

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

**APPEAL FROM ORDER NO.132 OF 2019
WITH
CIVIL APPLICATION NO.164 OF 2019
IN
APPEAL FROM ORDER NO.132 OF 2019**

Shri. Fayaz Ahmad T. Mujahid

...Appellant

vs.

M/s. Surana Commercial Private Ltd. & Ors.

...Respondents

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Mr. Prasad S. Dani, Senior Advocate, a/w. Mr. Surel Shah, i/b. Mr. Kewal B. Ahya, for the Appellant.

Mr. S.S. Patwardhan, for Respondent No.1.

Mr. Vishwanath Patil, i/b. Mr. Sameer Khedekar, for Respondent Nos. 2, 3 and 8.

Ms. Namita Mestry, i/b. Mr. Nitin V. Gangal, for Respondent Nos. 12 to 15 -CIDCO.

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CORAM : S.C. GUPTE, J.

DATED : 4 SEPTEMBER 2019

P.C. :

. Heard learned Counsel for the parties. The appeal from order is admitted and taken up for hearing forthwith by consent of Counsel.

2. The appeal from order challenges an order passed by the Court of Civil Judge, Senior Division, Panvel on an interlocutory

application of Respondent No.1 (original plaintiff). The plaintiff's suit was for specific performance of an agreement for sale of immovable property executed between defendant no.10 and the plaintiff. The suit also prayed for a declaration that the tripartite agreement between defendant nos. 1 to 9 and defendant no.11 and CIDCO, the original owner of the suit property, for transfer of the suit property executed on 13 July 2017, was illegal null and void. It is not in dispute that defendant nos. 1 to 9 are original allottees of the suit plot under the 12.5% scheme of CIDCO. A lease agreement has been executed in their favour by CIDCO on 1 October 2014. There is, however, no transfer of the suit plot by CIDCO in favour of defendant nos. 1 to 9. Before this agreement for lease, as allottees of the suit plot, defendant nos. 1 to 9 had entered into an agreement for sale of the suit plot with defendant no.10, represented by one Ravi Bhaskar Bangal. It appears that in pursuance of this agreement, executed on 28 December 2012, defendant nos. 1 to 9 agreed to sell the suit plot to defendant no.10. Defendant No.10, in turn, is claimed to have entered into an agreement for sale in respect of the suit plot with the plaintiff. It is on the strength of this agreement that the plaintiff has approached this Court in its special civil suit. The grievance of the plaintiff has been that defendant nos. 1 to 9 had unauthorisedly proceeded to enter into an agreement for sale of the suit plot in favour of defendant no.11, who is the Appellant in the present appeal; and in pursuance of that agreement, the parties had gone ahead and even executed a tripartite agreement on 13 July 2017 between CIDCO, as the owner of the suit plot, defendant nos. 1 to 9, as the original allottees and licensees of the suit plot, and the Appellant, as the new licensee. The agreement provides that CIDCO shall grant lease

of the suit plot in favour of the new licensee, substituting him in place of the original licensees, namely, defendant nos. 1 to 9, the latter having relinquished all their right, title and benefit and interest under the original licence executed in their favour. The Appellant herein has not only been put in possession of the suit plot in pursuance of this tripartite agreement, but has already constructed a building consisting of ground plus six floors. From the pleadings of the parties as well as material placed before the Court, it is apparent, as noted by the trial court, that a substantial construction has been carried out. There is some controversy between the parties as to the real extent of this construction. But it is clear that the entire civil structure of the building has come up with all six floors in place. At this stage, at the instance of the plaintiff, on its interlocutory application, the Appellant has been restrained from carrying out any construction on the suit plot or creating any third party right in respect of it. This injunction is the subject matter of challenge in the present appeal from order.

