

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER (ST.) NO.29453 OF 2015
WITH
CIVIL APPLICATION (ST.) NO.29456 OF 2015**

Hiralal Nandlal Goyal

... Appellant/
Ori. Plaintiff

vs.

Mustaq M. Siddique Diwan and Others

... Respondents/
Ori. Defendants

Mr. N.V. Walawalkar, Senior Advocate i/b. Mr. Suresh Sabrad, for the Appellant/original Plaintiff.

Mr. Amit Borkar i/b. Mr. Salman Abdul Rashid Patel, for Respondent Nos.9/2, 9/4, 9/5, 9/9, 18, 19, 20 and 22.

Mr. Atul Rajadhakshaya, Senior Advocate a/w. Mr. Akhilesh Dubey and Mr. Vagish Mishra i/b. M/s. Law Counsellors, for Respondent Nos. 11 to 15.

Mr. Rohit Sakhadeo i/b. Mr. P.V. Sakhadeo, for Respondent No. 23-CIDCO.

CORAM: MRS.MRIDULA BHATKAR, J.

DATE: 6th JANUARY, 2016

JUDGMENT:

. This Appeal is directed against the order dated 7th August, 2015 passed by the 2nd Joint Civil Judge Senior Division, Panvel below application (Exhibit 5) in Special Civil Suit No. 503 of 2012 thereby rejecting the prayer of temporary injunction of the Plaintiff.

2. The Respondent Nos. 1 to 22 are the legal heirs of one Khairunnissa Hussainmiyan Diwan who was the daughter of one Kamruddin Saeed Patel. Kamruddin had four sons and one daughter Khairunnissa. The landed property of Kamruddin was acquired for the development of Navi Mumbai. He was entitled to get the benefit under 12.5% scheme declared by CIDCO. Kamruddin died prior to that and therefore the legal heirs of Kamruddin had rightful claim in the lands/plots which were to be allotted by CIDCO under 12.5% scheme. Out of four sons, one died without leaving any legal heir. Therefore, other three sons and daughter Khairunnissa have claim in the said lands/plots.

3. The legal heirs of Khairunnissa have filed a suit No. 112 of 1994 for partition and declaration of their $1/4^{\text{th}}$ share in the plots which were to be allotted by CIDCO under 12.5% scheme in lieu of their acquired ancestral properties. The said suit was partly decreed and the Court declared that the Defendants i.e. the present Respondent Nos. 1 to 22 are having $1/9^{\text{th}}$ share in the suit plots/lands which CIDCO is going to allot under 12.5% scheme. The said order was challenged by the Defendants i.e. the other legal heirs of the sons

of Kamruddin. So also the cross objection was filed by the Respondent Nos. 1 to 22 against the said order as they were not happy with 1/9th share but the claim of 1/4th share under 12.5% scheme. The Appeal No. 1173 of 2005 was filed along with the cross objection in the High Court on 16th February, 2006. This Court directed CIDCO not to allot plots to the present Respondents who are the legal heirs of the branch of Khairunnissa but allowed to allot plots to the branches of three sons of Kamruddin with specific direction that they will not alienate those properties and will not change the nature of the properties and it is subject to the outcome of the Appeal. The said First Appeal thereafter due to enhancement of the pecuniary jurisdiction of the District Court, was transferred to the District Court where it was re-numbered as Civil Appeal No. 141 of 2012. At the time of hearing of this Appeal on 8th January, 2015 the statement was made by the Power of Attorney holder of the legal heirs of Khairunnissa i.e. the Respondent Nos. 1 to 22 do not want to claim any right in the property and they want to withdraw their suit. This statement was accepted by the Appeal Court and under Order 23(1) of the Code of Civil Procedure, the application was allowed and the learned Principal District Judge, Raigad-Alibag by his order dated 8th January, 2014 set

aside the judgment and decree passed in Special Civil Suit No. 112 of 1994 and allowed the Plaintiff to withdraw the suit.

