

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

APPEAL FROM ORDER NO. 967 OF 2016
WITH
CIVIL APPLICATION NO. 1211 OF 2016

1. M/s. Bharti Infra
through its proprietor
Shri Hiten Kishan Lehu
Adult , Occ: Business
having its office at Office No.405,
Thakkar Tower, Plot No.86,
Sector 17, Vashi
Navi Mumbai

2. M/s. Shree Developers
Registered Partnership firm
through its partners
a) Ravindra Madhukar Patil
aged 52 years, Occ: Business

b) Smt. Sangeeta Mahendra Mhatre
Adul, Occ: Business
having office at Shop No. 06,
Yoganand Complex,
Plot No.E-103,
Sector 3, Kharghar,
Navi Mumbai

.. Appellants
(Org. Plaintiffs)

v/s.

1) M/s. Aatmey Realtors,
Partnership firm
havingn office at Jasai,
Taluka Panvel, District Raigad.

- 2) Shri Ajinkya Anand Gharat,
Adult, Occ: Agriculturist,
- 3) Shri Anant Nathuram Gharat,
Adult, Occ: Agriculturist,
- 4) Shri Prabhakar Nathuram Gharat,
Adult, Occ: Agriculturist,
- 5) Shri Madhukar Nathuram Gharat,
Adult, Occ: Agriculturist,
- 6) Smt. Banubai Namdeo Patil,
Adult, Occ: Agriculturist.
- 7) Shri Chandrakant Balaram Mhatre,
Adult, Occ: Agriculturist,
- 8) Shri Mohan Balaram Mhatre,
Adult, Occ: Agriculturist,
- 9) Shri Dinkar Balaram Mhatre,
Adult, Occ: Agriculturist,
- 10) Smt. Hirabai Jairam Mhatre,
Adult, Occ: Agriculturist,
- 11) Smt. Champabai Pandurang Patil,
Adult, Occ: Agriculturist,
- 12) Smt. Nirmalabai Dhanaji Patil,
Adult, Occ: Agriculturist,
Nos.2 to 12 residing at Jasai,
Tal:Panvel, Dist: Raigad.
- 13) City & Industrial Development
Corporation,

Main Land & Survey Officer,
7th Floor, CIDCO Bhavan,
CBD Belapur, Navi Mumbai

..Respondents

Mr. S.M.Oak a/w. Mr. Sagar Joshi for the Appellant/Applicant.
Mr.P.S.Dani a/w. Ganesh Bhujbal for the Respondent Nos.1 to 5.

CORAM : SMT. ANUJA PRABHUDESSAI, J.
RESERVED ON : 16TH JUNE , 2017
PRONOUNCED ON : 14TH NOVEMBER, 2017.

JUDGMENT.

1. The appellants herein have challenged the Order dated 30th June, 2016 whereby the learned Civil Judge, Senior Division, Panvel has dismissed the application for temporary injunction (Exhibit 5) filed in Special Suit No. 46 of 2010.

2. The appellants herein were the plaintiffs and the respondents were the defendants in the said suit and for the sake of convenience they shall be referred to as the plaintiffs and defendants respectively.

3. The brief facts necessary to decide this appeal are as under:-
The defendant nos.3 to 6 and one Yamunabai Mhatre were the

owners of the property under Survey No. 305 Hissa No.19B, Survey No.304 Hissa No.19C and Survey No.304 Hissa No. 21C situated at Jassai, Panvel, District Raigad. The said property was acquired by the defendant no.13. The defendant nos.3 to 6 and said Yamunabai, being Project Affected Farmers were allotted the land bearing Plot No. C-4 Sector 8 admeasuring 1149.73 sq.meters under the 12.5 Scheme. The said plot shall be hereinafter referred to as the suit land. The defendant nos.3 to 6 and said Yamunabai had decided to develop the suit land. The plaintiff no.2 had agreed to develop the suit land and hence, on 22.10.2012 the plaintiff no.2 and the defendant nos.3 to 6 and said Yamunabai entered into a development agreement. In terms of the said agreement, the plaintiff no.2 had agreed to give to the defendant nos.3 to 6 and Yamunabai 50% construction of the proposed building and cash of Rs.2 Crores 7 lakhs out of which Rs.44 lakhs were paid on the date of execution of the said Development Agreement.

