

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Amk

APPEAL FROM ORDER (STAMP) NO. 12532 OF 2016
WITH
CIVIL APPLICATION (STAMP) NO. 12535 OF 2016
IN
APPEAL FROM ORDER (STAMP) NO. 12532 OF 2016

M/s. Sai Ganesh Enterprises

...Appellant

Versus

Smt. Hirabai Nathuram Patil & Ors.

...Respondents

.....

Mr. S. M. Oka i/b Mr. Sagar A. Joshi for the Appellant.

Mr. N. V. Walawalkar, Senior Counsel i/b Mr. Jeetendra Sachdeo for
Respondent No.7.

CORAM : G. S. KULKARNI, J.

DATE : 2nd MAY, 2016.

P. C. :

1. Heard Mr. S.M.Oka, learned counsel for the appellants/original
plaintiffs and Mr.N.V.Walawalkar, learned senior counsel for the
contesting respondent No.7/original defendant no.7.

2. This appeal is directed against the order dated 02.04.2016
passed by the learned Civil Judge Senior Division, Panvel whereby the
learned Judge has rejected an injunction application filed below

Exhibit 5 on behalf of the appellant. In this application before the Trial Court, pending the disposal of the suit, the appellant had prayed for the following reliefs:

- (a) Pending the hearing and final disposal of the present suit the Defendant No.7, 9 & 10 including its servants, agents, officers and any person claiming through them be restrained by an order of temporary injunction from transferring/creating third party interest and/or from carrying out the construction activity in and upon the Suit Plot;*
- (b) pending the hearing and final disposal of the present suit the Defendant No. 9 & 10, including its servants, agents, officers and any person claiming through them be restrained by an order of temporary injunction from granting any further transfer permissions or any other permissions such as Commencement Certificate to the Defendant No.7 in respect of Suit Plot viz. Plot no.88, land admeasuring about 1499.12 sq. mtrs at village Ulve, being Sector-21, Taluka-Panvel & District-Raigad;*
- (c) This Hon'ble Court be pleased to issue interim and ad interim ex-parte reliefs in terms of prayer (a) to (b) as above;*
- (d) All other and suitable reliefs as this Hon'ble court in the nature and circumstances of the case may deem fit to grant, be granted in favour of the Plaintiff;*
- (e) Cost of the Injunction Application be provided for.*

2. For the sake of convenience the parties are referred as they stand in the original proceedings.

3. In nutshell the facts are: The plaintiff claims to have entered into an agreement with respondent Nos.1 to 6 dated 18.08.2011 in respect of suit plot of land namely Plot No.88, Sector 21 situated at Ulve, Navi Mumbai admeasuring 1500 sq. mtrs. This agreement,

according to the plaintiffs is dated 18.08.2011 as the same was notarized on that date and is not a registered document. The case of the plaintiff is that by virtue of this agreement the plaintiffs has acquired rights from defendant Nos.1 to 6 for a lease to be obtained from the City and Industrial Development Corporation (for short 'CIDCO') in respect of this suit plot of land. The plaintiff state that they have parted with an amount of Rs.3 lacs which was paid in cash and Rs.1,50,000/- was paid to defendant Nos.1 to 6 at the time of execution of this agreement. The balance of Rs.1,05,50,000/- was to be paid at the time of execution of a agreement to be entered in future along with the CIDCO. In the suit in question the appellant has prayed for specific performance of this agreement.

4. The case of the plaintiffs is that defendant No.7 however, under a tri-partite agreement dated 25.03.2008 entered between defendant No.7, defendant Nos.1 to 6, and CIDCO/defendant No.9 -confirming party, is in possession of the suit land and is undertaking development. Accordingly the appellant has also made a prayer in the suit for a declaration that the said tri-partite agreement dated 25.03.2008 is illegal and null and void.