4. The Plaintiff is a builder developer who has entered into an agreement dated 17th February, 2007 in respect of the plot which was going to to be allotted by CIDCO under 12.5% scheme for the consideration of amount of Rs. 1,98,00,000/- and out of which Rs. 20 lacs were paid to Respondent Nos. 1 to 22 at the time of execution of the said agreement. It is the case of the Plaintiff that the original Defendants were supposed to take steps for the allotment of the plots as they have sold their share to the Plaintiff. The Plaintiff found that the Respondents were not fulfilling the terms and conditions of the said agreement in respect of obtaining the plot and therefore in order to get the plot, he filed a suit No. 503 of 2012 for specific performance against the Respondents.

5. During pendency of the suit, the Plaintiff had knowledge that the Respondents have relinquished the right of their share in the property and on 8th January, 2014 he filed First Appeal No. 141 of 2012 before the District Judge, Raigad. The said Appeal was disposed

of and the original suit was allowed to be withdrawn. The Plaintiff moved an application before the trial Court seeking that the Defendants should not create third party interest in the plot admeasuring 2200 sq. mtrs. situated at village Owe, Tal. Panvel, Dist. Raigad which is referred as a “suit plot”.

6. The learned trial Judge after hearing both the parties held that the Plaintiff have failed to establish *prima facie* case while the Defendant Nos. 1 to 22 have made statement before the Court that they have no right and interest in the share of the suit plot and it is a written admission given by the Defendants. On that basis the judgment and decree in Special Civil Suit No. 112 of 1994 was set aside and therefore no relief can be granted under the specific relief Act. Hence, this Appeal.

7. The learned senior counsel Mr. N.V. Walawalkar for the Appellant/Plaintiff has submitted that the Plaintiff has claimed over 1/9th share of the entire plot i.e. plot admeasuring 2200 sq. mtrs. The Plaintiff and Defendants have entered into an agreement on 17th February, 2007 and Rs. 20 lacs were paid to the Defendants.

Therefore, the Defendants bound to perform part of their obligation as per the said agreement. The learned senior counsel submitted that the Respondents can not relinquish their right in this manner without any registered document. In support of his submission, he relied on the judgment in the case of *Canbank Financial Services Limited vs. Custodian and Others*¹.

8. The learned senior counsel further submitted that the Plaintiff in fact has moved an application of intervention (Exhibit 45) in Civil Appeal No. 141 of 2012. However, the said application was rejected by the order dated 13th November, 2013 passed by the learned Principal District Judge, Raigad-Alibag. He supported that the Plaintiff did not challenge the said order in Appeal because the learned District Judge has expressed that the applicant could certainly agitate his rights by way of pursuing suit filed by him in the trial Court at Panvel and therefore he has not considered him as a party to the Appeal. The learned counsel submitted that the suit No. 503 of 2012 was filed earlier by the Plaintiff for specific performance against the Defendants. He further submitted that once the Respondents have

1. (2004) 8 Supreme Court Cases 355.

entered into an agreement to sale, they can not withdrew their right in such manner but this act will fall under the doctrine of feeding grant by estoppel.

9. The learned senior counsel submitted that the order passed by the learned Civil Judge is erroneous and it is to be set aside and the order of injunction is to be granted against the Respondents. He further pointed out that in the suit No. 503 of 2012 the learned Judge by its order dated 30th November, 2012 has directed the Defendants to maintain status quo in respect of the nature of suit property. However, by relinquishing the right, the Defendants in fact have breached the said order passed by the learned Civil Judge.

10. The learned counsel Mr. Amit Borkar for Respondent Nos. 9, 18, 19, 20 and 22 has argued that in First Appeal, the power of attorney holder has made a statement of relinquishment of right of which he was not empowered to make such statement. The Respondent No. 9 Khatoobibi Fakrimiya Mulla has given power of attorney to him only for filing/withdrawal of the suit and taking decision in respect of the suit but not in respect of relinquishing the

right in the property. He further submitted that Respondent No. 19 has challenged the order passed by the learned District Judge. He further submitted that learned trial Judge has denied the injunction only on the basis of the order passed by the learned District Judge in the Appeal thereby allowing the withdrawal of the original suit. The learned District Judge has held that it is a written admission given by the Respondent that they have no right, title, interest in the suit property. He argued that if such admission found incorrect in view of the legal possession, then the said order of injunction is to be set aside.

