

Neutral Citation No. - 2024:AHC:16721

**A.F.R.**

**Reserved On: 18.01.2024**

**Delivered On: 01.02.2024**

**Court No. - 52**

**Case :- MATTERS UNDER ARTICLE 227 No. - 12988 of 2023**

**Petitioner :- Executive Officer Nagar**

**Respondent :- Stainli Khan And Another**

**Counsel for Petitioner :- Ashok Kumar Tiwari**

**Counsel for Respondent :- Dinesh Kumar Yadav,Atmaram Nadiwal**

**Hon'ble Manish Kumar Nigam,J.**

1. Heard Shri Ashok Kumar Tiwari, learned counsel for the petitioner and Shri Dinesh Kumar Yadav, learned counsel for the respondent.
2. This petition has been filed challenging the order dated 08.11.2023 passed by Civil Judge (Junior Division), Farenda, District- Maharajganj in Original Suit No. 684 of 2023 (Stainli Khan Vs. Adhyaksha, Adarsh Nagar Panchayat Anand Nagar and another) rejecting the application filed by the defendant under Order 7 Rule 11 C.P.C., as well as the order dated 30.11.2023 passed by District Judge, Maharajganj in Civil Revision No. Nil/2023 (Executive Officer, Nagar Panchayat Vs. Stainli Khan and another) dismissing the revision filed against the order dated 08.11.2023.
3. Brief facts of the case are that the plaintiff-respondents instituted Original Suit No. 684 of 2023 (Stainli Khan Vs. Adhyaksha, Adarsh Nagar Panchayat Anand Nagar and another) for permanent prohibitory

injunction restraining the defendants not to raise constructions over the *rasta* shown by letters A,B,C,D, in the plaint map and obstruct the right of way of the plaintiff-respondents.

4. As per plaint's case, gate of the plaintiff's house is towards South and there is a 12 feet wide *rasta* towards the south of the plaintiff's house, which is in existence prior to the abolition of the zamindari. It has been further averted in the plaint that it is the only *rasta* available to the plaintiff-respondents to approach the road from his house and there is no other *rasta* available to the plaintiff-respondents. This *rasta* has been used by the plaintiff as well as his ancestors, the defendants are going to raise constructions over the *rasta* of which they had no legal right. Hence the suit. Relevant paragraph nos. 1, 2, 3, 4 and 5 of the plaint are quoted as under:

"1- यह कि नगर पंचायत आनन्दनगर उर्फ रूद्रपुर सेखुई, तप्पा लेहड़ा, परगना हवेली, तहसील फरेन्दा जनपद महाराजगंज में वादी का मकान आराजी नंबर 58 मि० 0.259 हे० में स्थित है। जिसका गृहकर वादी प्रतिवादीगण को भुगतान करता है।

2- यह कि वादी के मकान में दक्षिण तरफ वादी के मकान का गेट स्थित है, जैसा कि वादपत्र के मानचित्र में दर्शित है।

3- यह कि वादी के मकान के दक्षिण तरफ 12 फिट चौड़ा रास्ता जमींदारी विनाश के पूर्व से स्थित है जब आनन्दनगर उर्फ रूद्रपुर सेखुई गांव सभा थी।

4- यह कि वादी अपने मकान से निकल कर इसी 12 फिट चौड़ा रास्ता से दक्षिण तरफ स्थित सड़क पर आता जाता है। तथा इसी रास्ता से पूरब स्थित मुख्य सड़क पर आता जाता है जैसा कि वादपत्र के मानचित्र में दर्शित किया गया है।

5- यह कि वादी के पास अपने मकान से निकल कर दक्षिण स्थित सड़क पर आने जाने के लिये यही एक मात्र रास्ता है, इस विवादित 12 फिट चौड़ा रास्ता के अतिरिक्त अन्य कोई रास्ता वादी के पास नहीं है।