5. From these facts which have come on record before the Trial

Court and on the record of this appeal, it appears that defendant Nos.1 to 6 were beneficiaries of the allotment of the suit plot of land under 12.5% Gavthan scheme of the CIDCO. Under this scheme in view of the acquisition of the land for the New Bombay Project, CIDCO had undertaken allotment of developed plots of land to the original owners of the land whose lands were acquired under the Land Acquisition Act, for the New Bombay Project. Defendant nos. 1 to 6 were to be beneficiaries of such allotment of a plot of land as their lands were acquired. It appears that before the actual allotment letter came to be issued by the CIDCO, defendant Nos.1 to 6 had entered into agreements with some third parties creating some interest in their favour in the allotment of the said plot of land. These third parties were one M/s. Shivshankar Builders and Developers and the other third party was one Mr. Mahesh Changrani. Disputes arose between defendant Nos.1 to 6 and these third parties. These parties had filed civil suits before the Court of Civil Judge Senior Division at Panvel. M/s. Shivshankar Builders and Developers had filed Special Civil Suit No. 575/2007 and the civil suit filed by Mr. Mahesh Changrani was Special Civil Suit No.553/2007. The Civil Suit of Mr.Mahesh Changrani is not that relevant. However, what is relevant is an issue as raised on behalf of the appellant rely on some

interim orders passed in Special Civil Suit No. 575/2007 filed by Shivshankar Builders and Developers in respect of the suit plot of a status quo. This issue would be adverted to, a little later when the submissions as made on behalf of the learned counsel for the appellant/plaintiffs are considered.

6. After the allotment of the plot by the CIDCO by its allotment letter dated 19.01.2008 issued in favour of defendant Nos.1 to 6 and according to the case of defendant Nos.1 to 6 as also of defendant No.7, an agreement to lease came to be entered between the CIDCO and defendant Nos.1 to 6. A perusal of this agreement indicates that in order to enable a party to utilize the fruits of the allotment of land, CIDCO permits the allottee to develop the plot of land by permitting the allottee to enter upon the plot of land for the purpose of development. The agreement records in clause (1) that it is merely a grant of license. The stipulation is that the allottee would develop the plot of land within a period of 4 years from the date of this agreement. Clause 2 further records that it is not a demise in law. There are other number of terms and conditions which the allottee is required to undertake the development of the plot of land. Clause 5 (b) provides for the power of the CIDCO to resume land in

case of breach of terms and conditions in the agreement. It further provides for extension of time for completion of the obligations in clause 6. Clause 7 provides for grant of lease which would have some relevance. Clause 7 provides that as soon as the town planning officer has certified that the building is completed in accordance with the terms and conditions of the license and that the licensee has observed all stipulations and conditions to the said agreement the CIDCO will grant to the licensee a lease of the land by entering into a lease deed for a term of 60 years at an yearly rent of Rs.1/-. A reading of this agreement and more particularly clauses 6 & 7A would indicate that the CIDCO is dealing with the land in pursuance of the New Bombay Disposal of Lands Regulations, 1975 as framed under the Maharashtra Regional and Town Planning Act, 1966. In short by this agreement the CIDCO ensures development of land by grant of limited rights before a final lease deed could be entered.

7. It appears that thereafter the CIDCO handed over the possession of the suit plot of land to defendant Nos.1 to 6. As the plaintiff were not interested to develop the plot themselves and/or wanted to exploit it commercially by assigning their rights as conferred on them by virtue of the allotment letter, for consideration

in favour of defendant no.7 they approached CIDCO to assign their rights in favour of defendant no.7. Thereafter the tri-partite agreement dated 25.03.2008 came to be executed between the CIDCO, defendant Nos.1 to 6 and defendant No.7 whereby the rights of allotment which were conferred on defendant Nos.1 to 6 were agreed to be transferred in favour of defendant No.7, on defendant No.7 paying the CIDCO a premium of Rs.57560/-. The agreement in clause 1A specifically records that the parties would abide by the orders which would be passed in Suit No.553/2007 and Suit No.575/2007 filed by Mr. Mahesh Changrani and M/s. Shivshankar Builders and Developers respectively. By clause 3 it is recorded that the original allottee/licensee namely defendant Nos.1 to 6 relinquished and released their right, title and interest and demand in the said agreement and discharged the Corporation from all liabilities required to be performed to them by the CIDCO under the said agreement. This tri-partite agreement was registered on 21.05.2014 with the office of the Sub-Registrar of Assurances at Uran. The effect of this tripartite agreement is that the CIDCO recognised that rights are were assigned in favour of the defendant no.7 for the development of the plot and so would be the position in the records of the CIDCO.