11. The learned senior counsel Mr. Atul Rajadhakshaya for Respondent Nos. 11 to 15 has submitted that Plaintiff has no case as they have entered into a wagering contract. He relied on the contents in the agreement dated 17th February, 2007 and submitted that the Plaintiff in fact neither had performed part of the payment as per the contract nor has shown readiness and willingness to pay merely 50% of the amount within 60 days from the date of the agreement to sale. Thus the Plaintiff has failed to perform the said contract and he has no right to claim any relief especially in the suit filed under the

Specific Relief Act. In support of his submissions, he relied on the ratio laid down by the Hon'ble Supreme Court in the case of *N.P. Thirugnanam vs. Dr. R. Jagan Mohan Roa and Others.*²

12. He further submitted that the Plaintiff was not ready and willing to perform the contract and therefore injunction was rightly rejected. He also relied on the judgment of the Hon'ble Supreme Court in the case of *"The State of Orissa vs. Madan Gopal Rungta"*³ where it is held that the interim relief can be granted only in aid of and as an ancillary to the main relief which may be available to the party on final determination of his rights in a suit or proceeding.

13. The learned senior counsel Mr. Rajadhakshaya submitted that the Respondents have blood relationship with the opposite party in the original suit No. 112 of 1994 and therefore they have mentioned that after consulting with their senior member of their family they decided to relinquish the right in the property in favour of their brothers. They have choice to relinquish their share in the legal proceeding and put end to it. The Appellate Court has accepted this

2. (1995) 5 Supreme Court Cases 115.

3. AIR 1952 SC 12.

statement and the suit was allowed to be withdrawn. The learned senior counsel further submitted that under such circumstances, the plots allotted by CIDCO do not stand in the name of the Respondents and thus they do not have any title, interest or claim in the suit plots which were allotted or which were going to be allotted under 12.5% scheme by CIDCO. He relied on the injunction order dated 16th February, 2006 passed by the High Court in First Appeal No. 1173 of 2005. The High Court has directed CIDCO not to allot any plot to the Respondents i.e. legal heirs of Khirunissa but allotment is to be made in favour of the sons i.e. brothers. Accordingly, CIDCO has allotted plots in favour of the brothers and therefore as on today, the property does not stand in the name of Respondents and thus the order passed by the trial Court rejecting the application is legal and is to be maintained.

14. In this Appeal, the Plaintiff i.e. Appellant claims his right on the basis of the agreement dated 17th February, 2007. The said fact of execution of agreement is not disputed by the parties. The amount of Rs. 20 lacs as a first installment was paid by the Plaintiff to the Respondents. As per the terms of payment of amount of Rs.

1,98,00,000/-, the 25% of the amount was to be paid within one month from the date of the execution of sale deed and remaining amounts were to be paid in three installments after the decision of the Court in the Appeal No. 141 of 2012.

15. The submission of the learned counsel for the Respondents that the Appellant has not paid 25% of the amount within one month from the date of the execution of the agreement and thus has not shown any readiness and willingness to perform the obligation on his part, therefore the suit for specific performance is not tenable as he failed to show his continuous readiness and willingness and finally the suit will fail and therefore the interim order can not be passed, cannot be accepted at this interim stage.

16. The case of "*N.P. Thirugnanam*"(supra) relied by the learned counsel for the Respondents, was a suit for specific performance. It was S.L.P before the Supreme Court where the First Appeal was finally disposed of. Thus, on the basis of evidence the said matter was decided. It was held that the Plaintiff failed to show the continuous readiness and willingness to perform the terms of the

contract in respect of payment. The case in hand is not finally decided. It is at interim stage. The fact of the continuous readiness and willingness on the part of Plaintiff to perform his obligation can be determined on the basis of the evidence only. The Hon'ble Supreme Court in the case of “*N.P. Thirugnanam*”(supra) has given a yardstick to adjudge whether the Plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the Plaintiff prior and subsequent to the filing of the suit along with other attending circumstances. In the case of “*N.P. Thirugnanam*”(supra) it was held that,

“Relief of injunction is to be exercised according to the settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963. Under Section 16(c) of the Act, the Plaintiff must plead and prove that he had performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the Plaintiff is a condition precedent to grant relief of specific performance. The conduct of the Plaintiff prior and subsequent of the filing of the suit is to be taken

into account to find out readiness and willingness of the Plaintiff.”

