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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1241 OF 2015

M/s Sunny Buildtech Private Limited	]	
a Company incorporated under the	]	
provisions of Companies Act, 1956	]	
Through its Director:	]	
Mr. Rajeshkumar R. Lakhanpal	]	..Petitioner
age: 46 years,	]	
having its office at	]	
39, Arenja Corner,	]	
Sector 17, Vashi,	]	
Navi Mumbai 400 705	]	

V/s.

- | | | |
|--|---|----------------|
| 1. The State of Maharashtra |] | |
| Through the Principal Secretary |] | |
| Urban Development Department, |] | |
| Mantralaya, Mumbai 400 032. |] | |
| |] | |
| 2. City & Industrial Development Corporation |] | |
| of Maharashtra Ltd. (CIDCO) |] | |
| A company incorporated under the |] | .. Respondents |
| provisions of Companies Act, 1956 |] | |
| Through its Managing Director, |] | |
| having its office at |] | |
| CIDCO Bhavan, CBD Belapur |] | |
| Navi Mumbai |] | |
| |] | |
| 3. The Additional Collector and Chief Controller |] | |
| Unauthorized Constructions CIDCO |] | |
| having its office at |] | |
| CIDCO Bhavan, CBD Belapur |] | |
| Navi Mumbai |] | |
| |] | |
| 4. Chief Land & City Survey Officer |] | |
| CIDCO, |] | |

having its office at]
CIDCO Bhavan, CBD Belapur]
Navi Mumbai]

Mr. P. K. Dhakephalkar, Senior Advocate, I/by J.
G. Reddy, for the petitioner.

Mrs. M. P. Thakur, AGP, for the Respondent-
State.

Mr. A. M. Kulkarni, for respondent Nos. 2 to 4.

**CORAM : RANJIT MORE &
DR. SHALINI PHANSALKAR-JOSHI, JJ.**

CLOSED FOR ORDER : 15th APRIL, 2016.

JUDGMENT PRONOUNCED : 25th APRIL, 2016

JUDGMENT. : [PER : DR. SHALINI PHANSALKAR-JOSHI, J.].

1. Rule.
2. Rule made returnable forthwith.
3. With consent of the parties, heard finally at the stage of admission.
4. By this petition filed under Article 226 of the Constitution of India, petitioner seeks direction to the CIDCO Authorities to hand over to him alternate plot of land in lieu of plot No.70 Sector 27 of Owe, Kharghar, admeasuring 1100 sq. meters, under 12.5% scheme, in the same vicinity and having similar locations, considering encroachment made on the said

plot by one Mr. Keshav and Smt. Devkibai Kadu.

5. The facts of the petition are to the effect that respondent No.2 CIDCO, being the new town development authority, has acquired several properties in the area of Navi Mumbai, for development purposes and in lieu of the said acquisition, decided to give compensation to the persons whose lands were acquired. Alongwith the monetary compensation to be paid by CIDCO, to the affected persons, respondent No.1 Government of Maharashtra also decided to allot 12.5% developed plots to the project affected persons. The said scheme is commonly known as 12.5% scheme of CIDCO.

6. The lands bearing survey Nos. 334/2 and 335/2 of village Owe-Kharghar, admeasuring nearby 1 H. 27.9 R were belonging to one Shri.Baburao Ganpat Kathkari and his family. Vide award No.250, the said lands were acquired by CIDCO and in lieu thereof, Kathkari family was held entitled for 1100 sq. meters developed plot under 12.5% scheme. As per draw of lottery, Kathkari family was allotted plot No.70 in Sector 27, Owe Kharghar under the scheme on 10.9.2005. Agreement to lease was accordingly executed by CIDCO, in favour of Kathkari family on 12.10.2007. Due to financial problem, Kathkari family decided to hand over the said plot to the petitioner and made application to CIDCO for transfer. The said application was allowed and a tripartite agreement

came to be executed on 18.3.2008 in between Kathkari family, CIDCO and the petitioner. Accordingly the plot came to be transferred in the name of petitioner by CIDCO and his name came to be included as CIDCO's licensee on 27.3.2008.

