

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 82 OF 2013

1. M/s. Dharti Constructions
A Proprietorship concern with
Vipin Ramchandra Rivankar,
Proprietor, Shop no. 7, Star Video Centre,
Kamat Complex, Station Road,
Margao, Goa.
2. Shri Vipin Ramchandra Rivankar,
Aged about 53 years Proprietors Shop no.7,
Star Video Centre,
Kamat Complex, Station Road,
Margao, Salcete, Goa.

..... Appellants
Original Plaintiffs

V e r s u s

1. Joao Ataide C. V. Colaco
Major of age, Indian National
Aged about 58 years, Resident of
Flat no. C-6, Third Floor
Sundew Apts., Near Cine Vishant
Aquem, Margao, Goa.
2. Doris S. T. Colaco
Major of age, aged about 50 years
resident of
Flat no. C-6, Third Floor
Sundew Apts, Near Cine Vishant,
Aquem, Margao, Goa.

Corrections carried
Out as per Order dated
25.08.2016, passed in
MCA no. 409/2016.

..... Respondents
Original Defendants

Mr. Mario J. Pinto Almeida, Advocate for the Appellants- Original Plaintiffs.
Mr. Sudesh Usgaonkar and Ms. Marie Rosette Pereira, Advocates for the
Respondents-Original Defendants.

Coram:- K. L. WADANE, J.

Date of reserving Order :- 21.01.2016
Date of pronouncement of Order :- 28.01.2016

ORDER

Heard Mr. Almeida, learned Counsel appearing for the Appellants and

Shri Sudesh Usgaonkar, learned Counsel appearing for the Respondents.

2. This Appeal is directed against the Judgment and Order passed by the learned Adhoc District Judge-2, FTC-II, South Goa, Margao, in Regular Civil Appeal no. 84 of 2012 dated 18.02.2013, by which the Appeal of the Original Plaintiffs is dismissed. Therefore, the present Appeal.

3. The brief facts of the case may be stated as follows :

That the Plaintiffs-Appellants-prospective purchasers, filed a suit for specific performance, declaration and permanent injunction with respect to the Agreement dated 10.07.2000 executed by the Defendants-Respondents regarding plot no. 2, chalta no. 53 of PT Sheet no. 79 admeasuring 1182 square metres for total consideration of Rs.16,50,000/- out of which Rs.10,00,000/- were to be paid in cash within a time stipulated/mentioned in the Agreement for sale and Rs.6,50,000/- were to be paid in the form of kind i.e. by delivering flat admeasuring 84 square metres to be constructed within 24 months. According to the Plaintiffs, the Defendants have paid the amount of cash but not within the time agreed between the parties. It is undisputed fact that pending the conveyance of the said property, the Defendants have permitted the Plaintiffs to develop the said property by constructing thereon multi-storeyed building subject to obtaining of the approved plans and the construction licence and from the date of handing over the possession of the said property, the Defendants shall permit the purchaser to enter into the said property and occupy the same for the purpose of carrying out development and construction work and the work of construction and transfer of

premises constructed would be entirely at the risk, costs and responsibility of the Plaintiffs. The Plaintiffs were also entitled to enter into Agreements for Sale in respect of the flats and other premises in the proposed building to be constructed with proportionate rights in the said property on such price and, on such terms and conditions, as the Plaintiffs may deem fit and in the event the Plaintiffs delay the payment of installments of cash consideration, the amount due shall be payable with 18% interest per annum and either parties of the Agreement shall be entitled for specific performance of the Agreement.

4. Reading the rival contentions of both the sides, it appears that the disputed question between the parties is as to whether the Agreement dated 10.07.2000 is an Agreement for Sale or Agreement where the party has purely commercial interest and, therefore, it cannot be specifically performed. The learned Trial Court has dismissed the suit holding that the Plaintiffs have a commercial interest in the said property. Therefore, such Agreement for sale is not enforceable. In the Appeal, the same view is taken by the First Appellate Court and the Appeal came to be dismissed. Hence, the Second Appeal.

5. I have heard the arguments of Shri Almeida, learned Counsel appearing for the Appellants-Plaintiffs and Shri Sudesh Usgaonkar, learned Counsel appearing for the Respondents-Defendants.

6. During the course of arguments, Shri Almeida, learned Counsel appearing for the Appellant-Plaintiffs argued that the evidence adduced on behalf of

the Plaintiffs-Appellants is sufficient to hold that the Agreement is an Agreement for Sale and the Plaintiff has no commercial interest in the property which is subject matter of the Agreement of sale.

7. As against this, Mr. Sudesh Usgaonkar, learned Counsel appearing for the Respondents, has argued that the Plaintiffs have a commercial interest in the property which is subject matter of the Agreement for Sale. By referring the contents of the Agreement for Sale and certain admission given by the Plaintiffs, Mr. Sudesh Usgaonkar, learned Counsel appearing for the Respondents, has argued that the subject construction is of a Multi-storeyed building consisting of shops and flats which cannot be said that the Plaintiffs are constructing the same for personal use and occupation. The nature of construction, its quantity and number of the shops and flats, it cannot be said that the Plaintiffs are going to construct multi-storeyed buildings for their own use and occupation. To consider whether the Plaintiffs have a commercial interest or otherwise, it is material to note the contents of the Agreement for Sale wherein at page 5 of the Agreement it is agreed between the parties as follows :

“AND WHEREAS, considering the aforesaid representations of the PROSPECTIVE VENDORS and placing reliance upon the same and after ascertaining the truthfulness in such representations, the PROSPECTIVE PURCHASER has agreed to purchase the said property for the purpose of development by constructing multi storeyed building/s thereon, consisting of shops and residential flats to be disposed off on ownership basis or in any other manner deemed fit by the

PROSPECTIVE PURCHASER in his sole discretion.”