17. In the present case, the Plaintiff may bring some other attending circumstance and therefore at this interim stage, no finding can be given regarding the willingness and the readiness of the Plaintiff which may amount to finally deciding the matter itself.

18. The agreement as it is a basis of entire transaction is to be looked into. There is no dispute that the Respondent Nos. 1 to 22 are the legal heirs of Khairunnissa who has share along with her brothers and was entitled to get share in the property of Kamruddin. It is not disputed that Respondent Nos. 1 to 22 and the other co-sharers i.e. brothers of Khairunnissa were entitled to get the plots in 12.5% scheme of the CIDCO/Respondent No. 23. Thus, the Respondent Nos. 1 to 22 had undivided interest in the lands which are going to be allotted by CIDCO in the said scheme. This fact is the basis of the agreement which is further fortified by the judgment and decree dated 28th March, 2005 passed in RCS No. 112 of 1994. The said suit was filed for partition *interese* between the Khirunissa and her brothers. As per the said judgment and decree 1/9th share from the

land which was to be allotted from 12.5% scheme had fallen to Khairunnissa.

19. The Plaintiff was aware of this judgment and decree passed by the Court that the Respondents are going to get their 1/9th share in the land which was to be allotted under the scheme and therefore the contingent contract is entered into by the parties. My attention is drawn to some written portion in condition No. 3 in the said agreement where it is mentioned that, in the event of Respondents getting their share 25% of the amount, that was to be refunded as the part of 25% of the amount kept by the Respondents. Thus it shows that the Plaintiff was aware that the decision may be going against the Respondents and they might get any share. So with the open eye he has accepted this contingency and paid the amount.

20. In the Appeal on 16th February, 2006 this Court put restriction on CIDCO that CIDCO shall not allot the plots to the Respondents or the legal heirs of Khairunnissa and the plots are to be allotted to the sons however, they were directed not to deal with the property. Pursuant to that, it appears that CIDCO has allotted the plots

to the sons or legal heirs of the three sons of Kamruddin and did not allot any plot to the legal heirs of Khairunnissa. However, subsequently in Appeal on 8th January, 2014 the application was made before the District Judge, Raigad-Alibag that the present Respondents wanted to withdraw the suit and also prayed for setting aside the judgment and decree passed by the trial Court. This was submitted through power of attorney holder-the Respondent No. 8/3 in the said Appeal. The learned District Judge has allowed the said application and set aside the judgment and decree passed in Special Civil Suit No. 112 of 1994 and allowed to withdraw the suit and Appeal. The Court has mentioned that the Plaintiff have decided abandonment of their ownership right over the suit property as they wanted to act upon the advise given by the elderly family members. In the said order, the Court has stated that “I do not want to refuse the prayer merely because it does not strictly falls under the category abandonment.” Thus the Court has not given any finding in respect of relinquishment or the abandonment of the proprietary right of the Plaintiff who are the present Respondent Nos. 1 to 22.

21. The submission of learned counsel for the Appellant that

the Respondent Nos. 1 to 22 can not relinquish their proprietary right without following the proper legal procedure of relinquishment of right in immovable property is correct. The learned counsel has rightly relied on the ratio laid down by the Supreme Court in the case of “*Canbank Financial Services Limited*” (*supra*) wherein the Hon'ble Supreme Court held, such relinquishment of the right is not legal. In the said judgment it is held by the Supreme Court that,

“Extinction in right, title and interest in a property must be caused as a result of operation of law and not otherwise. Creation of title by an act of parties is subject to law. Once a title vests in a person, he can not be divested therefrom except by reason of or in accordance with a statute and not otherwise. An admission does not create a title; the logical corollary whereof would be that an admission does not create a title; the logical corollary whereof would be that an admission of a party would not lead to relinquishment of his right therein, if he has otherwise acquired a title in the property”.

22. Thus, there is a peculiar situation in the present case. By order passed by the District Court the suit is allowed to be withdrawn. The Appeal is also withdrawn. The suit No. 112 of 1994 was filed for partition between the legal heirs of the Kamruddin and in the said suit 1/9th share was determined to all the Respondent Nos. 1 to 22. However as the judgment and decree is set aside and the suit was also

allowed to be withdrawn, the entire situation has come to zero point as to when the suit No. 112 of 1994 was filed. Thus, the status of the proprietary right of the parties i.e. Respondents/co-shareres is that all the three brothers so also Respondent Nos. 1 to 22 who are the legal heirs of Khairunnissa have undivided share in the said property i.e. the land which was to be allotted by CIDCO in 12.5% scheme.

