

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**APPEAL FROM ORDER NO. 418 OF 2017
WITH
CIVIL APPLICATION NO. 541 OF 2017
IN
APPEAL FROM ORDER NO. 418 OF 2017**

Khimaram Chenaji Choudhary
Proprietary of Arihant Patravali Mart & Ors. ...Appellants

Versus

Harishchandra Atmaram Kadu & Ors. ...Respondents

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Mr.P.K.Dhakephalkar, Senior Advocate i/b. Mr. Santosh S. Musale
for the Appellants.

Mr.P.S.Dani, Senior Advocate i/b. Mr.Prasad B.Kulkarni for
Respondent Nos. 17, 17 (1) and 17 (2).

Mr.S.G.Karandikar for Respondent Nos. 1 to 16.

Mr. Rohit P. Sakhdeo for Respondent Nos. 18 and 19.

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**CORAM: MRS.MRIDULA BHATKAR, J.
DATED : OCTOBER 06 , 2017**

P.C. :

1. This Appeal from Order is directed against the order dated
07.02.2017 passed by the learned Civil Judge, Senior Division,
Panvel, below Exhibit- 5 in Short Cause Suit No. 12 of 2017.

2. The present appellants/plaintiffs have filed a Suit against the respondents/defendant nos. 1 to 16, who are the owners of the land at Village Vahal, Taluka Panvel, which is acquired by the State of Maharashtra/ CIDCO i.e. defendant no. 18 to set up Navi Mumbai project. The plaintiffs have entered into an unregistered Agreement of Sale dated 20.03.2014 in respect of the said land with defendant no. 1 to 16 for consideration of an amount of Rs. 5,25,00,000/-, out of which the plaintiffs have paid Rs. 75,00,000/- at the time of execution. Defendant nos. 1 to 16 irrespective of this Agreement of Sale had entered into tripartite agreement with defendant no. 17 and CIDCO on 10.11.2016. Therefore, the appellants/plaintiffs have filed the Suit for specific performance seeking declaration that the agreement of sale and assignment of leasehold rights dated 20.03.2014 in respect of the suit plot, entered into and executed by defendant nos. 1 to 16 in favour of the plaintiffs is still valid, subsisting and binding upon the defendants and sought injunction from restraining defendant nos. 1 to 16 from creating any third party rights, title and interest with respect to the suit land and also restraining from allotting, transferring or executing the tripartite agreement of the suit land in

favour of the third party. The application for interim relief under Exhibit 5 made by the plaintiffs was contested by the defendants especially defendant no. 17 i.e. the successive purchaser of the suit land. The trial Court after considering the averments and contentions raised by both the parties and their respective submissions refused to grant interim relief in respect of the suit land and directed defendant nos. 1 to 16 to deposit Rs. 75 lakhs i.e. the amount paid by the plaintiffs to defendant nos. 1 to 16 i.e. the owners of the suit land at the time of execution of the said unregistered agreement. Hence. This appeal.

3. In this appeal, the execution of the agreement by the land owners i.e. defendant nos. 1 to 16 of the suit land with the plaintiffs and defendant no. 17 *prima-facie* is proved. The payment of Rs.75 lakhs towards part of the consideration amount of Rs. 5,25,00,000/- by the plaintiffs to the owners of the land i.e. defendant nos. 1 to 16 also cannot be denied. It is necessary for the plaintiffs to show whether they have *prima-facie* good case to grant relief in their favour.

4. Mr. Dhakephalkar, learned senior counsel for the appellants, has submitted that the trial Court has erred in holding the fact of readiness and willingness against the plaintiffs . The learned Judge has wrongfully applied the principle of *pari delicto* in the present case. He has argued that the plaintiffs were always keen in execution of the suit land. He has submitted that the plaintiffs were not in default in payment as per the schedule of the payment as mentioned in clause nos. 4 and 21 of the agreement. The plaintiffs have given permission to defendant nos.1 to 16 to give a public notice in respect of their transaction pertaining to the suit land and as per the schedule of payment 21 days after the public notice in the daily newspaper. He has further submitted that an amount of Rs. 1,04,25,000/- was to be paid. However, defendant nos. 1 to 16 as per clause 21 of the agreement never gave public notice in the newspaper and, therefore, there was no occasion for the plaintiffs to fulfill the terms of the further payment as per the contract. He has further argued that defendant nos. 1 to 16 /owners of the land keeping the plaintiffs in dark and negotiated with defendant no 17. He has further argued that the claim of defendant no.17 that he is bonafide purchaser of the suit land is

bogus and false. He has further argued that defendant no. 17 in fact had knowledge of the previous transaction of the suit land between the plaintiffs and defendant nos. 1 to 16. He has further argued that defendant no. 17 gave public notices in two daily newspapers “Kille Raigad” and “Konkan Sakal” on 14.1.2014 and 02.09.2016. These newspapers are having a very negligible circulation. He has further submitted that it is curious to find the consideration amount in the tripartite agreement, which was executed two years after the Agreement of Sale of the plaintiffs, it is shown the same amount of Rs. 5,25,00,000/-. He has submitted that this transaction between defendant nos. 1 to 16 and defendant no. 17 is not bonafide and thus, the trial Court has committed an error in rejecting the relief that the defendants should not create any third party right. He has further submitted that the plaintiffs have filed the Suit within time and the finding given by the trial Court is erroneous and it is to be set aside. He has further submitted that the plaintiffs gave legal notice to defendant nos. 1 to 16 on 13.12.2014 and called upon them to perform their agreement, but defendant nos. 1 to 16 did not bother and, therefore, again the plaintiffs gave second notice on 19.10.2016 to

defendant no. 1 to 16, but they did not reply to the notices and therefore, the plaintiffs were constrained to file the suit.