8. It is the case of defendant No.7 that though the tri-partite agreement came to be executed on 25.03.2008 and was registered on 21.05.2014 however as the Special Civil Suits Nos. 553/07 and 575/07 were pending, no immediate action was taken on behalf of defendant No.7 to develop the said plot of land. It is the case of defendant No.7 that as regards Civil Suit No. 553/07, the same was withdrawn on 25.02.2009 and Civil Suit No. 575/07 was settled and ultimately it was withdrawn on 17.04.2014. Defendant No.7 in pursuance of the tri-partite agreement thereafter obtained approvals from the concerned authorities to commence the construction and accordingly it is the case of defendant No.2 that they had completed construction upto about five floors on the date of suit.

9. The plaintiffs have contended that though the agreement was entered by defendant Nos.1 to 6 with the plaintiffs on 18.08.2011, the appellant made inquiries in the month of March, 2015 in the office of the CIDCO as regards the status of the suit plot. It was informed to them that the CIDCO has entered into a registered tri-partite agreement dated 25.03.2008 in respect of the very plot of land with defendant No.7. The plaintiffs thereafter immediately

approached defendant Nos.1 to 6 who claimed ignorance about the same. The plaintiff thereafter obtained copies of the relevant documents including the copies of the documents in Suit Nos.553/07 and 575/07 and approached the Civil Court in the suit in question praying for reliefs inter alia seeking a specific performance of the agreement dated 18.08.2011 and declaration that the tri-partite agreement dated 25.03.2008 is illegal and null and void. The injunction application whereby plaintiffs sought a temporary injunction as noted above was heard and rejected by the learned Trial Judge by the impugned order.

10. Learned counsel for the appellant/plaintiffs in assailing the impugned order has advanced the following submissions:

(i) It is submitted that the tri-partite agreement dated 25.3.2008 between CIDCO, defendant Nos.1 to 6 and defendant No.7 was merely a license which was granted by the CIDCO for a period of 4 years as this agreement is required to read in conjunction with agreement to lease dated 21.01.2008. The said license had expired after 4 years i.e. on 21.01.2012. The license period was not extended by the CIDCO and, therefore, defendant No.7 had no legal right whatsoever to undertake

development of the said plot of land. In other words, the submission is that the agreement to lease had expired by efflux of time as the period of 4 years had come to an end to undertake development. The possession of defendant No.7 is, therefore, without any legal rights as also all permissions granted by the CIDCO are illegal.

(ii) The tri-partite agreement dated 25/3/2008 as entered with defendant No.7 is also hit by provision of Section 25 of the Contract Act in as much as under the tri-partite agreement no consideration had been paid in respect of the suit plot of land by defendant no.7.

(iii) There is no agreement by which defendant Nos.1 to 6 have agreed to transfer the leasehold rights in favour of defendant No.7.

(iv) The tri-partite agreement was void as it was entered in violation of the status quo order dated 4.9.2007 which was operating against defendant Nos.1 to 6 as also the CIDCO in Special Civil Suit No. 575/07.

11. On the other hand learned senior counsel on behalf of defendant No.7 submits that none of these submissions are either factually correct nor can they be accepted in law. It is submitted that the tri-partite agreement as entered by the CIDCO with defendant Nos.1 to 6 is legal, valid and proper in as much as the ultimate rights in respect of land to deal with and dispose of the land vests with the CIDCO. These rights of allotment were required to be exercised by the CIDCO in accordance with the statutory norms which are also set out in the agreement to lease. It is submitted that accordingly an allotment letter dated 19.1.2008 was issued by CIDCO in favour of defendant nos. 1 to 6. Thereafter the agreement to lease dated 21.01.2008 was entered between the CIDCO and the original allottees (defendant Nos.1 to 6) granting a licensee to undertake development within a stipulated period. However it was subject to other terms and conditions whereby the CIDCO would permit compliance of the terms and conditions on an extended period subject to the allottees complying with the requirements as stipulated in the agreement. It is submitted that the plaintiffs have not placed any document on record to show that this agreement to lease is not a valid document. It is required to be held as invalid document by the CIDCO which is not the case of the appellant. It is submitted that the extension of time as