7. Thereafter on 31.3.2008, petitioner pointed out to CIDCO that the plot of land which is transferred in his favour as new licensee of CIDCO is encroached by Shri.Keshav Kadu and his family. The CIDCO, however, initially did not bother to take any action. Subsequently, on 26.5.2008, the Additional Collector and Chief Controller of Unauthorised Construction directed the City Survey Officer to visit the site to find out whether there was any encroachment. At that time it was confirmed that Keshav Kadu had made encroachment on the plot of petitioner, while constructing building on his own plot. Keshav Kadu then informed the Managing Director, CIDCO that if such encroachment is noticed, CIDCO can deduct the said area from his entitlement under 12.5% scheme.

8. On 27.6.2008, in view of complaint of petitioner, CIDCO issued notice to Shri. Kadu under Section 53(1) of the MRTP Act, directing him to remove unauthorized construction on the petitioner's plot. Shri. Kadu then filed Regular Civil Suit No.198/2008, in the court of Civil Judge J.D. Panvel and obtained order of stay to the said notice. In the said suit, petitioner got himself impleaded as party and the suit is still

pending.

9. On 3.3.2010, the petitioner requested CIDCO to allot him any other alternate plot since encroachment made on his plot was very difficult to be removed. Acceding to his request, on 11.3.2010, CIDCO decided to allot him alternate plot bearing No.77, Sector 18 admeasuring 1100 sq. meter. However, petitioner found that the alternate plot No.77 was not having proper access and it was situate on 8 meter wide road. Therefore, the petitioner was not in position to utilize entire F.S.I. of the said plot. Hence petitioner requested CIDCO to allot him any other alternate plot, preferably being plot No.6 in Sector 35.

10. The petitioner's request was accepted and on 10.5.2011, office note was prepared by the office of CIDCO, wherein it was proposed to allot any other alternate plot to the petitioner. Similar office notes were prepared on 22.7.2011, 19.12.2011, 3.1.2012, 13.1.2012 and 10.2.2012. However, as actual allotment of plot did not take place, the petitioner made representations on 3.3.2012, 28.5.2014 and 5.8.2014. But it was of no use.

11. The submission of learned counsel for petitioner is that admittedly plot No.70 which was initially allotted to Kathkari family and subsequently transferred in the name of petitioner is having encroachment in the form of building constructed by the adjacent plot holder Keshav

Kadu. It is difficult to remove the said encroachment in view of pending suit in which relief of injunction is granted in favour of Shri.Keshav Kadu restraining CIDCO from demolishing his construction till final disposal of the suit. Hence it is submitted that the petitioner becomes entitled to get alternate plot. It is submitted that the fact that the petitioner's plot is having encroachment and he is entitled for alternate plot is also accepted by CIDCO by taking steps of allotting him alternate plot No.77. Hence now CIDCO cannot deny him the same benefit,as alternate plot No.77 is also found to be not having proper access and its entire FSI cannot be utilized as it is under road.

12. Further, it is submitted that as per the information gathered by the petitioner, Plot No.18 admeasuring 1050 sq. meters situate at Sector No.35(I) Owe Kharghar is vacant and the ready reckoner value of the said plot is less than ready reckoner value of Plot No.70 allotted to the petitioner. The allotment of the said plot to the petitioner will also not be in breach of linkage policy of the CIDCO. Hence it is submitted that CIDCO may be directed to allot this plot or even any other plot like plot No.4 and 5, to the petitioner within a period of four weeks from the date of the order.

13. It is further submission of learned counsel for the petitioner that as one Mr. Gul Panjwani, who was similarly situated as the petitioner, has been allotted alternate plot No.41, in Sector 18 in lieu of plot No.71 at

Sector 27, the petitioner is also entitled to get similar relief which CIDCO is avoiding to extend to him. Hence according to learned counsel for the petitioner, this discriminatory action on the part of CIDCO is required to be quashed and set aside by allotting him alternate suitable plot in the same vicinity.