4. The plaintiff no.2 was unable to develop the said land on his own due to financial constraints. Hence, he decided to develop the

suit land along with the plaintiff no.1. Accordingly, the plaintiff no.2 entered into a tripartite agreement dated 16.3.2013 with the plaintiff no.1 and the defendant nos. 3 to 6 and Yamunabai. In terms of the said Agreement, the plaintiffs paid to the defendant nos.3 to 6 and said Yamunabai a sum of Rs.10 lakhs. The plaintiffs claim that in addition to the said amount, they had also paid a sum of Rs.28,50,000/- to the defendant nos.3 to 6 and Yamunabai. The plaintiffs thus claim that they had paid total consideration of Rs.82,50,000/-.

5. It is the case of the plaintiffs that they had taken all requisite steps for allotment of the suit land in favour of the respondent nos.3 to 6 and Yamunabai Mhatre. They had also paid amount of Rs.43,67,000/- towards the premium and other expenses. In the meantime, said Yamunabai expired. The defendant nos.3 to 6 and the defendant nos.7 to 13 who are the legal representatives of Yamunabai started avoiding them. Sometime in the month of October 2015 these defendants told them that the defendant no.13 had allotted the suit land to them by virtue of the Lease Deed dated

21.5.2014 and that they had given the suit land to the respondent no.1 for development.

6. The plaintiffs claim that the defendant nos.3 to 12 could not have entered into an agreement with the defendant no.1 during the subsistence of the agreement dated 12.10.2012 and 16.3.2013. The plaintiff, therefore filed a suit for specific performance and for damages. During the pendency of the suit, the plaintiffs filed an application for injunction seeking to restrain the defendants from creating third party right in respect of the suit land.

7. The defendant nos. 3 to 6 have admitted having entered into an agreement dated 12.10.2012 and 16.3.2013. The defendants have also admitted having received total sum of Rs.54,00,000/- as part consideration. The defendants have however denied having received the amount of Rs.28,50,000/- at the time of execution of the agreement dated 16.3.2013.

8. The defendants further claim that in terms of condition no.5 of

the agreement dated 12.10.2012 the plaintiff no.2 was required to obtain a letter of allotment, to carry out actual measurement and obtain the possession of the suit land from CIDCO. The defendants claim that they had handed over to the plaintiffs all the documents for complying with the said condition. However, the plaintiff no.2 avoided performing his part of the contract as stipulated in clause no.5. The plaintiff no.2 told the defendant no.3 to engage his own person for obtaining the letter of allotment. The plaintiffs further agreed to bear the total expenses incurred in obtaining the letter of allotment.

9. The defendants claim that with the assistance of one Sudhir Shinde, they completed all the formalities of allotment of the suit land on 25.3.2013. The Lease deed came to be executed on 21.5.2013. The said lease deed was registered on 19.9.2014. The defendants claim that in addition to the amount of Rs.52 lakhs which was paid at the time of execution of the said agreement the plaintiffs were required to pay to them a sum of Rs.1,03,50,000/- as on the date of the execution of the lease deed. The plaintiffs failed to pay

the said amount, furthermore, the cheques which were issued by the plaintiff towards expenses of Sudhir Shinde were also dishonoured. The defendants therefore decided to develop the said property on their own and informed the plaintiffs accordingly. Those defendants thereafter entered into an agreement dated 5.11.2014 with the defendant nos.1 and 2 for developing the suit land. The defendants further claim that the plans were sanctioned and necessary permission for construction was granted by CIDCO on 17.2.2015. On obtaining the said permission, they commenced the construction and incurred expenses to the tune of Rs.1,75,00,000/-. The defendants also claim that they have already sold the flats to various persons whose names are disclosed in paragraph 6 of the written statement.

10. The defendants claim that the plaintiffs are not entitled for interim relief as they had failed and neglected to perform their part of the agreement. Further, they had approached the Court after considerable delay. The defendants have stated that without prejudice to the right to claim the damages they are willing to refund to the plaintiffs or deposit in the Court the amount of Rs.24,00,000/-

with prevailing bank rates.

11. While dismissing the application for temporary injunction, the learned Judge has held that the suit is barred by Section 69(2) of the Indian Partnership Act.