granted by CIDCO to complete the construction on certain conditions and which are complied by defendant No.7. Defendant no.7 is not in any manner in breach of the terms and condition so that CIDCO could resort to any action as contemplated under Clauses 4 & 5 of the said agreement to lease to resume land. It is then submitted that the submission on behalf of the appellant that the tri-partite agreement dated 25.03.2008 does not confer any legal rights in favour of defendant No.7 is also misconceived in as much as the CIDCO being a party to the document has affirmed to the position as incorporated in clause 3 of this agreement that the original licensee namely defendant Nos.1 to 6 relinquished and released all their right, title and interest, benefits and claims or demands whatsoever in the said agreement in respect of the said land. It is submitted that clause 1, 1A, 2, 3 & 4 of this tri-partite agreement indicates that defendant No.7 has stepped into the shoes of the original allottees to enjoy all the rights under the allotment letter dated 19.1.2008 and the agreement to lease dated 21.01.2008. It is, thus, submitted that the submission on behalf of the appellant is without any foundation that defendant No.7 has no legal rights in respect of suit plot of land. It is further submitted that, in fact, on 21.05.2014 the CIDCO had permitted defendant No.7 to enter into further agreement, as also has confirmed the said

agreement entered by defendant no.7 with M/s. Neelkant Infracon, for development of this land and accordingly development of this plot is undertaken.

12. As regards the contention that the CIDCO could not have entered tri-partite agreement in view of the injunction which was in operation in Civil Suit No.575/07, learned senior counsel for the defendant no.7 has drawn my attention to the order dated 04.09.2007 passed by the learned Civil Judge Senior Division in the said suit whereby according to defendant No.7, CIDCO was enjoined from allotting the suit plot of land and granting any development rights till the replies were filed by all the defendants in the suit. According to the plaintiffs the order dated 04.09.2007, in fact, prohibited defendant Nos.1 to 7 not to create any third party interest till the disposal of the suit. The submission on behalf of defendant No.7 is that the injunction was operating on all the parties to the suit including defendant Nos.1 to 6 and also the CIDCO till the replies were filed on behalf of the defendants. It is submitted that the order dated 04.09.2007 passed by the learned Civil Judge in the said civil suit, on this issue is very clear. Learned senior counsel for defendant No.7 in this context has drawn my attention to the application dated

14.03.2008 filed on behalf of the plaintiff therein (Shivshankar Builders) in civil Suit No. 575/07, the say to that application which was filed on behalf of defendant No.6, therein namely CIDCO, as also the say filed by defendant Nos.1 to 5 therein and the orders dated 22.04.2008 passed on the said application. From the reading of these applications and the respective replies of the parties, in that suit it is contended that the CIDCO had filed its say on 05.02.2008. The last of the replies was filed on 04.03.2008 and, therefore, the order dated 04.09.2007 had ceased to operate with effect from letter dated 04.03.2008 qua the CIDCO, and therefore, there was no embargo on the CIDCO to enter into a tri-partite agreement with defendant No.7 as also there was no embargo on the part of defendant Nos.1 to 5 to be parties to the said agreement as they have also filed their say on 08.02.2008. The injunction dated 4.9.2007 was therefore not in operation. It is submitted that, in fact, the order dated 22.04.2008 passed by the learned Trial Judge in the said suit clarifies this position whereby the learned Judge has observed that the injunction which was granted by him against all the defendants was till the respective replies were filed by all the defendants. However after the injunction ceased to operate on the CIDCO and other parties, on filing their say the agreement dated 25.03.2008 was entered and therefore in view

of this changed circumstance the plaintiff in the said suit on 22.04.2008 sought an order to prevent further complications and prayed that the CIDCO be directed to maintain status quo in respect of suit property. It is stated that accordingly the Court had agreed to the said request on 22.04.2008 the CIDCO was directed to maintain status quo in respect of the said suit plot by the said order dated 22.4.2008. It is submitted that however the position had remained that under the tri-partite agreement dated 25.03.2008 was already entered with defendant No.7, and thus defendant no. 7 was entitled to take benefits of the said agreement.

