

R.M. AMBERKAR
(Private Secretary)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7651 OF 2015

M/s. Fiza Constructions Company

.. Petitioner

Versus

Motilal Aatmaram Tandel & Ors.

.. Respondents

.....

- Dr. Uday P. Warunjikar for Petitioner
- Mr. Mukesh Vashi, Senior Advocate a/w Ms. Prachi Khandge and Ms. Swati Cheude i/by M.P. Vashi & Associates for Respondent Nos. 1 to 3

.....

CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 06, 2022

ORDER:

1. Heard Dr. Warunjikar, learned Advocate for Petitioner and Mr. Vashi, learned Senior Advocate for Respondent Nos. 1 to 3.

2. By the present Petition, Petitioner has taken exception to the order dated 14.10.2014 below Exh. 71 in Special Civil Suit No. 264/2009 passed by the Joint Civil Judge Senior Division, Panvel. Petitioner is Plaintiff in the said suit. The suit is filed for declaration, specific performance and injunction and in the alternative for damages. Subject matter of the suit is land bearing Survey No. 30 admeasuring 3900 sq. meters situated at Village Ulve, 1D, Taluka Panvel, District Raigad. By the impugned Order, Application for amendment filed under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (for short “**CPC**”) is rejected.

3. Such relevant facts which are necessary for deciding the present petition are as under:-

3.1. Respondent Nos. 1 to 3 (Original Defendant Nos. 1 to 3) agreed to sell the land admeasuring 2200 sq. meters to the Petitioner for Rs. 88,00,000/- in anticipation of being entitled to receive an amalgamated plot under the 12.5% Government scheme from CIDCO. Petitioner paid an amount of Rs. 22,00,000/- partly by cheque and partly by cash. Respondent Nos. 1 to 3 neglected to execute the sale deed and hence the suit came to be filed in 2009.

3.2. Written statement was filed on 10.06.2013. In the written statement, Respondent Nos. 1 to 3 contended that allotment of the original plot to them was cancelled on 19.12.2007 and CIDCO (Respondent No. 4) allotted another plot admeasuring 2249.30 sq. meters to them. In view of this disclosure, Petitioner sought amendment of plaint to correct the area of the allotted plot to 2249.30 sq. meters as according to the Petitioner, the original plot was itself allotted, however with a reduced area.

3.3. Learned Trial Court rejected the application seeking amendment on the ground that if granted, it would change the entire nature of the suit. That apart learned Trial Court recorded the finding that the proposed amendment is not necessary to decide the *lis* between the parties.

3.4. Hence the present Petition.

4. Dr. Warunjikar, learned Advocate for Petitioner has painstakingly submitted that the proposed amendment is necessary as identification of the suit property in terms of its area was only revealed and confirmed after the written statement was filed and in fact the same original plot has been allotted to Respondent Nos. 1 to 3 but with the reduced area, which was agreed between the parties. He submitted that the suit property stated and described in the plaint admeasuring 3900 sq. meters was originally conceived as an amalgamated plot which included the suit plot admeasuring 2250 sq. meters which is allotted to Respondent Nos. 1 to 3 as agreed to be sold. That Respondent No. 4 – CIDCO, planning authority decided not to allot the amalgamated plot to the private Respondents and instead decided to allot independent / individual plots. That it was agreed between parties that the plot which would be allotted to private Respondents was to be sold to Petitioner and hence the correct dimensions of the said plot allotted to Respondents were now necessary to be brought on record to establish its identity. He submitted that Petitioner was unaware about cancellation of the amalgamated plot admeasuring 3900 sq. meters plot as far back as on 19.12.2007. That it was only when written statement was filed by private Respondents subsequently on 10.06.2013, Petitioner became

aware of the said fact and therefore amendment is necessitated. Hence, he submitted that the impugned order deserves to be set aside.

