Shephali

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
IN ITS COMMERCIAL DIVISION
INTERIM APPLICATION NO. 970 OF 2020
IN
NOTICE OF MOTION NO. 1766 OF 2016
IN
SUIT NO. 306 OF 2016

Niranjan Realtors LLP & Ors …Plaintiffs
Versus
US Holidays Realty Pvt Ltd & Ors …Defendants
And
Pradhvi Multitrade Pvt Ltd ...Applicant

Mr Shakeeb Shaikh, *with Ashrrf Diamondwala, i/b Diamondwala & Co, for the Plaintiffs.*
Ms Deepti Panda, *with Jheel Mehta, i/b M/s. Purnanand & Co, for the Applicant.*
Mr Durgaprasad Halwai, *i/b Singhi & Co, for Defendant No. 5-Bank of Maharashtra.*

SHEPHALI SANJAY MORMARE
Digitally signed by SHEPHALI SANJAY MORMARE Date: 2021.09.29 10:32:47 +0530

CORAM: G.S. PATEL, J
DATED: 28th September 2021

PC:-

1. The present application will have to be allowed. It is filed by a third party. I previously summarised some of the rival contentions in my order of 14th September 2021. Paragraphs 1, 2 and 3 of that order read thus:

> "1. This is an application by a third party. Ms Panda appears for the Applicant. She says that the Applicant is the purchaser of part of the property that is in dispute in this specific performance suit. The Applicant claims to have a registered conveyance of 20th April 2015. The Suit itself, to which the Applicant is not a party, and possibly could not have been made a party, seeks specific performance of an MoU that is five years earlier in time of 24th July 2010. The MoU relates to the sale of a property described as Survey No. 219. Ms Panda's case is that her clients are the purchasers of a part of that property, namely Hissa No.2. Ms Panda therefore submits that the suit itself cannot extend to Hissa No.2, since title to this has passed to her clients, the Applicants.
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> 2. The Applicants claims to be adversely affected by my order of 17th February 2017. The Applicant was obviously not before the Court on that date. The fact that this is a registered conveyance was not before the Court. Consequently, there came to be an order against the Defendants in the form of injunction. It is this injunction of 17th February 2017 that Ms Panda says affects her clients. Consequently, she seeks reliefs in this Interim Application for a clarification obviously exempting the Applicant from ambit and scope of 17th February 2017 order.
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> 3. The Plaintiff and the Defendants to the Suit will need to respond to this third party Interim Application. Ms Panda tenders an Additional Affidavit. This is to be filed in the Registry and copies are to be served to the parties, if not already done. Affidavits in Reply to be filed and served on or before 27th September 2021 by the Plaintiff and the Defendants."

2. The relevant facts run like this. In 2008, one Ambrosia Construction Pvt Ltd **("Ambrosia")**, presently Defendant No. 4, bought some open land Survey No. 219 at Borsheti Village, Palghar admeasuring 48,100 sq. mtrs. This is referred to in the application and elsewhere as the "larger land". This was sub-divided into three parts: (i) Survey No. 219, Hissa No. 1, admeasuring 11,765 sq. mtrs, (ii) Survey No. 219, Hissa No. 2 admeasuring 33,165.25 sq. mtrs and (iii) Survey No. 219, Hissa No. 3 admeasuring 3169.75 sq. mtrs. Following this sub-division, separate 7/12 extracts were prepared for each of the sub-plots.

3. On 29th June 2012, Defendants Nos. 1 and 4 mortgaged a piece of this land admeasuring 11,765 sq. mtrs from the larger land, i.e from Survey No. 219, Hissa No. 1 to Defendant No. 5 as security for a loan of Rs. 5 crores. There seems to have been another mortgage of 25th March 2013 when a third entity, through Defendant No. 3, along with Defendant No. 1 mortgaged Plot No. B-32 to B-46 from Hissa No. 2 to the 6th Defendant Bank. A third mortgage of 31st May 2014 by the same third party through Defendant No. 3 along with Defendant No. 1 created security of an aggregate of 3,137.66 sq. mtrs in favour of UCO Bank.