13. As regards the contention as raised on behalf of the appellant that the agreement to lease dated 21.01.2008 and the subsequent tri-partite agreement dated 25.03.2008 do not create any legal rights in favour of deft No.7, it is submitted on behalf of defendant no.7 that this submission is misconceived and contrary to the plain reading of this agreement under which rights are created in favour of defendant No.7. As regards the contention of the plaintiff that the tri-partite agreement is hit by the provisions of section 25 of the Contract Act, in as much as no consideration has been paid by defendant no.1 to 6, is also submitted to be misconceived. This is for the reason that defendant No.7 had specifically pointed out that the

consideration was paid to defendant Nos.1 to 6 under a separate agreement/arrangement and that defendant nos.1 to 6 had no grievance whatsoever as it was completely inter se between defendant nos.1 to 6. The appellant ought to have no concern whatsoever in this regard. It is, therefore, urged that the impugned order does not call for any interference.

14. I have heard learned counsel for the parties and with their assistance I have also perused the relevant documents placed on record as also the impugned order passed by the learned Trial Judge. At the first blush the submissions as made on behalf of the appellant appeared to be attractive. However on a detailed scrutiny of the documents in question and considering the facts and circumstances of the case and the impugned order passed by the learned trial Judge, this appeal may not call for any interference, the reasons for which would be thus :

15. Defendant Nos.1 to 7 were admittedly beneficiaries of the allotment of the suit plot of land. Before the actual allotment of the plot of land by the CIDCO on 19.01.2008, they had entered into some agreements with the plaintiffs in Suit Nos. 553/07 and

575/07. By virtue of the allotment of the plot of land by the CIDCO defendant Nos.1 to 6 were within their own rights and were entitled to have an agreement to lease executed by the CIDCO in their favour so as to undertake development of the said plot land. Accordingly on 21.01.2008 the CIDCO had entered into an agreement to lease permitting defendant No.1 to 6 develop the plot within a period of 4 years. Nonetheless there is no document which has come on record that the agreement to lease has been terminated by the CIDCO in the manner the agreement would provide for. Though a period of 4 years were contemplated, it is not the case of the appellant that other conditions in the said agreement to lease which can undoubtedly come to the benefit of the allottee to seek extension etc. or to complete the construction under the extended period were not available and were not granted to defendant No.7. In the absence of any such document and that too from the CIDCO, it would be difficult to accept the case of the plaintiffs that the agreement to lease dated 21.01.2008 had expired by efflux of time. This also does not appear to be the case of the CIDCO who is also a defendant in the suit.

16. As regards the tri-partite agreement dated 25.03.2008, it appears that the same was entered between the

CIDCO, defendant Nos.1 to 6 and defendant No.7 only after the injunction in the order dated 04.09.2007 granted by the Trial Court in Special Civil Suit No. 575/07 ceased to operate. As per the order dated 04.09.2007 as passed in the said suit the injunction was clearly to operate till all the defendants in the suit filed their respective replies on the Exhibit 5 application. There is no dispute on the fact that the CIDCO which was defendant No.6 in the suit filed its reply on 04.03.2008 whereas defendant Nos.1 to 5 in the said suit filed their replies on 08.02.2008. In fact, the learned Judge in a further order dated 22.04.2008 has clarified this position where the learned Judge has clearly observed that the injunction was in operation till the defendants filed their respective replies. If this was the position then surely on the date of which the tri-partite agreement came to be entered by the CIDCO with defendant No.7 and defendant Nos.1 to 6 namely on 25.03.2008, there was no prohibition or an injunction as contained in the order dated 04.09.2007 so that the parties could not deal with the land. The submission on behalf of the plaintiffs that the tri-partite agreement would be rendered a nullity being contrary to the injunction order thus would not be well founded as the record would indicate.

17. As regards the contention urged on behalf of the plaintiffs that the agreement to lease and the tri-partite agreement would not confer any legal right in respect of the plot of land in defendant no.7 also may not be a correct assertion on the part of the plaintiffs. This is for the reason that the agreement to lease though undoubtedly granted a permission to the allottee (defendant Nos.1 to 6) to enter upon the plot of land to develop the same, and thereafter by virtue of the agreement dated 25.03.2008 these rights came to be conferred on defendant no..7 the ultimate rights in respect of the plot on fulfillment of the obligation of the development would be created by the CIDCO by entering into a final lease deed. The nature of the rights which are created by the agreement to lease are enabling rights which would finally get fructified into a final lease deed entered with the CIDCO. The position is undisputed that the CIDCO would remain the lessor for the period of 60 years and that the rights of lease would be created by the CIDCO only on compliance of the terms and conditions as contained in the agreement to lease. It would be, therefore, not proper for the plaintiffs to contend that these agreements would not confer any legal rights whatsoever in favour of defendant No.7 to develop the plot in question. These agreements are required to be considered in their entirety and for the purpose for