5. *PER CONTRA*, Mr. Vashi, learned senior Advocate for Respondent Nos. 1 to 3 has drawn my attention to the affidavit-in-reply dated 09.06.2015 and a subsequent affidavit dated 20.09.2019 of the answering Respondents, *inter alia*, contending that the allotment letter dated 19.12.2007 annexed as Exh. A to the plaint is a forged and fabricated document. That the correct allotment letter was subsequently issued on 19.11.2009 by CIDCO in favour of Respondent Nos. 1 to 3 and their sister Smt. Yamunabai Dhondu Mungaji. That the alleged allotment dated 19.12.2007 is issued in the name of Shri. Balaji Popat Thakur in respect of plot No. 30 admeasuring 3900 sq. meters in Sector - Node Ulve – “1D” whereas the subsequent correct allotment letter in in respect of plot No. 30 admeasuring 2250 sq. meters in Ulve, Sector 9. He submitted that the alleged agreement between parties mentioned in the plaint is dated 09.02.2006 whereas the correct allotment letter dated 19.11.2009 is issued three and a half years later. That the alleged agreement has no nexus and cannot be agreed to have been executed in respect of plot No. 30 which was allotted to Respondents in November, 2009. He submitted that the suit filed by Petitioner was also bad for non-joinder of the forth allottee i.e. Smt. Yamunabai Dhondu Mungaji as per the correct allotment letter.

Therefore, according to private Respondents, the original suit filed by Petitioner in respect of plot allotted vide letter dated 19.12.2007 pertained to an entirely different plot of land and not plot No. 30 admeasuring 2250 sq. meters which is allotted by the subsequent allotment letter dated 19.11.2009. He referred to both allotment letters by juxtaposing them and pointing out the differences and distinction in their nomenclature, reference number, file number, area and name of allottee(s) to support his submissions. He further submitted that final decree has been passed in favour of private Respondents in Suit No. 588 of 2010 which records that consideration has been paid to the four allottees whose names are mentioned in the allotment letter dated 19.11.2009. That consent terms have been filed by parties and CIDCO has executed a tripartite agreement in respect of plot admeasuring 2250 sq. meters and this is one more reason to prove that there is no nexus whatsoever between the original plot admeasuring 3900 sq. meters situated in Ulve 1D and the plot admeasuring 2250 situated in Sector 9, Ulve. Hence, he submitted that the reasons given in the impugned order are appropriate for rejecting the amendment application and it deserves to be sustained.

6. Submissions made by the learned Advocates has received due consideration of the Court. Record and pleadings have been perused.

7. One of the basic controversy which emanates from the pleadings is in respect of correct identification of the suit plot as agreed between the parties and as stated in the allotment letter dated 19.12.2007 which is at page 35 of the Petition. This allotment letter states that as per the computer lottery/allotment under 12.5% Government Scheme dated 18.12.2007, plot bearing No. 30 admeasuring 3900 sq. meters situated at Sector 9, Ulve-1D is allotted to Balaji Popat Thakur. As against this, the allotment letter issued subsequently on 19.12.2009 in favour of the private Respondents and Smt. Yamunabai Dhondu Mungaji under the same Government Scheme which is at page 150 of the petition describes the allotted plot as Survey No. 30, Ulve Sector 9 admeasuring 2249.30 sq. meters. In this context, the agreement dated 09.02.2006 of which specific performance is sought by Plaintiff before the trial Court needs to be seen to identify the suit plot which was intended by the parties to be transferred. The said agreement is at page 65 of the Petition. By the said agreement, private Respondents agreed to sell their plot of land which they would be entitled to under the award under 12.5% Government Scheme to the Petitioner. On running page 66 and internal page 2 of the agreement, immediately below the description of the suit plot, there is a specific reference to the area agreed to be sold i.e. 2200 sq. meters and most importantly it is stated that the allotment of such plot as contained in the CIDCO file No. 697. This

aspect and reference to the CIDCO file is relevant. Further in the receipt clause or internal page 9 of the same agreement, CIDCO file No. 697 once again finds a mention and the area of 2200 sq. meters is described identifying the suit plot. Private Respondents in their affidavit-in-reply have annexed the subsequent allotment letter and pleaded that it is the correct allotment letter wherein in the reference, number of the said letter, the number of CIDCO file No. 697 appears. In view thereof, the principal contention of the private Respondents that allotment made in 2009 is in respect of a completely different plot of land by CIDCO as against the earlier allotment is not sustainable and is dismissed.