5. Mr. Dani, learned Senior Counsel for defendant no. 17, has submitted that defendant no. 17 is bonafide purchaser. He had no notice of the unregistered Agreement of Sale between the plaintiffs and defendant nos. 1 to 16. He has further submitted that the plaintiffs did not give public notice. Though, in the first legal notice dated 13.12.2014, the plaintiffs have mentioned that the land was acquired under Section 159A of M.R.T.P. Act under 12.5% scheme. He has further submitted that the plaintiffs have deliberately preferred not to give the public notice though they were aware that defendant nos. 1 to 16 are going to dispose of the property. He has further submitted that the plaintiffs had not approached the Court with clean hands. He has argued that there is a deliberate delay of two years on the part of the plaintiffs in filing the Suit for specific performance after giving the first notice. He has further submitted that the averments in the plaint, wherein the plaintiffs have stated that after acknowledgment of the first notice of December 2014, defendant nos. 1 to 16 have given

assurance to the plaintiffs that they will co-operate to complete the formalities of letter of allotment from the office of CIDCO and thus the plaintiffs believed on their representation and waited for a period of time. However, in the second notice dated 19.10.2016 in para 10 and 11, the plaintiffs have referred that the first notice was received by defendant nos. 1 to 16 on 15.12.2014 and defendant nos. 1 to 16 so also CIDCO did not contact till then to the plaintiffs. He has pointed out that the plaintiffs too have taken contradictory stands in respect of talks and contacts between the plaintiffs and defendant nos. 1 to 16, during the period of two years about the suit land. He has further submitted that the conduct of the plaintiffs are to be taken into account. He has further submitted that now defendant no. 17 has entered into registered Agreement alongwith defendant no. 1 to 16 and CIDCO on 10.11.2016 in respect of lease and transfer of the other rights. Under such circumstances, this appeal is to be dismissed.

6. Learned counsel for the CIDCO i.e respondent nos. 18 and 19 has confirmed that CIDCO has entered into registered tripartite agreement on 10.11.2016 alongwith the land owners i.e. defendant

nos. 1 to 16 and defendant no. 17. He has further submitted that CIDCO has filed the affidavit and has stated that pursuant to that agreement, CIDCO has taken out the orders in favour of defendant no. 17.

7. Injunction is a discretionary equitable relief. The interim relief is sought in the Suit for specific performance. It is necessary to see the chronology of the events to ascertain the bonafides and conduct of the parties.

8. In the present case, defendant nos. 1 to 16 are responsible in creating the rights of two persons in the same suit land. The plaintiffs are the first in time, who entered into an agreement of sale alongwith defendant nos. 1 to 16 and, therefore, in normal course, the preference should be given to the plaintiffs in respect of the suit land. It is true that as per the clause in the agreement, the plaintiffs have given permission to defendant nos. 1 to 16 to give public notice and thereafter, the next payment was scheduled. However, defendant nos. 1 to 16 did not give the public notice. On 9 months after the agreement, the plaintiffs gave first notice on

13.12.2014 to the land owners i.e. defendant nos. 1 to 16, as they found that they are avoiding to take steps in furtherance of their contract by approaching the CIDCO. However, the plaintiffs did not say anything about the public notice in the said notices. Moreover, there was no bar for the plaintiffs to give public notice, if they were really keen in the said transaction. Admittedly, the initial payment of Rs. 75 lakhs is made by the plaintiffs to the land owners/ defendant nos. 1 to 16. However, in the case of specific performance, it is necessary for the party demanding specific performance to show that he was active towards the performance of the contract. It appears that nearly for a period of 1 year and 10 months i.e. from 13.12.2014 to 19.10.2016, there was total silence on the part of the plaintiffs. Sending of first legal notice is very material fact in this transaction, which shows that the plaintiffs were aware that defendant nos. 1 to 16 are likely to dispose of the property. I have considered the submissions of the learned senior counsel Mr. Dhakephalkar and Mr. Dani whether defendant no. 17 is bonafide purchaser or not.

9. At this interim stage, it is necessary for the plaintiffs to show some circumstances or acts, leading inference that defendant no. 17 is not a bonafide purchaser, albeit having knowledge of previous transaction, had ventured to enter into further transaction. However, in the absence of such facts, this Court cannot hold at this interim stage that defendant no. 17 is not a bonafide purchaser. Considering this, the plaintiffs have failed to prove the *prima-facie* case and balance of convenience in their favour. Overall the reasons given by the learned Judge of the trial Court cannot be faulted with. The order of the trial Court is hereby maintained with added directions as under:

- (i) The appeal is dismissed.
- (ii) Defendant nos. 1 to 16 i.e. the land owners are directed to deposit the interest amount @ 24% p.a. on Rs. 75 lakhs from the date of the agreement dated 20.03.2014.

10. Appeal from Order is disposed of accordingly.

11. In view of disposal of the Appeal from Order, Civil Application also stands disposed of.

(MRIDULA BHATKAR, J.)