which the agreement dated 21.01.2008 was entered into. The tri-partite agreement, therefore, only puts the defendant No.7 into the position of the original allottee namely defendant Nos.1 to 6 to undertake the development of the plot of land. Defendant No.7 is, therefore, under an obligation to comply with all the terms and conditions with the original allottee namely defendant Nos.1 to 6 to comply to the agreement to lease dated 21.01.2008. There cannot be any other interference which can be drawn from the conjoint reading of the agreement to lease dated 21.01.2008 and the tri-partite agreement dated 25.03.2008.

18. Having noted above the position and now coming to the claim for a temporary injunction as prayed by the plaintiffs in the application before the Trial Court it is quite clear that though the agreement was entered by the plaintiffs with defendant Nos.1 to 6 on 18.08.2011, for the first time in March, 2015 the plaintiffs found it appropriate to make inquiry in respect of suit plot of land. The averments are very clear in that regard in the plaint. The plaintiffs also did not bother to ascertain the position of the plot of land or to assert any of their rights under the agreement dated 18.08.2011. The submission on behalf of defendant No.7 against the plaintiffs is definitely not only of delay but latches on the part of the plaintiffs in

asserting their rights under this agreement dated 18.08.2011. In this regard there is much substance as urged on behalf of the learned senior counsel for defendant No.7 that the plaint clearly indicates that the plaintiffs are well versed with the property transactions and they are in the business of development of property. If this be the position then the plaintiffs were not aware about the status of the said plot of land cannot be believed. There is also much substance in contention on behalf of defendant No.7 that only after defendant No.7 has undertaken the development and had reached the construction up to the 5th floor the plaintiffs had thought it proper to approach the civil Court. Surely these aspects cannot be overlooked when the prayers for injunction are made before the Court. Further the perusal of the agreement dated 18.08.2011 entered into between the plaintiffs and defendant Nos.1 to 6 also prima facie shows that the plaintiffs may not be entitled for any injunctory reliefs for some additional reasons. Admittedly the plot of land belongs to the CIDCO. The CIDCO is the owner and would be future lessor of the plot of land. The agreement dated 18.08.2011 pressed into service on behalf of the plaintiffs is entered by the plaintiffs with defendant Nos.1 to 6. Admittedly the CIDCO is not a party or by virtue of any document the CIDCO has not confirmed this particular

agreement. The position is, therefore, that the plaintiff and defendant Nos. 1 to 6 have dealt with the plot of land which ultimately is of the ownership of the CIDCO, if this be the position then as to how without the concurrence of CIDCO the plaintiffs can assert any legal rights in respect of the suit plot is another matter which also becomes relevant.

19. It is thus, quite apparent that the appellants failed to make out any prima facie case to seek relief of temporary injunction. The balance of convenience was in favour of defendant no. 7. Any order of temporary injunction would definitely cause irreparable prejudice and injury to defendant no. 7. I am therefore, of the clear opinion that the plaintiff was not entitled to any relief of a temporary injunction as prayed in the interlocutory application. This appeal for the above reasons is completely misconceived and is accordingly rejected. No costs.

20. The above observations are purely in the context of this appeal which arises from an interlocutory order. Therefore, these are prima facie findings. Needless to observe that the above observations would not

prejudice the parties on their respective pleas in the trial of the suit.

21. The Civil Application does not survive and the same is accordingly disposed of.

22. At this stage the learned counsel for the appellant has requested that the respondents may be directed to maintain status quo in as much as defendant No.7/respondent No.7 shall not be allowed to construct beyond 8th floor as directed by this Court in the order dated 16.02.2016 passed in the earlier Appeal from Order (Stamp) No. 33449 of 2015 in the light of the observation as made above, the request cannot be granted and the same is accordingly rejected.

(G. S. KULKARNI, J.)