Suchitra

# IN THE HIGH COURT OF BOMBAY AT GOA

## SECOND APPEAL NO.9/2024
## WITH
## SECOND APPEAL NO.10/2024

MR. T. K. CHANDRAN, Son of Kannan, married, about 45 years in age, businessman, resident of MIG - 62, Goa Housing Board, Curti, Ponda - Goa. … APPELLANT

***Versus***

1. SMT. RUKMINI HALANKAR, VITHAL, Widow of late Mr. Vithal Halankar, aged 66 years, resident of H. No. 670, Rambhuwanwada, Tiswadi - Goa. Kumbharjua,

2. SMT. VAISHALI VINAYAK TARI, Daughter of late Mr. Vithal Halankar, widow of late Vinayak Maddo Tari, aged 45 years, housewife,

3. MR. SAIRAJ VINAYAK TARI, Son of late Mr. Vinayak Maddo Tari, aged 18 years, student,

4. MR. HARSH VINAYAK TARI, Son of late Mr. Vinayak Maddo Tari, aged 15 years, minor, student,

The Respondent No. 4 being minor, is represented herein by his mother and natural guardian, the Respondent No. 2, All residents of H. No. 58, Rumdawada, Post Usgaon, Pale, Bicholim - Goa.

5. MR. SWAPNIL HALANKAR, Son of

late Mr. Vithal Halankar, married, service, aged 39 years, & his wife,

6. MRS. SALONI HALANKAR, SWAPNIL, Wife of Mr. Swapnil V. Halankar, aged 38 years, housewife,

Both residents of H. No. 670, Rambhuwanwada, Tiswadi - Goa. Kumbharjua,

7. MRS. RAVINA KHORJUEKAR, RAVINDRA, Daughter of late Mr. Vithal Halankar, wife of Mr. Ravindra Khorjuekar, aged 43 years, housewife, and her husband,

8. MR. RAVINDRA KHORJUEKAR, Aged 47 years, businessman,

Both residents of H. No. 181/50, New Wado, near Hanuman Temple, c/o. Damodar Stores, Vasco - Goa.

9. MS. PUSHPAGANDHA VITHAL HALANKAR, Daughter of late Mr. Vithal Halankar, unmarried/spinster, aged 40 years, household,

10. MR. NITYANAND VITHAL HALANKAR, Son of late Mr. Vithal Halankar, aged 32 years, service, bachelor, Both residents of H. No. 670, Rambhuvanwada, Kumbharjua, Tiswadi Goa. … RESPONDENTS

Mr Jatin Ramaiya with Mr Pradip Kashyap, Advocates for the Appellants.
Ms A. Fernandes, Advocate for Respondent Nos.1 to 10.

**CORAM: M. S. KARNIK, J.**

**DATED: 7th MARCH 2025**

**ORAL ORDER :**

**1.** This Second Appeal challenges the Judgment and Decree dated 28.06.2022 passed by the District Judge-2, Panaji sitting at Ponda (First Appellate Court) in Regular Civil Appeal No.2/2020. The Civil Judge, Junior Division at Ponda (Trial Court) dismissed the appeal vide Judgment and Decree dated 27.05.2019.

**2.** The appellant is the original defendant. The suit was filed by the heirs of deceased Vithal Mahadev Halankar for eviction. Vide deed of sale/conveyance dated 08.06.2010, the Goa Housing Board sold Flat No.MIG-62 in a building constructed in Ponda Taluka to Vithal. This is the suit flat. Vithal allowed the defendant to occupy the suit premises which is subject matter of the leave and license agreement. An agreement for sale dated 24.05.2010 was entered into between Vithal and the defendant. Vithal agreed to sell to the defendant the said flat for a consideration of Rs.6,21,000/-.

**3.** An amount of Rs.3,00,000/- was paid by the defendant to Vithal on the date of singing of the agreement. Balance amount of Rs.3,21,000/- was agreed to be paid within forty days of the signing of the agreement. On failure of the defendant to pay the balance amount, a sum of Rs.75,000/- was to be forfeited by the plaintiff and the remaining amount was to be refunded without interest.