3. On the facts narrated above, it is difficult to see how either defendant nos. 1 to 9, the original allottees and licensees in respect of the suit plot, or CIDCO, the owner of the suit plot, who has agreed to create a lease in respect of the suit plot in favour of the Appellant, can be said to be privy to the agreement for sale as between defendant no.10 and the plaintiff. On the date the plaintiff and defendant no.10 entered into this agreement, the latter was merely an agreement purchaser of the suit plot, whilst his vendors, namely, defendant nos. 1 to 9, themselves were mere allottees holding an agreement to lease by the land owners, CIDCO, in their favour. In other words, even they did not

have any title to the suit property as of that date. So also, it cannot be demonstrated from the pleadings or material produced before the trial court that whatever agreement defendant no.10, as an agreement purchaser, entered into with the plaintiff could bind defendant nos. 1 to 9 or CIDCO. Even the trial court, in its impugned order, does not appear to have been considered the question of privity of contract as between defendant nos. 1 to 9 on the one hand and the plaintiff on the other. The trial court appears to have laid emphasis on the alleged conduct of some of defendant nos. 1 to 9 (particularly, defendant nos. 4 and 6) suggesting that these defendants had direct knowledge and notice of the disputed agreement between defendant no.10 and the plaintiff. In the first place, merely because these two defendants had knowledge, on the footing that there was no internal family dispute between the defendants, the remaining of defendant nos. 1 to 9 could not be said to be having any knowledge of the disputed transaction. This conclusion of the trial court is itself quite strange. But be that as it may, for that reason there is no way the plaintiff could claim performance from the original licensees/allottees, namely, defendant nos. 1 to 9, of its agreement with Defendant No.10, who was merely an agreement purchaser under them. No amount of knowledge or notice by itself could ever bind these defendants to perform the agreement for sale, under which the plaintiff claims. As things stand today, the Appellant is not only an agreement purchaser directly under defendant nos. 1 to 9, but he holds a tripartite agreement as between the original landlord CIDCO, the agreement lessees, Defendant Nos. 1 to 9, and himself. On the strength of this tripartite agreement, the Appellant has not only been put in possession of the suit plot, but has constructed a building with ground plus six floors

and which building has come up to a substantial state of completion. On these facts, the trial court could not have granted any interim injunction restraining further construction or creation of third party rights in respect thereof. The most that could have been done in a case like this is to have required the Appellant to carry on further construction or create third party rights subject only to the plaintiff's rights claimed in the suit. The Appellant could even have been asked to put all third parties, with whom he would enter into agreement/s in respect of the suit plot, to the notice of the suit filed by the plaintiff, but nothing beyond that.

4. The trial court has not only obfuscated the issue of privity as between the original allottees, defendant nos. 1 to 9, and the plaintiff, but even missed out on the case of the Appellant as a bonafide purchaser with value without notice. Discussion in this behalf, found in paragraphs 20 and 29 of the order, is at best speculative. The Appellant's conduct of going ahead with the construction without waiting for the fate of the plaintiff's interlocutory application (in the face of the trial court itself not passing any suitable ad-interim orders) has been found to be unusual and unnatural by the trial court. There has been a further generic observation that looking at the entire conduct of the Appellant herein (defendant no.11), there was scope for drawing an inference at the *prima facie* stage that he was involved in the act of defendant no.10 of defrauding the plaintiff. Merely on the basis of these generic and speculative observations, the trial court appears to have disposed of one of the fundamental issues in the matter, namely, the Appellant's case of bonafide purchase with value and without notice. That is clearly not in order.

5. In the premises, the impugned order cannot be sustained. The same is, accordingly, quashed and set aside and substituted by the following order:

(i) The construction carried out on the suit property by the Appellant and any third party rights created in respect of such construction shall be subject to the decision in Special Suit No.367 of 2018;

(ii) If the Appellant deals with any third party concerning any premises in the construction made on the suit property, such third party shall be put to the notice of the pending suit;

6. The appeal from order is disposed of accordingly.

7. In view of the disposal of the appeal from order, the civil application does not survive and is disposed of.