

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

WRIT PETITION NO. 13165 OF 2016

M/s Prabhat Builders and
Developers

..Petitioner.

Vs

Sunny Real Estate Consultants
through Proprietor Mr
Suryaprakash Agrawal and Ors.

.. Respondents

Mr.Vijay Patil i/b Mr.Siddheshwar B.Kalel, Advocate for Petitioner.

Mr.P.K.Dhakephalkar, Senior Advocate, Mr.Reddy (Aradwad)
Jagdish G., Advocate for Respondent no.1.

Mr. S.L.Mhatre i/b Shraddha Gholap, Advocate for Respondents
no. 2 and 3.

**CORAM : R.G.KETKAR,J.
DATE : 17/02/2017**

PC:

1. Heard Mr.Vijay Patil, learned counsel for the petitioner, Mr. P.K.Dhakephalkar, learned senior counsel for respondent no.1 and Mr.S.L.Mhatre, learned counsel for respondents no. 2 and 3 at length. On the motion made by Mr.Patil, leave to delete respondents no. 4 and 5 is granted as they were exparte in the courts below. Amendment shall be carried out forthwith. Rule. Learned counsel for respondents 1, 2 and 3 waive service. In view of the narrow controversy raised in the petition and at the request and by consent of the parties, Rule is made returnable forthwith and Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of

India, the petitioner, hereinafter referred to as 'defendant no.4', has challenged the Judgment and order dated 7.10.2016 passed by the learned Ad-hoc District Judge-1, Raigad, Alibaug in Civil Misc. Appeal No. 7 of 2016. By that order, the learned District Judge allowed the Appeal preferred by respondent no.1, hereinafter referred to as 'plaintiff, and issued injunction restraining defendants no. 4 and 5 from creating third party interest over the suit property including the structure of building with the tenements in it constructed on plot no.39/178 at Sector 9 Ulve and the land below it till final disposal of the suit. The learned District Judge directed the trial Court to decide the suit on or before 31.1.2017 by giving top priority to the matter. Parties shall hereinafter be referred to as per their status in the trial Court.

3. The plaintiff has instituted suit, inter-alia, praying for specific performance of contract dated 27.2.2006 executed by defendants no.1 and 2 in their favour; for cancellation of registered tripartite Agreement dated 9.6.2008 entered into by and between defendants no.1 and 2 on one hand and defendant no.3 on the other; for perpetual injunction restraining the defendants from creating third party interest as also for perpetual injunction restraining defendant no.4 from carrying out any construction.

4. The plaintiff came with the case that defendants no.1 and 2

executed agreement in favour of the plaintiff wherein they agreed to sell a plot which will be allotted by the CIDCO under 12.5% scheme in view of acquisition of properties of defendants no.1 and 2. The total consideration agreed was Rs.21 lakhs. Out of that, the plaintiff paid Rs.5,25,000/- to defendants no.1 and 2. The plaintiff contended that on 8.5.2008, defendant no.5 -CIDCO allotted plot no.39 in Sector 9 at Ulve to defendants no.1 and 2 and one Samadhan Bhoir. On 23.5.2008, lease deed was executed by CIDCO in favour of defendants no.1 and 2 and Mr Bhoir. On 9.6.2008, registered tripartite agreement was entered into by and between defendant no.3, CIDCO and defendants no.1 and 2 and Samadhan Bhoir. On 17.6.2008, CIDCO gave permission to defendants no. 1 and 2 and Samadhan Bhoir to transfer plot no. 39 in favour of defendant no.3. Accordingly, name of defendant no.3 was entered in the records of CIDCO.

5. It is the case of defendant no.4 that between 22th and 28th May, 2010, public notice was issued in Vashi Times inviting objections for the proposed transactions. As no objections were received including from the plaintiff, on 26.7.2010 registered tripartite agreement was entered into by and between CIDCO and defendants no.3 and 4. On 24.9.2010, CIDCO gave permission to defendant no.3 for transfer of plot no.39 in favour of defendant no.4. In that it was also recorded that tripartite agreement was executed in respect of the said plot on 26.7.2010

between CIDCO, defendants no. 3 and defendant no.4. Accordingly, name of defendant no. 4 was entered in the CIDCO records. On 4.10.2010, CIDCO gave building permission to defendants no.3 & 4. On 26.5.2011, CIDCO allotted plot no.178 instead of plot no.39. Accordingly, on 26.5.2011 rectification deed was executed between defendant no.5 and CIDCO and defendant no.4. On 14.2.2013, CIDCO gave building permission in respect of carrying out development in plot no.178.