6- यह कि 12 फिट रास्ता को वाद पत्र के मानचित्र में अक्षर अ, ब, स, द व लाल रंग से दर्शित किया गया है।

7- यह कि वादी के पूर्व वादी के पूर्वज इस विवादित रास्ता का उपयोग अपने जीवनकाल तक करते रहे उनके निधन/मृत्यु के उपरांत इसका उपयोग वादी कर रहा है ऐसी स्थिति में वादी को इस रास्ता के उपभोग का सुधाधिकार प्राप्त हो चुका है।

8- यह कि प्रतिवादीगण नगर पंचायत के पदाधिकारी हैं ये लोग प्रशासनिक दबाव बनाकर प्रश्नगत रास्ता में निर्माण कार्य करके विवादित रास्ता को बंद करके वादी के आवागमन को बाधित करना चाहते हैं जिसका प्रतिवादीगण को कोई विधिक अधिकार नहीं है।"

5. The defendant-petitioner has appeared in the suit and filed an application paper no. 37 Ga/1 under Order 7 Rule 11 C.P.C., mainly on the ground that prior to filing of the suit, the plaintiff has not given any notice as required by Section 326 of the U.P. Municipalities Act, 1916 as well as under Section 80 C.P.C. and therefore, the suit filed by the plaintiff-respondents is barred by law and the plaint so filed is liable to be rejected in view of sub-clause 11-(d) of Order 7.

6. The respondents contested the application by filing objection and the trial-court vide order dated 08.11.2023 rejected the application filed by the petitioner under Order 7 Rule 11 holding that the suit is not barred by Section 326 of the U.P. Municipalities Act, 1916. Revision filed by the petitioner against the aforesaid order was also rejected by the revisional court, vide order dated 30.11.2023, hence the present petition.

7. It has been contended by learned counsel for the petitioner that the only question involved in the present petition is whether the suit filed by the plaintiff-respondents is barred for want of notice under Section 326 of U.P. Municipalities Act, 2016 as admittedly the plaintiff-respondents has not given any notice under Section 326 of the U.P. Municipalities Act, 1916 and as such the plaint is to be rejected, in view of sub-clause D of Order 7 Rule 11 C.P.C.

8. Before proceeding further, it would be appropriate to consider the provisions of Section 326 of the U.P. Municipalities Act, 1916 which reads as under:

*"326. Suits against (Municipality) or its officers.--(1) No suit shall be instituted against a (Municipality), or against a member, officer or servant of a (Municipality), in respect of an act done or purporting to have been done in its or his official capacity, until the expiration of two month next after notice in writing has been, in the case of a*

*(Municipality), left at its office, and, in case a member, officer or servant, delivered to him or left at his office or place of abode, explicitly stating the cause of action, the nature of the relief sought, the amount of compensation claimed, and the name and place of abode of the intending plaintiff, and the plaint shall contain a statement that such notice has been so delivered or left.*

*(2) If the (Municipality), member, officer or servant shall before action is commenced, have tendered sufficient amends to the plaintiff, the plaintiff shall not recover any sum in excess of the amount so tendered, shall also pay all costs incurred by the defendant after such tender.*

*(3) No action such as is described in Sub-section (1) shall, unless it is an action for the recovery of immovable property or for a declaration of title thereto, be commenced otherwise than within six months next after the accrual of the cause of action.*

*(4) Provided that nothing in Sub-section (1) shall be construed to apply to a suit wherein the only relief claimed is an injunction of which the object would be defeated by the giving of the notice or the postponement of the commencement of the suit or proceeding"*

**9.** It is being contended by learned counsel for the petitioner that the suit is bared by Section 326 of the U.P. Municipalities Act, 1916 as it is admitted position that the plaintiff has not given any notice as required by the Section 326 of the U.P. Municipalities Act, 1916. It has been further contended by the learned counsel for the petitioner that the land in dispute belongs to Nagar Panchayat and the plaintiff has other *rasta* to approach the road therefore, no suit for injunction is maintainable that too without giving notice to the petitioner as mandated by Section 326 of the U.P. Municipalities Act, 1916 and the courts below have erred in law in rejecting the application of the petitioner under Order 7 Rule 11 C.P.C.