14. This petition came to be resisted by respondent Nos. 2, 3 and 4 by filing affidavit of one Mr. Vijay Singh Patil, who is working as Chief Land and Survey Officer in CIDCO. It is submitted that at the time of allotment of said plot to Kathkari family in the year 2007, plot was free from any encroachment or unauthorized structure. The vacant possession of the plot was handed over by CIDCO and accepted by Kathkari family. Possession receipt dated 12.10.2007 is annexed to that effect. It is further submitted that as per agreement of lease executed by CIDCO with Kathkari, it was the responsibility of the allottee to fence the said plot at his expenses within 2 months from the date of receiving possession. It is submitted that as neither the petitioner nor his predecessors have done so, CIDCO cannot be expected to allot an alternate plot for their own fault. It is submitted that while executing tripartite agreement dated 12.10.2007 also the petitioner did not make any grievance about the alleged encroachment or unauthorised structure on the said plot. Thus, it is clear that the petitioner had verified the vacant

possession of the said plot and then only entered into agreement. It is further submitted that after about 1 ½ month of the tripartite agreement, petitioner has complained about unauthorised structure of Mr. Keshav Kadu and in view thereof request was made by him to allot alternate plot. Initially the request of the petitioner was considered by CIDCO and petitioner was allotted alternate plot No.77. However, petitioner refused the same alleging that there was no access and petitioner could not utilize the entire F.S.I. Even then, CIDCO, as Planning Authority, will be taking action against the unauthorized structure standing on the petitioner's plot. A notice to that effect is already issued and a suit is pending. In view thereof, it is submitted that the petitioner cannot be entitled to get any alternate plot, particularly in the light of the latest policy decision taken by CIDCO, vide resolution No.11152 dated 11.8.2014, not to allot such alternate plots.

15. According to learned counsel for respondent CIDCO, in the light of above fact situation, petitioner is not entitled to invoke writ jurisdiction of this Court, as there is no fundamental or Constitutional right in favour of the petitioner to claim particular plot much less alternate plot as may be suitable to the petitioner. The allotment of plots under 12.5% scheme is an extra statutory compensation to the Project Affected Persons over and above statutory compensation paid under the Land

Acquisition Act. Hence the Project Affected Person cannot demand allotment of particular plot under 12.5% scheme as per own choice. Any such demand is not justified. The relations between the petitioner and CIDCO are purely of contractual nature and governed by the agreement. In case of breach of statutory obligation, the only remedy available is of filing of suit and not writ jurisdiction. The reliance is placed by learned counsel for the petitioner on the judgment of Division Bench of this Court in **Ashok Ganu Shelke -vs- State of Maharashtra and ors**, in Writ Petition No.2747 of 20905 dated 27.4.2006 to advance his submission that the petitioner is not having any legal right or equity to stake any lawful claim that a particular plot be allotted in place of plot already allotted.

16. Having heard learned counsel for the petitioner, learned AGP for the State and learned counsel for CIDCO, and on perusal of the record we deem it appropriate and just to grant and allow this petition for the simple reason that it was the responsibility of the CIDCO to allot plot which was free from encroachment. In this case though CIDCO states that the plot, when allotted to Kathkari family was, free from encroachment and it was demarcated by boundaries, there is no evidence to that effect except for the possession receipt. The possession receipt also nowhere mentions the date on which possession was handed over by visiting and inspecting the plot. There is also nothing to show that the plot was actually

demarcated.

17. The agreement to lease also does not reveal that vacant possession of the plot was delivered to Kathkari family on 12.10.2007. It is pertinent to note that immediately after tripartite agreement between the petitioner, Kathkari family and CIDCO in the month of March, 2008, the petitioner noticed encroachment on the said plot by adjoining plot holder Shri. Kadu, who has already constructed building thereon. The fact that there was encroachment on the petitioner's plot, is also not disputed by the CIDCO. Regular Civil Suit No.198/08 filed by Kadu against the notice issued to him under Section 53(1) of the MRTP Act by CIDCO, is pending in the Court.

18. A copy of the order passed below Exh.5, an application for interim relief filed therein by Keshav Kadu, is produced on record by the petitioner which prove that Shri.Kadu, after obtaining permission for construction from CIDCO, even prior to year 2008 he has made construction of ground + 2 floors, the compound wall and the CIDCO was not diligent enough to stop said illegal construction at the beginning. The CIDCO also could not substantiate its stand in the said suit and as a result, the relief of interim relief as claimed by Shri. Kadu was granted and CIDCO, by order dated 5.3.12009 passed by Civil Judge J.D. Panvel, in the said suit, is restrained from demolishing the said construction. Thus

there is much substance in the contention of the petitioner that encroachment on his plot No.70 is not easy to be removed.