4. The present Applicant, Pradhvi Multitrade Private Limited **"Pradhvi Multitrade")** wanted to purchase 12 plots Nos. D-01 to D-05 and D-07 to D-13, aggregating to 4,526.30 sq. mtrs from Survey No. 219, Hissa No. 2.

5. Before it made the purchase, the Applicant Pradhvi Multitrade obtained a title certificate dated 12th March 2008 certifying the title of the first owner Ambrosia Construction as been clear, legal, marketable, and free from all encumbrances and reasonable doubt.

6. Pradhvi Multitrade's lawyer accepted the title certificate after verification. Pradhvi Multitrade then took a conveyance dated 20th April 2015. This is registered. Under it, title to all 12 plots in Survey No. 219, Hissa No. 2 passed from Defendants Nos. 1 and 4 to Pradhvi Multitrade.

7. When Pradhvi Multitrade applied to another bank for loan, that bank investigated title and reported that there was then a pending Suit No. 3077 of 2008. That suit was later withdrawn. Pradhvi Multitrade thus claims to be a bona fide purchaser for value without notice and the rightful owner of the 12 plots on Survey No. 219, Hissa No.2 (covering the whole of that hissa).

8. Pradhavi Multitrade did not know of any right claimed by the Plaintiffs. The reason is because there is no document that is registered by the Plaintiffs showing the Plaintiffs' claim over 12 plots that Pradhvi Multitrade purchased. It is only later that Pradhvi Multitrade learnt of my order of 17th February 2017 that it now seeks to have clarified.

9. A copy of that order is at Exhibit "A" to the present Interim Application. It is a short order and this is how it reads:

"1. When the Suit was originally filed, the Plaintiffs sought ad- interim reliefs. Kathawalla J rejected that application on 23rd December 2015.

2. The Suit seeks Specific Performance of a MOU dated 24th July 2010 at Exhibit "C" to the Plaint. Annexed to this MOU is a draft agreement for joint development. The Plaintiffs' case is that under the MOU and the proposed joint development agreement they were to develop the property which is a substantial plot of land ad measuring about 41 Hectares and 81 Gunthas in Taluka Palghar, District Thane, Survey No. 219. According to the Plaintiffs, the Defendants failed to execute the joint development agreement. They also failed to pay the Plaintiffs the amounts subsequently agreed. The Plaintiffs found that in the meantime the Defendants had encumbered the property and created security over it. Before me today, Defendant No.5, the Bank of Maharashtra, is represented by Mr Dhaval Patil who states that the whole of the property is mortgaged to that Bank.

3. On 17th January 2017, I allowed the Plaintiffs' Chamber Summons for amendment. This introduced new prayers to the Notice of Motion and the Suit. The Plaintiffs averred that since the date of the refusal of ad-interim reliefs, they found the Defendants were attempting to create third party rights.

4. Mr Tamboly's attorneys have given notice of today's application. None appears for the Defendants. Mr Tamboly presses for restraint in terms of prayer clause (b) against the Defendants from creating any third party rights. I believe this is necessary not so
much for the Plaintiffs but for the protection of the Bank of Maharashtra whose contentions must, of course, be left open and whose rights are unaffected, being a secured creditor. the Defendants cannot be allowed to transact with

the property in a manner that would defeat the rights either of the Bank of Maharashtra. The Plaintiffs may be incidentally protected as a result, but that is immaterial.

5. In my view there is sufficient reason and case made out for the grant of a limited ad interim relief not in terms of prayer clause (b) as it is cast, but in a modified form, viz., that pending the hearing and final disposal of the suit, the Defendants shall not sell, transfer, alienate, create any third party rights, part with possession or further encumber or charge the suit property Exhibit "A" to the Plaint, except to the extent necessary to discharge and satisfy the claim of the 5th Defendant, the Bank of Maharashtra.

6. Further Affidavits in Reply, if any, to be filed and served on or before 10th March 2017. Affidavits in Rejoinder to be filed and served on or before 17th March 2017.

7. List the Notice of Motion for hearing and final disposal on
29th March 2017.

8. This order is specifically without prejudice to all the rights, contentions and remedies available to the Bank of Maharashtra, Defendant No.5."