**10.** *Per contra*, learned counsel appearing for the respondent invited attention of the Court to sub-Clause 4 of Section 326, which provides that nothing in this sub-Section shall construe to apply to a suit, wherein the only relief claim is an injunction of which the object would be defeated by

giving of notice or the postponement of the commencement of the suit or proceedings.

11. It has been further contended by the learned counsel for the respondent that the question whether the suit is barred by Section 326 can not be considered in an application under Order 7 Rule 11 C.P.C. and the application of the petitioner was rightly rejected by courts below.

12. Learned counsel for the petitioner, in support of his case relied upon the judgment of Full Bench of this Court in case of **Haji Ahmad Raza and others Vs. Municipal Board Allahabad** reported in **A.I.R. 1952, Allahabad 711**, wherein the law as propounded by the Full Court in para 10 of the judgment is quoted as under:

*"10. The crucial point for determination is whether the object of the suit would be "defeated" by the giving of the notice or the postponement of the commencement of the suit. If the answer is, in the affirmative then no notice was necessary, but if it is in the negative then the suit must fail for want of notice. No doubt, the plaintiffs would have been inconvenienced by a delay of two months in the institution of the suit, but it cannot be said that the object of their suit would have been "defeated" by such delay. If the impugned bye-law is illegal the plaintiffs and all members of their community can be amply compensated by damages. It is only in cases where the loss cannot be adequately compensated by damages that the provisions of Sub-section (4) of Section 326 of the Municipalities Act are attracted.*

*An example of such a case would be where a Municipal Board in the purported exercise of the powers vested in it under the U. P. Municipalities Act proposes to demolish a building. It has got such powers, for instance, under Sections 186 and 263 of the Act and the aggrieved party may then bring a suit for an injunction to restrain the Board from demolishing the building. A delay of two months in such a case would defeat the purpose, because by that time the building would have been already demolished. The word "defeated" in Sub-section (4) of Section 326 is much stronger than the word "inconvenienced". If the plaintiffs' contention were accepted then it would mean that in every suit for an injunction there is no need of any notice, because in every such case a delay in the institution of the suit is bound to cause inconvenience to the plaintiff. It will be noticed that Sub-section (4) of Section 326 does*

*not dispense with the requirement of notice in all suits for an injunction. It is only in those suits for an injunction in which the object would be "defeated" by the giving of the notice or the postponement of the commencement of the suit that this requirement has been dispensed with."*

13. Learned counsel for the petitioner further relied upon the judgment of this Court in case of **Municipal Board, Shikohabad, District Manipuri Vs. Chandar Deo Prasad Srivastava and others 1963 All LJ 688**. The Division Bench of this Court relying upon the judgment in case of Haji Ahmad Raza(supra) has held in paragraph nos. 6 and 7 as under:-

*".....The Board had the power to levy tax and the very act of levying tax was the act of the Board and consequently a notice had to be given unless it was covered by the exception given in sub-Section (4). The exception given in sub-Section (4) has also a very restricted meaning. Its language goes to show that even in case of injunction a notice is necessary to be given to the Board or to its officers or servant covered by sub-Section (1). But where the object of the suit would be defeated by giving a notice in an injunction suit, such a notice need not be given. It will thus appear that giving of a notice under Section 326 of the Municipalities Act even in suits for injunction is the rule and the exception is only in those cases where the object of such a suit would be defeated by the giving of a notice or by the postponement of the commencement of the suit or proceeding. none of the plaintiffs of the six suits made out a case as to how the object of the suit would have been defeated if a notice under Section 326 would have been given. It appears that at the time of arguments a case was made out that distress warrant would have been issued if the demand notices served upon the plaintiffs had not been complied with. Firstly, the courts below should not have permitted the plaintiffs to make out such a case which was not given in the plaint but even accepting that distress warrants would have been issued that could not be taken to be sufficient to show that the object of the suit would have been defeated by the giving of the notice. There was no question of the object of the suit failing by mere payment of the tax which had been imposed upon the plaintiffs and if the plaintiffs had succeeded in the suit they could have claimed refund of the tax paid by them. There is not even an allegation of any distress warrant or threat in the plaint but mere threat or fear of distress warrant in the mind of the plaintiffs could not be taken to be sufficient cause for not giving a notice nor could it be taken to be such as to defeat the object of the suit if the notice had been given.*