**4.** A notice dated 15.03.2011 was issued by Vithal through Adv. Nelson Soares asking the defendant to vacate the suit flat. Vithal died on 09.09.2012. It is the case of the plaintiff that the defendant was a trespasser and was liable to pay compensation of Rs.1,000/- per day from January 2009 till the disposal of the suit for illegal occupation of the suit flat as per the leave and licence agreement. The plaintiff prayed that the defendant be evicted from the possession of the suit flat.

**5.** The Trial Court framed following issues and rendered findings thereon:

| Sr. No. | Issue | Finding |
|---|---|---|
| 1. | Whether the Plaintiffs prove that the Defendant was allowed to use and occupy the suit flat purely on a temporary basis under a leave and license agreement? | Proved. |
| 2. | Whether Plaintiffs prove that as on date the Defendant is in illegal occupation of the suit flat? | Proved. |
| 3. | Whether the Plaintiffs prove that the Defendant has breached the terms of the agreement dated 24/05/2010? | Proved. |
| 4. | Whether the Plaintiffs prove that the Defendant is liable to pay a sum of Rs.18,25,000/- to the plaintiffs by way of damages an further amount of Rs.1,000/- per day till the date of vacating the suit flat, as prayed in prayer clause (c) of the plaint? | Not proved. |
| 5. | Whether the Plaintiffs prove that the Defendant is liable to pay arrears of monthly compensation/license fee of Rs.2,300/- for the period from January 2009 and up till the date of final disposal of the suit? | Not proved. |
| 6. | Whether the Defendant proves that late Mr. | Not proved. |

| | | |
|---|---|---|
| | Vithal Halarnkar was not in possession of the suit flat up till 12/07/2010 i.e. up till the date of the conveyance deed? | |
| 7. | Whether the Defendant proves that there was an agreement for sale executed between him and late Vithal Halarnkar in January 2005? | Not proved. |
| 8. | Whether the Defendant proves that he was always ready and willing and is still ready and willing to perform his part of the contract? | Not proved. |
| 9. | Whether the Defendant proves that the Plaintiffs are liable to specifically perform their part of the contract? | Not proved. |
| 10. | Whether counter claim has been filed within limitation? | No. |
| 11. | Whether the Defendant proves that in the alternative the Plaintiffs are liable jointly and severally to pay to the Defendant a sum of Rs.6,42,000/-including interest, as prayed in prayer clause (b) of the counter claim ? | Not proved. |
| 12. | What relief? What Order? | Suit is partly decreed. |

**6.** The Trial Court partly decreed the suit for eviction. It was declared that the sale deed stands terminated as null and void. The defendant was directed to hand over vacant and peaceful possession of the suit flat to the plaintiff. At this stage, it is relevant to mention that the defendant had filed a counter claim for specific performance. The Trial Court found that the defendant could not prove that he was ready to perform his part of the contract and that the counter claim was not within limitation. The counter claim was dismissed.

**7.** The First Appellate Court dismissed the appeal, after framing the following points for determination and rendering its findings thereon:

| Sr. No. | Points for determination | Findings |
|---|---|---|
| 1. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that the defendant was occupying the suit flat premises on a temporary basis under a leave and licence agreement ? | In the Negative |
| 2. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that the defendant had committed a breach of agreement for sale dated 24/5/2010? | In the Negative |
| 3. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that Vithal Halarnkar was in possession of the suit flat premises prior to the deed of conveyance dated 12/7/2010? | In the Negative |
| 4. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that there was no agreement of sale executed between the defendant and late Vithal Halarnkar in 2005? | In the Negative |
| 5. | Did the Ld. Civil Judge Junior Division, "C"Court, Ponda err in holding that the defendant was not ready and willing to perform his part of the agreement ? | In the Negative |
| 6. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that the plaintiffs are not liable to pay Rs.6,42,000/- being the earnest money paid together with interest ? | Partly in the affirmative. |
| 7. | Did the Ld. Civil Judge Junior Division, "C" Court, Ponda err in holding that counter-claim is barred by limitation ? | Partly in the affirmative. |

**8.** The First Appellate Court was of the opinion that time is not the essence of the contract. The First Appellate Court

concurred with the findings of the Trial Court that the defendant could not prove his readiness and willingness to perform his part of the contract. Further, the First Appellate Court concurred with the findings of the Trial Court that the counter claim is not within limitation.