6. Mr. Patil submitted that though the suit was instituted by the plaintiff on 16.11.2010, suit summons were served on defendant no.4 on 18.9.2014. He submitted that the learned trial Judge rejected the application on 24.11.2015. During pendency of application Exhibit-5, there was no ad-interim order. Aggrieved by this decision, the plaintiff preferred Civil Misc. Appeal on 7.1.2016. Pending Appeal, there was no ad-interim order. By the impugned order dated 7.10.2016, the learned District Judge allowed the Appeal. He invited my attention to paragraph 9 of the impugned order. In paragraph 9, the learned District Judge observed that defendant no.4 produced some documents along with application-Exhibit-15. The said documents were not filed before the trial Court. The plaintiff, therefore, raised objection for considering these documents for deciding the appeal on merits.

7. Mr. Patil submitted that in fact those very documents were part of the trial Court's proceedings. The plaintiff did not produce

those documents in the District Court, though they were part of the record of the trial Court. Defendant no.4, therefore, filed application Exhibit-15 on 18.7.2016 which was allowed by the learned District Judge. He submitted that the learned District Judge was, therefore, not justified in discarding those documents on the ground that they were not filed before the trial Court. Mr. Dhakephalkar did not seriously dispute this submission.

8. Mr. Patil invited my attention to paragraph 16 of the impugned order. In that paragraph, the learned District Judge observed that on 26.5.2011, CIDCO addressed a letter only to defendant no.4 informing that instead of original plot no.39, in its place plot no. 178 is allotted. It was observed that change of allotment in place of plot no.39 to plot no. 178 was not brought to the notice of defendants no.1 and 2 or Mr Samadhan Bhoir or to defendant no.3 by CIDCO. He submitted that the learned District Judge totally ignored (1) registered tripartite agreement dated 9.6.2008 entered into by and between CIDCO, defendant no.3 and defendants no.1,2 and Samadhan Bhoir, (2) letter dated 17.6.2008 by which CIDCO gave permission to defendants no.1 and 2 and Samadhan Bhoir to transfer plot no.39 to defendant no.3, (3) registered tripartite agreement dated 26.7.2010 entered into by and between CIDCO and defendants no.3 and 4, (4) letter dated 24.9.2010 addressed by CIDCO giving permission to transfer plot no.39 in favour of defendant no.4 and also entering

the name of defendant no.4 in CIDCO's records. CIDCO was, therefore, justified in addressing letter on 26.5.2011 to defendant no.4 as the allotment of plot no.39 was cancelled and in its place plot no. 178 was allotted.

9. I do not propose to dealt with the findings recorded by the learned District Judge in paragraphs 16 and 17 as I am inclined to remand the matter. As the learned District Judge proceeded to decide the appeal ignoring these documents which were part of the trial Court's order, I find it appropriate to set aside the impugned order, thereby, restoring Civil Misc.Appeal No.7 of 2016. I refrain from going into merits of the case, lest it will influence the Appellate Court.

10. In view thereof, Petition is disposed of in the following terms:

- (i) Impugned order dated 7.10.2016 is set aside.
- (ii) Misc.Civil Appeal No. 7 of 2016 is restored to the file of the District Court.
- (iii) Parties agree that they will appear before the learned Principal District Judge on 1.3.2017 and for that purpose no fresh notice be issued to them.
- (iv) Learned Principal District Judge is requested to assign the Appeal to a Judge, other than the Judge who has passed the impugned order. It is made clear that this does not cast aspiration on the Judge who passed the impugned order.

(v) After assignment of the Appeal, the learned District Judge is requested to fix a date and thereafter decide the Appeal as expeditiously as possible preferably within four weeks from appearance of the parties. All contentions of the parties on merits are expressly kept open.

(vi) Rule is made absolute in the aforesaid terms with no order as to costs.

(R.G.KETKAR, J.)