

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.88 OF 2013**

- 1 Shri Jose Philip D'Souza, son of Domingos D'Souza, aged about 56 years, married, social service, r/o. Villa Dom-Rine, Near Tilak Maidan, Vasco-da-Gama, Goa.
- 2 Mrs. Neny Fernandes e Souza wife of Mr. Jose Philip D'Souza, aged about 40 years, married, housewife, r/o. Villa Dom-Rine, Near Tilak Maidan, Vasco-da-Gama, Goa.
- 3 Mrs. Teresa D'Souza e Cunha, daughter of Domingos D'Souza, wife of Mr. Andrew D'Cunha, aged about 52 years, married, housewife, (previously r/o. House No.586, Opp. Goa Shipyard Ltd., Vaddem, Vasco-da-Gama, Goa) and presently residing at : "Boa Vista", House No.2/27/A, Near Vaddem Sea-shore, Vasco-da-Gama, Goa.
- 4 Mr. Andrew D'Cunha, son of Manuel D'Cunha, aged about 53 years, married, service, (previously r/o. House No.586, Opp. Goa Shipyard Ltd., Vaddem, Vasco-da-Gama, Goa) and presently residing at : "Boa Vista", House No.2/27/A, Near Vaddem Sea-shore,

Vasco-da-Gama, Goa.

.... Appellants

V/s

- 1 Mr. Hector Faria,
son of John Faria,
- 2 Mrs. Gladys Faria,
wife of Hector Faria,
- 3 Mr. Ashley Faria,
son of Hector Faria,
- 4 Mr. Brian Faria,
son of Hector Faria,

All major in age,
all residing at Palm Springs,
Chicalim, Mormugao, Goa.

.... Respondents

Shri Thalman P. Pereira, Advocate for the Appellants.
Shri M. B. Da Costa, Senior Advocate with Ms. Soniya Chodankar,
Advocate for the Respondents.

CORAM : N.M. JAMDAR, J.

DATE : 22nd JANUARY, 2015

ORAL ORDER :

The second appeal is filed by the defendants, who have suffered the concurrent findings of fact and decisions by the trial Court and the appellate Court, as regard the issue of specific performance in favour of the respondents/original plaintiffs.

2. The suit was filed on 25/11/2005 by the respondents/plaintiffs seeking specific performance in respect of the property described in the plaint on the basis of an agreement dated 23/05/2003. The trial Court framed issues as regard to whether the respondents/plaintiffs proved that they were entitled to registration of Sale Deed on payment of balance amount, whether they were entitled to claim specific performance, and, whether the suit was barred by law of limitation.

3. As regard the respondents'/plaintiffs' claim of specific performance it was granted and the suit was not held to be barred by limitation, the trial Court, however, partly decreed the suit in respect of 2033 square metres instead of 2700 square metres claimed by respondents/plaintiffs. The respondents, plaintiffs were directed to pay the balance amount in specific performance of the agreement. In the appeal filed by the appellants/defendants, the appellate Court framed similar issues and held them in favour of the respondents/plaintiffs, and confirmed the order of the trial Court.

4. Shri Thalman Pereira, the learned Counsel for the appellants, firstly urged that Joaquim Pires and his wife Aurora, and Pascoal

D'Souza and his wife Piedade, were necessary parties in the suit was in view of the claim of the respondents/plaintiffs to the area of 667 square metres. The learned Counsel further contended that the respondents/plaintiffs were not ready and willing to perform their part of the contract whereas, the appellants were always willing, and this point has not been considered by both the Courts below. The learned Counsel further submitted that the Courts below have also not considered the aspect of 12% interest and the evidence of the witness examined to show the fairness of the price and the market value has been omitted from consideration.

5. As regard the issue as to 12% interest is concerned, Shri M.B. Da Costa, the learned Senior Counsel appearing for the respondents/plaintiffs pointed out that this issue was not framed both in the trial Court as well as in the appellate Court. Perusal of the impugned judgment shows that this point was not urged. Though Shri Pereira submitted that the appellant had urged this point before the appellate Court, steps ought to have been taken to move the appellate Court to get the record corrected. Since the record shows that this part was not urged before the Courts below, it cannot be permitted to be taken up for the first time in second appeal.

6. Even as regards the issue as regard to readiness and willingness on the part of the appellants is concerned, in the plaint the respondents/plaintiffs have pleaded their readiness and willingness and again there is no counter argument seem to have been made as reflected as the perusal of the decisions rendered by both the Courts below shows.

7. Shri Da Costa submitted that after the agreement which was executed in May, 2003 the suit was filed in the year, 2005, since the appellant did not adhere to their part of the agreement. In view of any contra finding or argument in the proceeding of the Courts below, the fact that the respondents/plaintiffs were ready and willing as contended in their plaint will have to be accepted and this point cannot be now urged in the Second Appeal.

8. As regard the point that Joaquim Pires and his wife Aurora and Pascoal D'Souza and his wife Piedade were not joined as parties to the suit by the respondents/plaintiffs, the appellate Court has taken note of the fact that the suit has been decreed only for 2033 square metres and not for the entire 2700 square metres. Shri Da Costa

contended that Joaquim Pires and his wife Aurora and Pascoal D'Souza and his wife Piedade were not necessary to be joined as party defendants since separate agreement could be executed and they were and are willing to co-operate with the respondents/plaintiffs.

9. Considering the above mentioned position, it cannot be said that any perversity is committed by both the Courts below and the discretion used to grant specific performance is fair and proper and legal. No substantial question of law arises in the appeal. The appeal is accordingly dismissed.

N.M. JAMDAR, J.

NH/-