12. Mr. Oak, the learned Counsel for the plaintiff has submitted that the learned trial Judge has mis-interpreted and mis-construed the provisions of Section 69(2) of the Indian Partnership Act. It may be mentioned here that sub-section (2) of Section 69 provides that no suit to enforce the right arisen from the contract shall be instituted in any court by and on behalf of any persons against the third party unless the firm is registered, and the person sueing are shown in the Register of Firms as partners in the firm. In the instant case, the learned trial Judge in paragraph 20 of the impugned order has observed that the partnership firm was registered before filing of the suit. The learned trial Judge has held that the suit is not maintainable by virtue of Section 69(2) of the Partnership Act mainly because the Development Agreement dated 12.10.2012 was executed

before the registration of the partnership firm.

13. As stated earlier, sub-section (2) of Section 69 only imposes a bar on institution of suit by an unregistered firm. This section does not create any bar for entering into a contract by an unregistered firm. It is not in dispute that the partnership firm was registered even before the accrual of cause of action and since the suit was filed by a registered partnership, the bar under Section 69(2) is not applicable.

14. The learned Judge has also held that the plaintiffs are not entitled for interim relief as they failed to perform their part of agreement as stipulated in clause 5 of the agreement dated 12.10.2012.

15. The learned Counsel for the plaintiff has submitted that the defendants have admitted having entered into agreements dated 12.10.2012 and 16.3.2013, and also having received part consideration in respect of the said agreements. He submitted that

the plaintiffs had paid to the defendant nos.3 to 12 total amount of Rs.82,50,000/- as part consideration. The plaintiffs were always ready and willing to perform their part of the contract, despite which the defendant no.3 and his son, defendant no.2 formed a partnership firm (defendant no.1) and the defendants entered into a development agreement dated 5.11.2014 with the defendant no.1 with an intention of avoiding the performance of their part of contract.

16. Mr.Dani, the learned Counsel for the defendants has submitted that the plaintiff had not taken any steps to get the land allotted from CIDCO, and having failed to perform their part of the contract under clause 5, the plaintiffs were not entitled to seek specific performance of the contract. The learned Counsel for the defendant has further submitted that there is no prima facie material on record as regards payment of Rs.28,50,000/-.

17. The learned Counsel for the defendant has submitted that the plaintiff no.2 was present in the office of CIDCO on the date of

execution of the agreement dated 5.11.2014. The plaintiffs were aware of the execution of the agreement despite which they did not seek any prompt action and filed the suit only after the construction had reached the plinth level and after the defendant had already created third party interest in respect of the flats proposed to be constructed in the suit land. The learned Counsel for the defendant submits that the conduct of the plaintiffs as well as the delay in approaching the Court does not justify grant of discretionary reliefs.

18. It is not in dispute that the defendant nos.3 to 6 and one Yamunabai were the project affected farmers and the defendant no.13 had decided to allot the suit land to the defendant nos.3 to 6 and Yamunabai in terms of 12.5 Scheme. The plaintiff no.2 and the defendant nos.3 to 6 and Yamunabai had entered into an agreement dated 12.10.2012 in respect of the suit land. In terms of the said agreement, the plaintiff no.2 was to develop the said suit land and as consideration thereof he had agreed to give 50% of the building proposed to be constructed in the suit land, in addition to sum of Rs.1,07,00,000/-. It was also agreed that the defendant nos.3 to 6

and said Yamunabai would obtain allotment letter, get the plot demarcated and obtain the possession of the suit land within three months from the date of execution of the said agreement. The expenses towards the demarcation, measurements and obtaining allotment letter were to be paid by the plaintiff no.2.

19. It is not in dispute that at the time of execution of the said agreement, the plaintiff no.2 had paid to defendant nos.3 to 6 and said Yamunabai, an amount of Rs.44 lakhs. It is also not in dispute that the plot was not measured, demarcated or allotted within three months from the date of execution of the said agreement. Nevertheless, the plaintiff no.2 with consent of the defendant nos.3 to 6 and said Yamunabai decided to develop the suit land along with the plaintiff no.1 and accordingly entered into a tripartite agreement dated 16.3.2013. In the said agreement the parties had agreed that there would be no change in consideration. However, it was agreed that out of total cash consideration of Rs. 2 Crores 7 lakhs, in addition to the amount of Rs.44 lakhs which was received at the time of execution of agreement dated 12.10.2012, the plaintiff no.1 would

pay to the defendant nos.3 to 6 and Yamunabai a sum of Rs.10 lakhs at the time of execution of the agreement dated 16.3.2013. The plaintiff was also required to pay an amount of Rs.1,03,50,000/- at the time of execution of the lease agreement with CIDCO and after obtaining the possession and letter of allotment of the suit land, and executing the tri-partite agreement. The balance amount of Rs.51,75,000/- was to be paid on obtaining the construction permission from CIDCO.