7. *The view which we have expressed finds support from the Full Bench authority of Haji Ahmad Raza v. Municipal Board, Alld., AIR 1952 Alld. 711..... "*

14. Relying upon the aforesaid judgments, it has been contended by learned counsel for the petitioner that the object of the suit would not be defeated by giving notice under Section 326 or the postponement of the commencement of the suit and the plaintiff can be suitably compensated in case, he succeeds in the suit.

15. Learned counsel appearing for the respondents relied upon the judgment of this Court in case of **Bishamber Nath and others Vs. Municipal Board, Jhansi** reported in **1980 All LJ 118**. In the case of Bishamber Nath (supra) the facts of the case were that the Municipal Board was laying pipeline to give water connections to the houses, and it was contended by the Board that the laying of a pipeline could in law be undone even if it was completed, if it was found to be illegal. The contention was rejected by the Court and it has been held as under in paragraph No. 7 of the judgment:

*"7. Learned counsel for the appellant has referred to the decision of a Bench of this Court in the case of **Mohomed Ekram Khan v. Mirza Muhammad Bakar, (AIR 1935 Allahabad 106)**, where it was held that notice under Section 326 of the Municipalities Act was not necessary in a case where the reliefs claimed were those of an injunction if the case came within the last proviso. The plaintiff in the instant case had asserted that the Boards agents had started making the constructions and despite his protest the constructions were going on, and that he would suffer an irreparable loss, if the constructions were not stopped, and therefore, the suit had been filed without giving a notice under Section 326 of the Municipalities Act. The plaintiffs ownership of the property was established and in the normal course he was entitled to restrain any act of trespass over his land. The laying of a pipeline could in law be undone even if it was completed, if it was found to be illegal, but nevertheless, the trespass on the property of the plaintiff by a local authority without complying with the provisions of law was a circumstance in which it could be held that the purpose of the suit could be defeated by the giving*

*of a notice, because before the period of the notice would expire, the action of the Board would be completed."*

16. Learned counsel appearing for the respondent also relied upon judgment of this Court in case of **Abdul Majid Vs. Nagar Palika reported in 1980 (6) ALR 485**, in paragraph 9 of the aforesaid judgment this Court held as under:

*"9. This section provides that no suits shall be instituted against a Board..... until the expiry of two months next after notice in writing to the Board. But in a case where relief claimed his an injunction, notice as contemplated in this section, is not necessary. When this suit was filed, the relief claimed was for mandatory injunction; but subsequently, the relief for demolition was also added in the plaint. According to the plaint allegations and relief claimed therein, initially notice under Section 326 was not necessary. But according to the defendant's case, infact it is a suit for demolition and not for injunction, and therefore, notice was necessary. In this case, it is necessary to find out as to whether it was really a suit for mandatory injunction or just to by-pass the provisions of notice, suit purporting to be for injunction, was filed. The answer of this question depends on the fact that if the construction was in existence from before filing of the suit, in that case filing of the suit for injunction would be just to by pass the provisions of notice. But where the construction was yet to start or it was in progress, the suit for injunction to restrain from starting construction or making further construction will be a suit for injunction in the real sense. In the present case, according to the evidence and finding of the Courts below, when the suit was filed, construction had just started and it was in progress and the same was completed during the pendency of the suit. In this view of the fact, the suit was rightly filed originally for injunction to restrain the defendant from making further construction, but when further constructions were completed during the pendency of the suit, the plaint was rightly amended for the relief of demolition. In view of these facts of the case, notice under Section 326 of the Act was not at all necessary. The lower appellate Court has erred in law in holding that the suit is bad for want of notice under Section 326 of the Act."*