19. As CIDCO itself found it difficult to remove encroachment on the plot of petitioner, CIDCO decided to allot alternate plot to the petitioner, bearing No.77, in Sector 18. This act of CIDCO of allotting alternate plot No.77 to the petitioner, clearly goes to indicate that CIDCO is not denying or disputing its liability to provide alternate plot to the petitioner on account of the encroachment found on the plot allotted to him. If the vacant possession of the plot was allotted by CIDCO, and it was the responsibility of the allottee to fence the said plot, then CIDCO would not have agreed to provide alternate plot No.77 to the petitioner. If the said alternate plot No.77 is not suitable as it is not having proper access and it is situate on 8 meter wide road, as a result of which petitioner cannot utilize the entire FSI of that plot, it follows that the petitioner becomes entitled to get another alternate plot. The five office notes dated 22.7.2011, 19.12.2011, 3.1.2012, 13.1.2012 and 10.2.2012, were prepared to that effect. Now by taking recourse to the recent policy decision taken by CIDCO on 11.8.2015, CIDCO cannot deprive the petitioner of the right vested in petitioner of getting alternate plot of land, as the plot allotted to him is having encroachment thereon.

20. In this respect, it is also pertinent to note that in the affidavit

filed by the Chief Officer of CIDCO, it is not denied that CIDCO has earlier allotted alternate plot No.77 to the petitioner. In the affidavit there is also no denial to the fact that one Shri.Gul Panjwani, who was similarly situated as the petitioner, has been allotted alternate plot No.41 at Sector 18 in lieu of plot No.71 Sector No.27. Respondent CIDCO, therefore, cannot give differential treatment to the petitioner, when it is not disputing that there is encroachment on the plot of petitioner. It is also accepted that it is their responsibility to remove the said encroachment and CIDCO has assured to take steps for it. However, in view of the pending suit and difficulty in removal of encroachment, if CIDCO cannot do so, then it becomes the responsibility of CIDCO to ensure that the petitioner gets alternate plot which can be suitably used by him for the purpose for which it was allotted.

21. The fact that alternate plots are available for allotment in the same linkage sector is not denied in the affidavit filed on behalf of CIDCO. Learned counsel for the petitioner has made a statement to this Court on 7th April, 2016 that in the same locality in which plot No.70 allotted to the petitioner is situated, there is plot No.18, situated at Sector No.35-I at Owe/Kharghar, admeasuring 1050 sq. meters which is vacant and that can be allotted to the petitioner as an alternate arrangement to the plot in question. The area of the said plot No.18 is 1050 sq. meters which is less

than plot No.70 allotted to the petitioner. The said plot is also in the same linkage sector. Hence a specific direction was given by this Court to CIDCO to consider this proposal. However, the affidavit filed by the CIDCO on 15.4.2016 does not make any reference to the said proposal nor it is stated that there is no such plot which can be allotted as alternate arrangement to the petitioner. It is also not denied that plot No.18 is in the same linkage sector. Mr. Kulkarni, learned counsel for CIDCO, however, submitted that if Court decides to allot this plot to petitioner as an alternate arrangement, then same may be allotted subject to same conditions on which original plot was allotted.

22. As to the judgment of this Court in **Ashok Ganu Shelke -vs- State of Maharashtra and ors**, in W. P. No.2747 of 2005, on which reliance is placed, the petitioner therein was insisting for allotment of alternate plot in the same village from which his lands were acquired and therefore, Court held that CIDCO is justified in refusing his request considering that it was not possible and feasible to allot lands within the same village considering the area acquired through allotment and certain linkage sector being identified in the nearby villages. In the instant case facts are different as allotment of alternate plot No.18 suggested by petitioner would be in accordance with the linkage policy of the CIDCO.

23. In view of this factual position we are of the considered opinion that CIDCO cannot escape from its liability of either removal of encroachment on the plot allotted to the petitioner, which is not likely to happen in near future and therefore alternate liability of providing alternate plot to the petitioner in the same vicinity and having same linkage.

24. The petition, therefore, stands allowed.

25. Respondent No.2 CIDCO, is hereby directed to allot to the petitioner alternate plot of land being Plot No.18, admeasuring about 1050 sq. meters, situated at Sector 35-I, at Owe/Kharghar in lieu of plot No.70 sector 27 situate at Owe Kharghar, admeasuring 1100 sq. meters under 12.5% scheme, within four weeks from the date of order, on the similar conditions on which original plot was allotted.

26. Rule made absolute in above terms.

[DR. SHALINI PHANSALKAR-JOSHI, J.]

[RANJIT MORE, J.]