20. The defendants have not disputed having received Rs.44,00,000/- at the time of execution of the first agreement and an amount of Rs.10,00,000/- at the time of execution of the agreement dated 16.3.2013. Though the plaintiffs have claimed that in addition they have paid Rs.28,00,000/-, there is no prima facie material to substantiate the said claim.

21. Be that as it may, both these agreements were executed even before the suit land was measured, demarcated and allotted to the defendant nos.3 to 6 and Yamaunabai. It is thus evident that on the

date of execution of these two agreements, the defendant nos.3 to 6 and Yamunabai had no right, title and interest in respect of the suit land. One of the conditions as stipulated in clause 5 of the agreement was that the defendants were to take all necessary steps for getting the plot measured, demarcated and allotted in their favour within three months from the date of execution of the agreement and the expenses towards the same were to be borne by the plaintiffs.

22. The material on record prima facie reveals that the defendants had taken assistance of one Sudhir Shinde to get the plot measured, demarcated and allotted. It is not in dispute that the cheque issued by the plaintiff towards the expenses incurred by said Sudhir Shinde were dishonoured. Thus, there was no compliance of clause 5 of the agreement dated 12.10.2012, which as stated earlier stipulated that the plaintiff would incur all expenses in respect of the measurement demarcation and allotment of the said plot.

23. The records reveal that the plot was measured and demarcated

on 18.4.2013 and a lease agreement in respect of the suit land was executed between the defendant nos.3 to 12 and 13 on 21.5.2014. As stated earlier, in terms of agreement dated 16.3.2013, the plaintiffs were required to pay to the defendant nos.3 to 12 an amount of Rs.1,03,50,000/- as on the date of execution of the lease deed with CIDCO. It is not in dispute that the plaintiffs had not paid the said amount and the plaintiffs had therefore failed to comply with clause (c) of the agreement dated 16.3.2013.

24. The defendants had averred that on account of inaction of the plaintiff, they had decided to allow the defendant nos.1 and 2 to develop the said property. It was further averred that the public notice dated 28.9.2014 was issued calling for objections. However, the plaintiffs had not raised any objection as regards the said decision of the defendant nos.3 to 12 to allow the defendant nos.1 and 2 to develop the suit land. Subsequently, the defendant nos.1 and 2 and the defendant nos.3 to 12 and the defendant no 13 entered into a tripartite agreement dated 5.11.2014 in respect of the suit land. The defendants had specifically averred that the plaintiff was present in

the office of CIDCO on the date of execution of the said tripartite agreement and that he had submitted his objection before the CIDCO regarding the execution of the said tripartite agreement. These averments which are not specifically denied, prima facie reveal that the plaintiffs were aware about the execution of the lease deed dated 21.5.2014 and the execution of the tripartite agreement dated 5.11.2014, despite which the plaintiff had not taken prompt action against the defendants.

25. It is also to be noted that the plans were approved and permission was granted by CIDCO on 7.10.2015. Upon obtaining the said permission, the defendant started construction on the suit land. It is stated that the construction has reached the plinth level and the defendants have already entered into agreement with regard to the flats which are to be constructed in the said land. There is no specific denial of these averments. The records thus prima faice indicate that the plaintiffs had approached the Court after considerable delay. The learned Judge was therefore justified in holding that the delay in approaching the Court as well as the

conduct of the plaintiffs would not justify grant of discretionary and equitable relief.

26. At this stage it would be advantageous to refer to the decision of the Apex Court in ***Wander Ltd. And Anr. vs Antox India P Ltd*** **1990 SUPP (1)SCC 727** wherein the Apex Court has observed that

“ 9.the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the

fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.”

27. In the light of the above settled principles and considering the facts and circumstances of the case, in my considered view, the impugned order does not warrant any interference and hence the appeal from order is hereby dismissed. However, in the light of the statement made by the defendants nos.1 to 12, they are directed to pay to the plaintiff or deposit before the trial court an amount of Rs.54 lakhs with interest at the rate of 9% per annum from the date of receipt of the amount till the date of deposit, which would be without prejudice to the right to claim damages.

28. In view of disposal of the appeal, civil Application No. 967 of 2016 does not survive and the same is accordingly disposed of.

(ANUJA PRABHUDESSAI, J.)