Civil Suit No. 142 of 2010 is restored to file.

30. In view of above, nothing survives for consideration in pending Interim/Civil Applications, if any, and the same stand disposed of.

[Sharmila U. Deshmukh, J.]