23. After hearing the learned counsel for CIDCO, it is learnt that CIDCO has allotted the plots to the legal heirs of the three brothers and not to legal heirs of Khairunnissa. The learned counsel for CIDCO/Respondent No. 23 has filed an affidavit of one Mr. Jagdish Rathod, Additional Chief Land and Survey Officer, CIDCO. It is pointed out that the total entitlement under 12.5% scheme pertaining to the file No. 305, Kharghar is about 18000 sq. mtr and all the entitlement is allotted to the persons entitled. Thus it shows that the entitlement is of 18000 sq. mtrs. The learned counsel in the course of his argument has also produced Agreement to Lease. It is in the name of Khatijabi bi Mohd Ismail Diwan. All the four plots bearing Nos. 113, 122, 118 and 60. Khatijabi bi is shown as Respondent No. 10 in the present Appeal and Respondent Nos. 11 to

15 are legal heirs. As Khatija bi bi is the deceased. The learned counsel for CIDCO has submitted that these plots are allotted in the name of Khatijabi bi in Agreement to Lease dated 24th July, 2007 and now she is dead, hence her legal heirs are on record.

24. As observed above, the relinquishment of the right is not legal and hence all the Respondent Nos. 1 to 22 who are the legal heirs of Khairunnissa has interest and entitlement in the said property as registered deed of relinquishment is not executed. If such deed of relinquishment would have been executed and registered with due stamp fees, the situation would have been different. However, as on today, they are entitled to the undivided right. However, the entitlement is for how much share is also not determined in the absence of withdrawal of the suit and therefore everything has become *de novo*.

25. Under such circumstance, no order of status quo or stay can be granted in respect of the suit land. As on today though the Respondents have right or title in the property, the said plots as per the submission of CIDCO are allotted to the persons entitled. The

Respondents Nos. 1 to 22 claimed that they have not received any plot or land in the capacity of legal heirs of Khairunnissa. Therefore granting any order of status quo or injunction will amount to passing order against co-sharers who are not party to this Appeal.

26. At the time of hearing of this Appeal, as the information given by the learned counsel of CIDCO about the allotment of four plots to Khatijabi bi/Respondent No. 10, it was submitted by the learned senior counsel for the Appellant that this information was not available to the Appellant at the time of hearing of the application (Exhibit 5) before the trial Court. The learned counsel further submitted that Respondent Nos. 11 to 15 have received these lands and therefore the plot or the area to the extent of 2200 sq. mtrs from these plots is to be reserved and the order of status quo to be granted in respect of the said plot so that the right of the Plaintiff i.e. Appellant can be protected as the agreement is not disputed by the parties.

27. While answering to this submission, the learned counsel for Respondent Nos. 11 to 15 argued that Khatijabi bi did not receive

these plots as legal heirs of Kairunissa but she has received this plot being the legal heirs of one of the sons of Kamruddin. He submitted that Khatija bi who was the daughter of Khairunnissa had claimed her right in the dual capacity as a daughter of Khairunnissa and so also as the wife of one of the sons of Kamruddin. She married to her maternal uncle and so she was entitled to receive these plots from the other branch of Kamruddin. Thus, these four plots cannot form the share of Khairunnissa under 12.5% scheme land but is the part of other co-sharers and no injunction can be granted.

28. Considering the submissions of both the learned senior counsel and also of the learned counsel of the CIDCO and in view of the affidavit filed before me, I keep this point open as the learned senior counsel for the Appellant has submitted that they want to move a fresh application in respect of the four plots before the trial Court. The Appellant is at liberty to move such application before the trial Court and the trial Court to decide the said application if filed by the Appellant/Plaintiff in respect of the four plots on merits in accordance with law.

29. Accordingly, the Appeal from Order stands dismissed.

30. In view of the above, Civil Application does not survive and accordingly disposed of.

(MRS.MRIDULA BHATKAR, J.)