10. Obviously, Pradhvi Multitrade is directly affected by this order because it covers the whole Survey No. 219 and makes no exception for the 12 plots from Hissa No. 2 that Pradhvi Multitrade purchased.

11. The present Interim Application candidly accepts that Defendants Nos. 1 and 3 filed a Review Petition which I dismissed on 8th January 2019. I note this because an argument is raised by the

Plaintiffs that Pradhvi Multitrade is barred by the principles of *res Judicata* or some principles analogous to it. That cannot be. The order of 8th January 2019 in the Notice of Motion in the Review Petition by Defendants Nos. 1 and 3 is at pages 112 to 115 of the present Interim Application. One look at that order shows that the Review Petition was not dismissed on merits. It was the Notice of Motion for condonation of delay that was dismissed. To put this beyond all doubt, I will extract the relevant portion of the 8th January 2019 order:

> "1. There is more than one reason to dismiss this Notice of Motion. There is first of all a completely unexplained delay of 265 days. Not only is that delay unexplained but such explanation as is attempted is on a patently incorrect and wholly unsustainable basis.
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> 2. The Notice of Motion seeks that this delay be condoned in the filing of a Review Petition (L) No. 47 of 2017, which seeks a review of my order dated 17th February 2017 on the Plaintiff's Notice of Motion No. 1766 of 2016. In the present Notice of Motion for delay condonation there is a statement in paragraph 4 that the Applicants/original Defendants Nos. 1 and 3 were unaware of the order dated 17th February 2017 and that their Advocate did not appear. What is not pointed out is that the Advocates for the Plaintiffs, Diamondwala & Co, gave notice on 15th February 2017 to Mr Kamlakant Pandey who had filed his vakalatnama for Defendants Nos. 1 and 3 that the Plaintiff's Notice of Motion would be taken up for ad-interim reliefs on my board on 17th February 2017.
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> 3. I am now told that Mr Pandey "never appeared" in the matter. Then I am told that he had "only filed his vakalatnamaa". I do not even pretend to understand what, if anything, this is supposed to mean and how this can

possibly be used as a reason to condone any delay. Once an Advocate has filed a vakalatnama, it is not for the other side to go around attempting to serve both the Advocate and the litigant he represents. Otherwise, there would be no purpose to filing vakalatnamas at all. It is also not as if these Defendants are impoverished illiterates. The 1st Defendant claims to be a real estate company with a more than somewhat ambitious name. The 3rd Defendant is one of its directors. They are certainly expected to be more vigilant. I see no cause whatsoever to allow the Notice of Motion.

4. Without looking at the Review Petition itself, and looking only to the Affidavit in Support of the present Notice of Motion and order dated 17th February 2017 it further appears to me that the entire case now presented is deliberately mischievous. Even in the Affidavit in Support of the delay condonation Notice of Motion, the Applicants attempt to make out that the order of 17th February 2017 was passed solely on the statement I recorded on behalf of Mr Dhaval Patil for Defendant No. 5 that his client, the Bank of Maharashtra had a mortgage of the whole of the property in question was the basis of my order. In fact, the Bank of Maharashtra was not the Plaintiff. The fact that it had a mortgage was only one of the reasons to grant the Plaintiff the injunction, and indeed I did observe that contentions of the Bank of Maharashtra were left open but that the Defendants could not transact the property to defeat the rights of either the Bank of Maharashtra or the Plaintiffs. In paragraph 5 of that order, I also said that the injunction would operate against the Defendants only so that they would not transfer, sale etc the suit property in the claim only to a limited extent and not to the extent of the entire relief claimed, i.e. only to the extent necessary to discharge and satisfy the claim of the Bank of Maharashtra. In other words, if the mortgage was only for a portion of the

> property, and that was sufficiently clear and clarified in paragraph 5.
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> 5. Obviously, the Defendants Nos. 1 and 3 do not want to subject themselves even to this limited injunction. It is for this reason that they have deliberately not filed any kind of application for clarification, speaking to the minutes or a review petition in time but only done so at a very late stage. This is the only explanation for the wholly misleading statements in the Affidavit in Support of the present Notice of Motion.
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> 6. The Notice of Motion is dismissed. There will be no order as to costs."

