

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.4434 OF 2015**

Sunil Vasant Phadke

..Petitioner

Vs.

Vasant Ganesh Phadke & Ors.

..Respondents

**Mr. P. S. Dani Senior Advocate a/w Mr. T. D. Deshmukh for the Petitioner
Mr. R. S. Datar for the Respondent Nos. 5 to 11
Mr. G. S. Godbole a/w Mr. P. M. Tilak for the Respondent Nos.12 to 17**

**CORAM : R. M. SAVANT, J.
DATE : 22nd SEPTEMBER, 2015**

P.C.

1 The writ jurisdiction of this Court is invoked against the order dated 25-7-2014 passed by the Learned Ad-hoc District Judge-1, Kalyan by which order, the Appeal being Misc Civil Appeal No.26 of 2014 filed by the Petitioner came to be dismissed and resultantly the order dated 20-2-2014 passed by the Trial Court i.e. the Learned Joint Civil Judge Junior Division, Kalyan rejecting the application Exhibit 5 came to be confirmed.

2 The Petitioner herein is the original Plaintiff. The Respondent No.1 herein is the father of the Plaintiff and the Respondent Nos.2 to 4 are the other family members. The Respondent Nos.5 to 11 are the persons in whose favour a decree has been passed in Regular Civil Suit No.383 of 1992. the said Suit was filed against the Respondent No.1 and the Kalyan Dombivli Municipal Corporation The Respondent Nos.12 to 17 are the developers who are

presently undertaken the development of the suit property. The Petitioner / Plaintiff has filed the Suit in question for declaration and partition of his share which he claims to be $1/5^{\text{th}}$ in the suit property. The Plaintiff claims the suit property to be an ancestral property. As indicated above, the Respondent No.1 is the original Defendant No.1 to the suit in question and who has executed the development agreement along with the Respondent Nos.5 to 11 which development agreement is dated 7-12-2007 for development of the property in question.

3 In the context of the challenge raised in the above Petition, certain intervening facts would have to be noted. On the Urban Land Ceiling Act (ULC Act) coming into force the Respondent No.1 herein filed a return under Section 6 of the said Act, pursuant to which an order dated 27-4-1989 under Section 8 of the said Act came to be passed wherein the portion of the suit property i.e. the land in question came to be declared as surplus. The said land in the development plan of the erstwhile Kalyan Dombivali Municipal Council was shown as housing for the dishoused and physically disabled. The said entries were accordingly made in the revenue record in favour of the Kalyan Dombivli Municipal Council on the order under the ULC Act being passed. The said order dated 27-4-1989 passed under the ULC Act came to be challenged by the Defendant Nos.5 to 11 before the Appellate Authority on the ground that since they are in possession, the Respondent No.1 herein i.e. the Defendant No.1

could not file the return as a holder of the land. The said Appeal came to be allowed by the Appellate Authority constituted under the said Act by an order dated 10-6-2000 and the matter came to be remanded back to the Competent Authority for a denovo consideration of the statement filed by the Defendant No.1 under Section 6 of the said Act. Another intervening fact is that in the year 1992, the Defendant Nos. 5 to 11 in the present Suit filed Regular Civil Suit No.383 of 1992 and the substantive relief sought was for a declaration that the Defendant No.1 to the said Suit, i.e. the Kalyan Dombivli Municipal Corporation was not entitled to give it on rent basis to the said Defendant Nos.5 to 11. However, the relief sought was a direction that the Kalyan Dombivli Municipal Corporation be directed to remove the encroachment. In the said Suit, the Defendant No.1 i.e. father of the Plaintiff has filed reply to the application for injunction and suffice it would be to state that the Defendant No.1 referred to the ULC proceedings and averred that he has been divested of title of the said land in view of the fact that the ULC proceedings culminated in an order passed under Section 8 whereby the surplus land has been vested in the State. Hence it was averred by him that he has nothing to do with the said land.