**9.** Mr Ramaiya, learned counsel for the appellant was at pains to point out that both the Courts below have failed to take into consideration the material part of the evidence of the witness of the plaintiff. Specific suggestion was put that the sale deed could not be executed since the plaintiff failed to produce the sale deed and obtained an order from the Court declaring him the successor of Vithal. The plaintiff did not respond to this suggestion. It is the submission of Mr Ramaiya that in view of the provision of Section 148 of the Indian Evidence Act, this was a fit case where the Court should have drawn an adverse inference as the answer to the question obviously would be unfavourable to the plaintiff, he having refused to answer the question. Mr Ramaiya further submitted that the inferential finding that the defendant had no resources to generate the balance amount of Rs.3 lakhs is absolutely unwarranted. It is submitted that the Court should have considered that an amount of almost Rs.3 lakhs was already paid at the time of execution of the agreement for sale and what was remaining to be paid was only the balance amount of Rs.3 lakhs. Mr Ramaiya submitted that the Courts below did not consider the case of the defendant that though the defendant was ready and willing to perform his part of the contract, but it was only on account of the plaintiff not having the succession certificate that the sale deed could not be executed

and hence the materials on record clearly demonstrate that the defendant was always ready and willing to perform his part of the contract. Mr Ramaiya submitted that the appeal requires to be admitted on the following additional substantial question of law apart from the substantial questions of law which are already formulated in the appeal:

> **A.** Whether it was incumbent upon the Ld. Trial Court and the Ld. Appellate Court to render findings on the effect of admissions and/or statements made in the cross examination by the Plaintiffs/Respondent whilst passing the Judgement and Order?

**10.** Mr Ramaiya further submitted that the Courts below should not have dismissed the counter claim.

**11.** On the other hand, Ms A. Fernandes, learned counsel for the respondent invited my attention to the findings of the First Appellate Court as well as the Trial Court. She submits that the findings are based on the evidence on record which by no stretch of imagination can be said to be perverse. It is submitted that the concurrent findings recorded by the Courts below are not to be interfered with.

**12.** I have heard learned counsel for the appellant as well as the respondent. Appellant/defendant was put in possession of the suit flat on basis of a leave and license agreement. When the agreement of sale was entered into between Vithal and the defendant, a sum of Rs.3 lakhs was paid by the defendant to Vithal. The balance amount of Rs.3 lakhs was not paid by the defendant to Vithal. Though the First Appellate Court has

reversed the findings of the Trial Court on the aspect that time was the essence of contract, however there are concurrent findings of fact as regards the defendant committing breach of the leave and license agreement dated 04.02.2005. The First Appellate Court held that there was nothing to show that the defendant had the required money to pay the balance amount. Even after the notice dated 15.03.2010 was issued terminating the agreement for sale dated 24.05.2010 and asking the defendant to vacate the suit premises, the defendant did not pay the balance price and demand execution of sale deed. The findings of the First Appellate Court are based on the evidence on record. The First Appellate Court took into consideration that for the payment of amount of Rs.3 lakhs at the time of execution of agreement of sale, the defendant had taken loan from the bank. The further testimony of defendant no.1 clearly demonstrates that he did not have money to pay the balance price. In fact it was the specific stand that the defendant was to borrow money from his brother to pay the balance amount. The First Appellate Court observed that the defendant has not examined his brother as a witness to show that his brother had the money and that he intended to give the money to his brother. In my opinion, these are all findings of fact rendered on the basis of evidence on record. These findings of facts do not warrant any interference. The present appeals do not involve any substantial questions of law.

**13.** Both the Second Appeals are dismissed. No costs.

**14.** At this stage, a request is made by Mr Ramaiya, learned counsel for the appellant that as the appellant has been occupying

the premises since the year 2005, he may be granted some time to vacate the same. This request is opposed by Ms Fernandes. In my opinion, I feel it appropriate that though the execution may proceed, for six months from today the appellant may not be evicted.

**M. S. KARNIK, J.**

Signed by: SUCHITRA NANDAN SINGBAL
Designation: Personal Assistant
Date: 13/03/2025 18:34:02