

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.97 OF 2014**

SHRI A. B. MENEZES AND ANR.APPELLANTS

V/S

SHRI ROSARINHO D'COSTA AND 3 ORS. ...RESPONDENTS

Shri A.F. Diniz, Advocate for the Appellants.

Shri Nitin Sardessai, Senior Advocate with Shri L. Raghunandan, Advocate for the Respondents.

CORAM : N.M. JAMDAR, J.

DATE : 4th FEBRUARY, 2015

ORAL ORDER

By this Second Appeal, the appellants challenge the judgment and decree passed by the District Court, South Goa, Margao, allowing the appeal and dismissing the suit filed by the appellants. The suit was filed by the appellants for declaration that the respondents have no right to carry out construction in the suit plot and the area specified in the plan and relief of injunction.

2. The respondents are owners of a plot admeasuring 995 square metres property situated in Margao. The respondents constructed certain building on this property through a developer. The respondents entered into an agreement with the developer on 31 March 1984. As per this agreement, the

respondents were entitled to 35% of built up area. The developer was entitled to 65%. It was also specified in the agreement that the developer would not carry out any structural or architectural activity in the building, without prior permission of the respondents except for minor alternations within the flat area. The agreement to be entered into by the developer was to be of the flats, as per the design and specifications of the approved plan of the municipality. It was also stated in the agreement that foundation stone for three storeyed building was to be laid and out of the additional floor if construction equivalent to 35% of the increased FAR was to be given to the respondents. The respondents also executed power of attorney in favour of the said developer.

3. The developer thereafter entered into an agreement for sale with the appellants on 8 December 1984. In the agreement sale of two flats was specified. In this agreement the developer agreed that he will not carry out any construction in the open space around the building. It was also agreed that if additional FAR is allowed and if construction is to be put up, it would be put up only in the east west direction. The agreements specified that the appellants will have right to plot where the building is constructed.

4. The appellants filed a suit bearing no.241/1992, in the Court of seeking relief of injunction against the respondents. The appellants pleaded that, inspite of the agreement dated 8 December 1984 with the developer, the respondents started constructing on the terrace on the wing which was not in east-

west direction. Certain construction was also started on the open space. It was stated that the construction was under the cantilevers portion of veranda of the appellants and also of one Antonio Fernandes. The appellants accordingly sought for relief of injunction.

5. The respondents filed their written statement and contended the claim. The respondents stated that the respondents have right in respect of the entire building including the completion of the third floor, and at this stage the appellants cannot insist on their proportionate right. It was also contended that the developer went beyond his authority and included certain clauses in the agreement which he was not authorized to do.

6. The learned Civil Judge considered the case of the appellants. The learned Civil Judge found that the agreement dated 31 March 1984 entered into by the respondents with the developer gave full authority to the developer and the agreement entered into by the developer with the appellants was valid and that the clauses contained in the agreement dated 8 December 1984 conferred right on the appellants to seek relief of injunction. The learned Civil Judge accordingly decreed the suit and declared that the respondents had no right to carry out construction on the disputed part of the terrace. The respondents were directed to demolish the construction carried out by them under the veranda of F1 and F2.

7. In the appeal filed by the respondents, the appellate Court came to the conclusion that the developer did not have an authority to include clauses in the agreement beyond what was provided in the agreement between the respondents and the developer. Since the entire case of the appellants was based on the agreement with the developer and having found that the developer had no authority to include those clauses in the agreement, the appellate Court allowed the appeal and set aside the order passed by the trial Judge.

8. Mr. A.F. Diniz, the learned Counsel for the appellants firstly contended that the agreement dated 8 December 1984 entered into with the developer clearly stated that no construction shall be carried out in the open space and there was a specific clause that additional construction will be only in east west direction. He submitted that it was provided that proportionate right to the flat was specified in the agreement. According to Mr. Diniz, the developer was fully authorized to enter into the agreement and for want of any change to the agreement, the learned Appellate Court could not have gone beyond the agreement. He submitted that in spite of full knowledge of this agreement, respondents chose not to challenge the same. The suit of the appellants is based entirely on this agreement. As has been rightly pointed out by Mr. N. Sardesai, the learned Senior Counsel for the respondents that the relief for declaration and injunction is granted entirely on this agreement, which is almost seeking relief of specific performance. That being so the appellate Court was entitled to look into the fact whether the developer who had entered into

an agreement with the appellant, had authority to agree to certain negative covenants. Though this issue was not framed in trial Court, the point was urged before the trial Court.

