

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

**FIRST APPEAL NO.778 OF 2014
WITH
CIVIL APPLICATION NO.2134 OF 2017
IN
FIRST APPEAL NO.778 OF 2014**

M/s.Parijat Developers
(Through Its Partner Mayur Shamaldas
Desai) ..Appellant

V/s.
M/s.Parshwa Associates
(Through Its Partners Chandrakant
Nanji Bheda) & Ors. ..Respondents

Mr.Abhijit P. Kulkarni for the Appellant.

Mr.Sanjay Kadam a/w Mr.Sanjil Kadam, Ms.Sayalee Rajpurkar i/b
Kadam & Co. for Respondent No.2.

Mr.Prashant Kamble i/b Mr.A.S. Rao for Respondent No.8.

CORAM : MRIDULA BHATKAR, J.

DATE : 16th AUGUST 2017

P.C.

1. The learned counsel for the appellant submits that he has served Respondent Nos.1A to 1D, 4 and 5 by publication. The appellant has deleted Respondent Nos.3 and 7. In spite of service, none present for the Respondent Nos.1A to 1D. This Court by order dated 17th March 2015 has indicated to the parties that an endeavor

will be made to decide the appeal finally at the stage of admission. The parties are given notice that it will be heard finally at the stage of admission.

2. The learned counsel for Respondent No.2 is present.

3. Admit. By consent and as was indicated to both the parties, the matter is finally heard at the stage of admission.

4. The appellant is the original plaintiff, who is a developer, and has filed the suit. He has entered into an agreement for the development on 06-08-2011 with a trust i.e. original Defendant No.2 and according to the plaintiff, the plaintiff has acquired all the development rights in respect of the suit land owned by the trust. The suit land earlier was owned by Parsee Zorastrian Anjuman of Kalyan which was purchased by Defendant No.2-Trust and thereafter, by agreement dated 18-12-2002, one Mr.P.R. Patel had entered into an agreement for the development of the property with the Trust. Thereafter, the plaintiff gave financial assistance to him of Rs.1,89,00,0000/-. After demise of Mr.Patel vide agreement dated 09-08-2011, the plaintiff entered into an agreement with the Trust and purchased the development rights.

However, Defendant-Trust had also entered into the development agreement earlier with the defendant No.1 and had executed a Power of Attorney on 27-09-2006 or 02-11-2006 in respect of the development of the suit land in favour of defendant No.1. Therefore, the plaintiff filed the suit for specific performance seeking declaration that the development rights of the movable properties assigned to the plaintiff by agreement dated 09-08-2011 is legal, valid and enforceable in law. He also sought a declaration against defendant No.1 in whose favour the defendant Trust executed the Power of Attorney of development rights in respect of the suit lands and these Power of Attorney and the agreement dated 03-04-2008 are to be declared as false, fabricated, illegal and fraudulent documents. The plaintiff sought number of documents in respect of sanctioned plans, IOD etc., given by Kalyan-Dombivali Municipal Corporation i.e. defendant No.8. After notice, the defendant No.1 and other defendant Nos.2 to 7 filed appearance and they moved an application under Section 9A read with Order VII Rule 11 of the Civil Procedure Code, taking objection to the maintainability of the suit. The objection raised by the defendants was that the suit cannot be tried by the Civil Court as appearing under Section 51 of the Bombay Public Trusts Act, 1950 on the ground of necessary permission and due to the subject matter which is triable by the

Charity Commissioner. The objection was also that the suit is barred under Section 149 of the Maharashtra Regional Town & Planning Act, 1966. The learned 4th Joint Civil Judge Senior Division, Kalyan, after hearing both the parties and considering the submissions, allowed the said application and dismissed the suit by order dated 08th January 2014. Hence this Appeal.

5. Heard submissions of the learned counsel for both the sides and perused judgment, record and proceedings placed before this Court. The learned counsel for the appellant has submitted that appellant has asked for a number of prayers and the main prayer is that of the specific performance. Other prayers are ancillary and there cannot be an order under Section 51 of the Bombay Public Trusts Act, 1950 or under Section 149 of the Maharashtra Regional & Town Planning Act, 1966. He has submitted that in this case Respondent No.8-Kalyan-Dombivali Municipal Corporation has acted upon the permission granted by the Charity Commissioner of Rajkot under Bombay Public Trust Act, which is illegal. He has submitted that the view taken by the learned trial Judge is not correct.

6. The learned counsel for the respondent No.2-Trust has

submitted that defendants have also filed Special Civil Suit No.51 of 2014 in respect of the agreement dated 3rd April 2008 along with Deed of Conveyance dated 15th April 2013 against the present respondent No.1 in respect of their earlier agreement of 2006 and in respect of the same suit land which is pending before the Kalyan Court. He submits that in the said Civil Suit, present defendant or respondent No.2-Trust seeks the cancellation of the said agreement of 2006.

7. This being the challenge under Order VII Rule 11 of the Civil Procedure Code and so also under Section 149 of the MRTP Act on the ground of maintainability of the suit, it is necessary to refer to and rely on the pleadings and the prayers made in the plaint. If at all the suit is filed against the movable property of the Trust, then permission of the Charity Commissioner under Section 51 of the Bombay Public Trust Act is necessary. However, the plaintiff has filed the suit not only against the Trust but also against Respondent No.1 and also other persons as it appears from the pleadings and the prayers made therein. The plaintiff seeks specific performance in respect of agreement dated 09-08-2011 which is executed between him and defendant no.2-Trust. Similarly, a declaration is sought that the earlier agreement dated 03rd April

2008 which was executed between the defendant Nos.2,3,4 and defendant No.1 is false, fraudulent and illegal. So also, plaintiff has prayed for the cancellation of the other Power of Attorney which was executed in favour of the defendant no.1 who is not a Trust. He also seeks other ancillary reliefs in respect of the permission granted by the corporation for the development activities of the defendant No.2. Considering the prayers made and reliefs sought by the plaintiff, I am of the view that the Charity Commissioner is not having jurisdiction to decide the issues between the parties, which are not trust and, therefore, the suit as a whole, is required to be decided along with all the prayers and considering this, I am of the view that the Civil Court is a proper Court to entertain the suit to adjudicate all the issues raised before him.

8. Moreover, defendant-Trust has also filed Special Civil Suit No.51 of 2014 which is pending before the Court at Kalyan in respect of the suit property. In view of this, the First Appeal is allowed. The judgment and order dated 08th January 2014 passed by the learned trial Judge is hereby set aside. The suit is to be listed before the concerned Trial Judge.

(MRIDULA BHATKAR, J.)