4 In so far as the Regular Civil Suit No.383 of 1992 is concerned, the same was thereafter amended and the Defendant Nos. 5 to 11 who were the Plaintiffs in the said Suit sought a declaration that they have become owners

by adverse possession. It seems that the Defendant No.1 did not file his Written Statement. The Suit proceeded to trial and ultimately came to be decreed by the Trial Court by judgment and order dated 19-7-2007 and the declaration of title in favour of the Defendant Nos.5 to 11 by adverse possession was granted. It seems that pursuant to the said decree, the Defendant Nos.5 to 11 prosecuted the ULC proceedings. The Petitioner herein as indicated above has filed the Suit in question inter alia for a declaration as regards his share in the suit property as also the declaration that the development agreement dated 7-12-2007 executed by the Defendant No.1 as confirming party is not binding upon his share. The other relief sought is that the decree passed in Regular Civil Suit No.383 of 1992 is also not binding on his share. Significantly the Plaintiff though claimed that the said decree has been passed on account of the collusion between the Defendant No.1 and the Plaintiff to the said Suit has not sought the setting aside of the said decree but as indicated above has only sought a declaration that the said decree is not binding on his share. In the said Suit, the Plaintiff has filed an application for temporary injunction. The said application was opposed to on behalf of the Defendant Nos.11 to 17 who now have the said development agreement in their favour and who are now developing the property in question.

5 The Trial Court considered the said application and having regard to the antecedent facts as narrated herein above namely the order passed

under the ULC Act against the Defendant No.1, the decree of Regular Civil Suit No.383 of 1992, vesting of the title in respect of the land in question in favour of the Defendant Nos.5 to 11, who the Trial Court held have title in the absence of any challenge to the decree passed in the said Regular Civil Suit No.383 of 1992 and the Defendant No.1 being the confirming party as Karta of Phadke HUF, came to a conclusion that the claim of the Plaintiff if any can only be against his father i.e. the Defendant No.1 for a share out of the consideration that he has received for execution of the development agreement in favour of the Defendant Nos.12 to 17. The Trial Court held that in view of the fact that none of the three ingredients for the grant of temporary injunction have been satisfied discretion could not be exercised in favour of the Plaintiff and accordingly rejected the application Exhibit 5 by order dated 20-2-2014.

6 The Plaintiff aggrieved by the said order dated 20-2-2014 filed Misc Civil Appeal No.26 of 2014. The Lower Appellate Court on a re-appreciation of the material on record did not find any reason to interfere with the order passed by the Trial Court refusing to exercise discretion in favour of the Plaintiff. The Lower Appellate Court adverted to the fact that there was no serious challenge to the development agreement except seeking a declaration that the same was not binding on his share as also the decree passed in Regular Civil Suit No.383 of 1992 in respect of which as indicated above the Plaintiff is only seeking declaration of the said decree is not binding on his share. The

Lower Appellate Court has adverted to the fact that the Defendant No.1 was already divested of all his rights by virtue of the ULC proceedings and therefore the Plaintiff could not have any claim in respect of the said property. The Lower Appellate Court as indicated above therefore did not deem it appropriate to interfere with the order passed by the Trial Court and accordingly dismissed the Appeal.

7 The Learned Senior Counsel Mr. Dani appearing on behalf of the Petitioner would contend that having regard to the manner in which the decree was passed in Regular Civil Suit No.383 of 1992 as also having regard to the covenants of the development agreement it could not be said that the Plaintiff has absolutely no case for atleast protecting his rights pending the Suit.

8 Per contra the Learned Counsel Mr. Godbole appearing for the Respondent Nos.12 to 17 and the Learned Counsel Mr. Datar appearing for the Respondent Nos.5 to 11 support the impugned order. The Learned Counsel drew this Courts attention to the relief sought in the instant Suit and it was therefore the submission of the Learned Counsel that the order passed by the Trial Court does not require any interference at the hands of this Court in its Writ Jurisdiction.

9 Heard the Learned Counsel for the parties. Both the Courts below on the basis of the material on record have come to a conclusion that the Plaintiff has not made out any case for exercise of discretion in his favour. The fact that there is a decree in favour of the Defendant Nos.5 to 11 of having title by way of adverse possession cannot be disputed. In so far as the decree is concerned, the relief sought in the instant Suit is a declaration that the said decree is not binding on the Plaintiff's share though before this Court the Learned Senior Counsel appearing for the Petitioner / Plaintiff sought to question the decree on the ground of the same being obtained by collusion between the Plaintiff and the Defendant No.1. It is also required to be noted that pursuant to the ULC proceedings the land in hands of the Defendant No.1 was declared surplus and was shown as vested in the Corporation as the same was reserved for a public purpose under the development plan of the Kalyan Dombivli Municipal Corporation. The aforesaid facts have been taken into consideration by the Courts below whilst adjudicating upon as to whether the Plaintiff is entitled to the grant of temporary injunction. In the light of the concurrent findings recorded by the Courts below, no case for interference in the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed.

[R.M.SAVANT, J]

CERTIFICATE

Certified to be true and correct copy of the original signed order