12. Now, this is clearly shows that had Defendants Nos. 1 to 3 filed an application for clarification things might have been very different. But the Notice of Motion for condonation of delay was dismissed because the delay was unexplained and the reasons were not sufficient. There was no adjudication on merits.

13. A submission was then urged on the basis of a decision of the Supreme Court in *Board of Control for Cricket in India & Anr vs Netaji Cricket Club & Ors.*[1] My attention was invited to paragraph 90 of that decision, which reads thus:

> "**90**. Thus a mistake on the part of the Court which would include a mistake in the nature of the undertaking may also call for a review of the sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words "sufficient reason" in Order 47 Rule 1 of the code are wide enough to include a misconception of fact or law by a court or even an

1 (2005) 4 SCC 741.

> advocate. An application for review may be necessitated by way of invoking the doctrine *"actus curiae neminem gravabit"*.

14. In my reading of it, this decision is wholly against the Plaintiffs. It is Pradhvi Multitrade that is adversely affected by the order of a Court made in a proceedings to which it was not a party though it could or should have joined as a party.

15. In all the Plaintiffs' violent objections, what is not pointed out is crucial. The suit is for specific performance of an Memorandum of Understanding **("MoU")** dated 24th July 2010. It was filed in the November 2015. Pradhvi Multitrade's conveyance is dated 20th April 2015, i.e. after the MoU but before the suit was instituted. The minimum that the Plaintiffs ought to have done before instituting the suit was to check for itself the status of the larger land and every parcel of it. This MoU itself does not create any rights in the land. It certainly does not pass title to the Plaintiffs.

16. But what is more curious is that even after the Plaintiffs knew of the Review Petition filed by Defendants Nos. 1 and 3 in 2019, and even after this Interim Application by Pradhvi Multitrade in 2020, the Plaintiffs have done nothing to implead Pradhvi Multitrade. The Plaintiffs could have sought a variety of reliefs. They could have limited the specific performance prayer to a part of the land, accepting Pradhvi Multitrade's conveyance. They could have amended the plaint to challenge Pradhvi Multitrade's conveyance. The Plaintiffs could have assailed the conveyance here, in this suit, or in another proceeding. But it did nothing, and doing nothing is, frankly, not an option to the Plaintiffs. They cannot continue with the suit for specific performance of the MoU covering the whole of the larger property when title to one of its three Hissas has been conveyed away to Pradhvi Multitrade. I am not by this order allowing any such application for amendment and should not be misunderstood to have been done so. I merely indicate that the Plaintiffs have done absolutely nothing despite having knowledge of the right and title claimed by Pradhvi Multitrade over a part of the land that the Plaintiffs claim is the subject matter of the MoU. Therefore, before the Plaintiffs protest that Pradhvi Multitrade should have come earlier or has been delayed, the Plaintiffs must themselves must explain how they can expect the Court to continue an order that adversely affects another entity that holds a registered document of title, one that has not been impeached in a single proceeding. What the Plaintiffs cannot explain is how they can sustain the Suit and demand specific performance over a property and the title to which is today with Pradhvi Multitrade under a registered document. These arguments by the Plaintiffs on delay etc without considering the fundamental underlying problem affecting the frame of the suit therefore count for next to nothing.

17. Ms Panda for the Applicant Pradhvi Multitrade is quite correctly not seeking to have Pradhvi Multitrade impleaded in the Suit. She would undoubtedly resist any application to join Pradhvi Multitrade, and may well succeed in that endeavour. All that she says is that the order of 17th February 2017 granting a wide injunction over Survey No. 219 should be clarified not to include any part of Survey No. 219 that has passed under a valid and registered document of title to a third party, i.e. that third party rights that accrued prior to the institution of the suit are not affected by the 17th February 2017 order. Prayer (b), therefore, correctly asks for a clarification that the 17th February 2017 order does not affect the properties conveyed to Pradhvi Multitrade. This is an application that must, for the reasons I have indicated, be allowed.

18. The Interim Application is made absolute in these terms and will receive an order in terms of prayer clause (b). There will be no order as to costs.

19. All concerned will act on production of a digitally signed copy of this order.

(G. S. PATEL, J)