8. That apart, it is seen that the earlier allotment letter in 2007 refers to the allotted plot as plot No. 30 in Sector No. 9. It is pertinent to note that the subsequent allotment letter in 2009 also refers to the plot as plot No. 30 in Ulve, Sector No. 9. Hence, the submissions of private Respondents that the plot situated at Ulve Node 1-D as per the earlier allotment letter is a different plot is not correct if the two letters of allotment are seen and read together. Further at page Nos. 82 to 99 of the Petition, receipts of payment made to the private Respondents have been annexed to the Petition. In the affidavit-in-reply dated 24.06.2015 and the subsequent affidavit dated 18.03.2016, these receipts have not been denied by the private

Respondents nor commented upon.

9. In the above backdrop, the learned Trial Court has returned a finding in the impugned order that the earlier allotment letter dated 19.02.2007 was an intent letter. The learned Trial Court has merely accepted the say of the private Respondents that the subsequent allotment in 2009 was made even prior to filing of the suit without even *prima facie* considering the separate allotment letter as it stands. It is pertinent to note that both the allotment letters describe the suit plot as plot No. 30, situated at Sector – 9 in Ulve. That the suit is for specific performance of the agreement between the parties and perusal of the agreement would clearly reveal the intent of the parties. As alluded to herein above, there is a direct nexus between the agreement of which specific performance is sought and the subsequent allotment letter as it both refers to the same CIDCO File No. 697. Further it is seen that description of the plot in both allotment letters is similar and identical. Hence I am unable to agree with the finding returned in paragraph No. 5 of the impugned order. The said finding is cursory in nature and without application of mind. It therefore deserves to be set aside. It is further held that the correct description and identity of the suit plot will not alter the nature of the suit as the substantive relief is of specific performance of the Agreement between the parties in respect of the suit plot agreed to be sold. Perusal of the application

filed by Petitioner indicates that the Petitioner became aware of cancellation of the earlier allotment and the subsequent allotment only after reading the written statement and the documents annexed thereto.

10. Hence, in view of the above observations and findings, following order is passed:-

- (i) The Impugned order dated 14.10.2014 is quashed and set aside;
- (ii) Application dated 16.01.2014 seeking amendment to the plaint and injunction Application below Exh. 5 is allowed and the plaint shall stand amended in terms of the amendment sought in paragraph 9 (I) thereof which reads thus:

“(I) To replace in Para 1 of the Plaint and Injunction application the words “3900 square meters (amalgamated)” with the words “2249.30 sq. mtrs” and the words “CIDCO/BHUMI/SATYO/ULWE/S SATYO/137/2007” with the words CIDCO/BHOOMI/SATYO/ULWE II/697/2009.”

11. In view of the fact that Special Civil Suit No. 264 of 2009 is pending since long, the learned Trial Court is requested to dispose of the suit as expeditiously as possible and in any event within a period of one year from the date of this order.

12. Parties are directed to appear before the trial court on 21st

December, 2022 at 12.00 noon or thereafter for obtaining appropriate directions.

13. It is clarified that all contention of both parties are expressly kept open. The Trial Court shall not be influenced by any observation made by this court in the present order and the suit shall be tried on its own merits.

14. With the above directions, Writ Petition is allowed and disposed.

[MILIND N. JADHAV, J.]

RAVINDRA
MOHAN
AMBERKAR
Digitally
signed by
RAVINDRA
MOHAN
AMBERKAR
Date:
2022.12.15
19:14:43
+0530