17. In view of the judgment of the Full Bench and the other judgments cited by the counsel for the parties, the legal position which emerges is that a notice has to be given before instituting a suit against the Nagar Pallika (Municipality) in view of the provisions of Section 326



Municipalities Act, 1916, unless the case is covered by the exception given in sub-Clause 4 of Section 326.

**18.** In view of the judgment of the Full Court in case of Hazi Ahmad Raza (*supra*), the exception given in sub-Section 4 has also very restricted meaning. Even in case of injunction, a notice is necessary to be given to the Board or its officer or servant covered by sub-Section 1. Where the object of the suit would be defeated by giving a notice in an injunction suit, such notice need not be given.

**19.** Considering the facts of the present case, it is clear that as per the plaint averments, the *rasta* in dispute is the only *rasta* available to the petitioner to approach the road. In case, the aforesaid *rasta* as claimed by the petitioner is obstructed by raising constructions by the Nagar Panchayat, the purpose of the suit would be defeated and therefore, no illegality has been committed by the courts below in rejecting the application under Order 7 Rule 11 C.P.C. filed by the defendant-petitioner on the ground that the suit is barred by Section 326 of the Municipalities Act, 1916.

**20.** Contention of learned counsel for the respondent that the question whether suit is barred by Section 326 of U.P. Municipalities Act, 1916 cannot be considered at the stage of deciding the application under Order 7 Rule 11, is wholly misconceived.

**21.** Order VII Rule 11(d) CPC provides that the plaint shall be rejected "where the suit appears from the statement made in the plaint to be barred by any law", hence, in order to decide whether the suit is barred by law, it is the statement in the plaint will have to be construed. The Court while deciding such an application must have due regard only to the statements made in the plaint. Whether the suit is barred by any law must be determined from the statements in the plaint and it is not open to decide the issue on the basis of any other material including the written statement in the case.

**22.** In case of **Madanuri Sri Rama Chandra Murthy Vs. Syed Jalal; (2017) 13 SCC 174; (2017) 5 SCC (Civ) 602;** the Apex Court has summarized the legal position as follows:-

*“The plaint can be rejected under Order VII Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order VII Rule 11, [CPC](#) be exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order VII Rule 11, [CPC](#). Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under [Order VII Rule 11 of CPC](#) to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when, the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under [Order VII Rule 11 of CPC](#) can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage.”*

**23.** So far as the contention of learned counsel for the petitioner that the land in dispute belongs to Nagar Panchayat and plaintiff has another *rasta* and therefore, suit for injunction is not maintainable in view of Section 326 of U.P. Municipalities Act, 1916 is also misconceived as at the time of deciding the application under Order 7 Rule 11 C.P.C. the court has to look into only the averments made in the plaint and the case set up by the defendant in his written statement or in an application under Order 7 Rule 11 C.P.C. cannot be looked into.

24. From the plaint averments as quoted above it is clear that the case of the plaintiff is that the land in dispute is the only *rasta* available to the plaintiff, which is being obstructed by the Nagar Panchayat by raising construction there upon. So far as the case set up by the defendant-petitioner is concerned, the same can be considered only after framing an issue and considering the evidence led by both the parties at the time of deciding the said issue during trial and not at the stage of considering the application under Order 7 Rule 11 C.P.C.

25. In view of discussion made above and the settled legal position, I am of the considered opinion that the courts below have rightly rejected the application under Order 7 Rule 11 C.P.C. No illegality has been committed by the courts below and the petition fails and is accordingly, **dismissed.**

**Order Date :-** 01.02.2024

Nitika Sri.