9. The perusal of the agreement dated 31 March 1984 shows that it clearly limits the authority of the developer to enter into agreements and also to carry out construction. It is specifically provided that no structural or architectural design of the building would be changed without permission of the respondents. Agreeing to shift the entire construction of an additional floor to other side of the wing, by no stretch of imagination can be considered as minor alterations within the flat area, for which no permission of the respondents was required. This the developer had volunteered to provide in the agreement with the petitioner. The agreement dated 31 December 1984 did not authorize to include such term. So also the authority given to the developer was only for sale of flats. He had no authority to specify anything regarding terrace or open space, yet the developer volunteered that no construction will be carried out in the open space.

10. Having proportionate right in the open space is different than having a right as a member of the society to open space, which is not the case of the appellants. The entire case is based on the agreement dated 31 March 1984. Once the agreement between the developer and the respondents was only in respect of sale of flats that too in conformity with permissions and licences, then the developer had no right to introduce a covenant and undertake upon itself not to

construct in the open plot.

11. Mr. Diniz relied upon Sections 182 to 186, 187 & 237 of the Indian Contract Act. He submitted that the principal is bound by the promise held out by the agent. Mr. Diniz submitted that the agreement entered into by the appellants with the developer was on the basis of special power of attorney which clearly authorized him to sell the flat to the appellants with certain conditions. He submitted that not to construct the additional floor on particular side of the wing or not to construct in the open area were conditions for the sale of flat. This argument cannot be accepted. As stated earlier neither the special power of attorney nor the agreement dated 31 March 1984 authorized the developer to provide for such restrictions. By placing such restrictions in the agreement the rights of the respondents were directly affected. Though it was submitted that the respondents will not be affected by shifting of additional construction or construction in open plot, this cannot be accepted as under the agreement dated 31 March 1984 certain contingencies were provided and rights have accrued to the respondents. Any deviation therefrom will directly affect the respondents. Though additional substantial question of law was handed over regarding the implied authority of a developer, it was not pressed during the hearing. In any case, the appellants could not have done so since this would require pleadings.

12. The learned Counsel also submitted that implications of clause 10 of the agreement dated 8 December 1984 that no

construction will be carried out in open space has not been considered by the appellate Court. Relief of injunction is sought on the basis of this clause. The appellant has not come forth with a case that the open space is a common amenity and as a flat holder he has an interest in it and being a public amenity there should be no construction. The argument is purely based on the agreement. Once it is held that the developer had authority to introduce such covenant the argument based on this clause also must fail and has rightly been rejected.

13. Mr. Diniz also submitted that appellants will have proportionate right to the plots where the building is constructed. This proportionate right is not denied by the respondents, but what is pointed out by them is that the right will arise when the entire construction will be completed. On the basis of this right flowing from the agreement executed with the developer, the appellants cannot seek to restrain the respondents and seek order of demolition. In view of this position no fault can be found with the finding of the appellate Court that the appellants were not entitled to any relief and that suit deserves to be dismissed. No substantial questions of law arise in this appeal. The appeal is accordingly dismissed.

14. Mr. Diniz submitted that if the appeal is dismissed it will give a free charter to the respondents to carry out construction in any manner they like, in violation of building permissions and other laws. This apprehension is unwarranted. Merely because the suit of the appellants seeking to enforce their

rights based on agreement dated 8 December 1984 is dismissed that does not mean that the Court has granted liberty to the respondents to carry out construction in violation of rules and regulations. Such position is inherent and is needless to be restated.

N.M. JAMDAR, J.

NH/-