8. In the background of the above contents, now it is necessary to refer certain admissions given by the Plaintiffs during his cross examination. Pw.1/Vipin, initially tried to make out the case that he had personal interest to purchase the suit property. He has stated in the cross examination, the said Agreement was executed by the Defendants for the purpose of constructing his own residential house and not for the purpose of constructing a multi storeyed building therein and selling the premises in such building and that the house which he intended to construct for himself in the said plot was also to be multi storeyed for accommodation of his family and family of his sister, cousin brother and mother. However, he admitted that he had read the Agreement and that it is for the purpose of development by constructing a multi storeyed building thereon consisting of shops and residential flats to be disposed of on ownership basis. Thus, from the contents of the above mentioned Agreement and the admission given by the Plaintiff that refer to the nature of the construction, it appears that the Agreement was entered by the Plaintiffs and the Defendants with commercial interest and, therefore, the said Agreement cannot be specifically enforced under Section 20 of the Specific Relief Act, 1963, as rightly pointed out by Mr. Sudesh Usgaonkar, learned Counsel appearing for the Respondents-Defendants.

9. To support the above view, it is useful to quote certain observations in the case reported in **2000(3) Mh. L. J. 131** in the case of **Gurudev Developers vs. Kurla Konkan Niwas Co-op. Hsg. Society**, in which it is observed at para 6 thus :

“6. Counsel for the defendant has brought to my notice

another judgment of this Court in which the same view has been reiterated (given in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1986). Therein again a similar view has been taken and held that such a development agreement cannot be said to be an agreement to sell nor an agreement to lease. It has been held that it is simply an agreement to develop the property belonging to the defendants on certain terms and conditions. Thus it has been held that such an agreement cannot be specifically enforced. This judgment of the learned Single Judge has been upheld in appeal being Appeal No. 285 of 1988 Date of Decision : 7th March, 1988. The Division Bench has observed as follows:

“In essence the suit agreement is a development agreement where the aim of the professional builder/contractor (appellant) is to make a profit by completing building and selling the flats at a profit.

A breach of such an agreement can be compensated by way of damages. Merely because a temple and a guest house for devotees were also to be constructed within the plot, makes no difference to the essence of the development agreement. While we applaud the pious zest of the professional builder-contractor in seeking to ameliorate the spirits and material comforts of the devotees, the essence of the contract still remains a building contract entered into with the aim of making profits by the expedient of constructing the building and selling the flats at a profit. We agree with the learned Single Judge that damages for breach of such a contract would be the adequate remedy.

Appeal dismissed.”

The Division Bench judgment has been followed by a Single Judge Bench in Notice of Motion No. 763 of 1989 in Suit No. 844 of 1989 on February 8, 1991. Therein also the parties were entered into an agreement which was very similar to the agreement in the present suit. The learned Judge after considering the characteristics of the agreement has held:

“The plaintiffs are professional builders/contractors and their aim in entering into the suit agreement was to make profit by completing building and selling the flats therein. Breach of such an agreement can be compensated by way of damages. No interests in land has been created by the defendants in favour of the plaintiffs under the said agreement.”

Argument of the Counsel that an interest in the land had been created by the defendants in favour of the plaintiffs, because the defendants had under the agreement agreed to sell to the plaintiffs the entire second floor of the building to be constructed and one shop also, was rejected. The learned Judge held:

“I am afraid it is not possible to accept this contention. It is correct that under this clause the defendants have agreed to give and allot to the plaintiffs the premises mentioned in sub-clauses (a) and (b) thereof. However, this is nothing but mode of remunerating the plaintiffs for the services of construction of the building which the plaintiffs have agreed to render to the defendants under the said agreement.”

Relying on the aforesaid Division Bench judgment the learned Judge has further held:

“I am supported in my view to the effect that the suit for specific performance of development agreement is not maintainable by an unreported judgment of the Division Bench of this Court in Appeal No. 285 of 1988 in Notice of Motion No. 76 of 1987 in Suit No. 3419 of 1996 being the judgment of Lentin and Sujata Manohar, JJ. dated 7th March, 1988.”

10. Mr. Sudesh Usgaonkar, learned Counsel appearing for the Respondents-Defendants has further relied upon **Mr. Joe Mathias vs. Mr. Cajetan**

S. Cordeiro & Ors. reported in **1997(1) Goa L. T. 22**, at para 9 thus :

“9. On the other hand, learned Senior Counsel Shri V. B. Nadkarni, has urged that the predominant intention behind the Agreement dated 07.10.86 is only development of property and the plaint also shows that the emphasis is on the developmental activity and in the circumstances of the same, it cannot be said that the findings of the Trial Court that the Appellant's interest was purely commercial interest can be said to be perverse. In this respect he further contended after relying upon sections 20 and 41 of the Specific Relief Act, that the relief of specific performance is discretionary in nature and the conduct of the appellant disentitles him to assistance of the Court. Learned Senior Counsel for Respondent no. 2 has relied upon *S. P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others (AIR 1994 SC 853)*.”

11. Looking to the observations of the above cited cases, it appears that when there is a commercial interest in reference to the Agreement for Sale between the parties, then such Agreement for Sale is not enforceable, since the power of the Court to grant the relief of specific performance is a discretionary power. Here, in the present case, it has been established by the evidence that the Plaintiffs have commercial interest due to the transaction entered between the parties by way of Agreement for Sale.

12. I have gone through the reasons/observations recorded by the learned Trial Court as well as the First Appellate Court. Both of them by giving

cogent reasons, have dismissed the suit as well as Appeal respectively.

13. Hence, there is no substance in the Appeal, therefore, it is dismissed with no Order as to costs.

K. L. WADANE, J.

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