

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.72 OF 2015

SHRI.UMAKANT SHANTA NAGWEKAR
AND ANR.

..... APPELLANTS.

V/S

SHRI YESHWANT VINAYAK NAIK (EXPIRED)
THROUGH LRS. AND 3 ORS..

..... RESPONDENTS.

Shri Marvin D'Souza, Advocate for the appellants.

CORAM :- F.M. REIS, J.

Date : - 18th June, 2016.

P.C. :

Heard Shri Marvin D'Souza, learned Counsel appearing for the appellants.

2. The above appeal challenges the Judgments passed by the Courts below, whereby the appellants have been directed to deliver possession of Flat No.9 in the subject building put up by the appellants, for the respondents No.1 and 2, who are the owners of the property based, on the agreements executed between them.

3. Mr. Marvin D'Souza, learned Counsel appearing for the

appellants has vehemently argued two main contentions, assailing the findings of the Courts below. The first contention of the learned Counsel is that there is no specific pleading in the plaint, nor in the evidence of the respondents to show their readiness and willingness to perform their part of the agreement and, as such, as this mandatory requirement in terms of Section 16 of the Specific Relief Act has not been satisfied, the Courts below were not justified to grant the relief. The learned Counsel has taken me extensively through the Judgments of the Courts below to point out that there is no material to suggest that the respondents have shown their readiness and willingness to perform their part of the agreement. The learned Counsel points out that as this mandatory requirement has not been satisfied, the Courts below were not justified to grant the relief. It is further submitted that the extension of the agreement dated 20/2/1984 executed on 29/11/1986 has been executed by fraud and, as such, is not binding on the appellants herein. It is further pointed out that before receiving notice from the respondents to deliver the subject-flat, the appellants had already agreed to convey the flat No.9 on the Second Floor to the respondent/defendant No.3 in the said suit. It is further submitted that as the said flat is no longer in possession of the appellants, the question

of directing delivery of possession of such flat to the respondents No.1 and 2/plaintiffs in the suit would not arise at all. It is further submitted that as the respondents No.1 and 2 have not sought for termination of the agreement between the appellants and the respondents No.3 and 4, the suit itself is not maintainable and, as such, according to him, there are substantial questions of law which arise in the present appeal for consideration. The learned Counsel has, thereafter, extensively gone through agreements to point out that there are some corrections in the agreements, which were not authorised by the appellants which according to him itself suggests a fraud committed by the respondents No.1 and 2 on the appellants to execute such agreement. The learned Counsel has, thereafter, taken me through the Judgment of the learned Trial Judge, as well as of the Lower Appellate Court to point out that both the Courts below have not at all examined this crucial aspect while proceeding to decree the suit. The learned Counsel, as such, submits that there are substantial questions of law for consideration in the present appeal.

4. I have duly considered the submissions of the learned Counsel and I have also gone through the records. With regard to the first

contention of Shri D'Souza, learned Counsel appearing for the appellants that there are no averments in the plaint filed by the respondents No.1 and 2 to show their readiness and willingness to perform their part of the contract, I find that such contention has no substance. A plain reading of para 12 of the plaint discloses that there are specific averments to the effect that the respondents No.1 and 2/plaintiffs in the suit were ready and willing to perform their part of the contract by paying the sum of Rs.2,500/- per sq metre towards the costs of the extra area. The learned Trial Judge has also noted that in the affidavit filed by the respondents No.1 and 2, there is a specific averment with that regard which, itself, would disclose the readiness and willingness of the respondents No.1 and 2 to perform their part of the contract. In such circumstances, the contention of Shri D'Souza, learned Counsel appearing for the appellants that on this count, there is a substantial question of law which arises in the present appeal, cannot be accepted.

5. Shri D'Souza, learned Counsel appearing for the appellants when asked to point out the particulars of the alleged fraud, if at all pleaded in the written statement, it is submitted that though such

particulars are not found therein, nevertheless, there is a specific averment that the subsequent agreement executed on 29/11/1986 is null and void. Order VI, Rule 4 of the Civil Procedure Code clearly provides that when fraud is sought to be contended by a party, particulars thereof have to be furnished. As no particulars on that count are found in the pleadings of the appellants, the question of claiming the aspect of fraud in the present second appeal cannot be considered based on inferences from the pleadings and the evidence on record which would require reappreciation of the material on record.

6. Be that as it may, on perusal of the Judgments of the learned Trial Judge, as well as of the learned Lower Appellate Court, it is seen that both the Courts below have concurrently come to the conclusion that the respondents No.1 and 2 are entitled for the specific performance of the contract.

7. The main contention of the learned Counsel appearing for the appellants is that as the appellants have already agreed to sell the said flat to the defendant No.3/respondent No.3, the question of directing delivery of possession of such premises would not arise. In the present

case, both the Courts below have noted that as far as respondent No.3 is concerned, the flat which was agreed to be sold is Flat No.6 in the subject building. The learned Judge has also noted that the whole expedient act on the part of the appellants is a mischievous exercise, carried out only to try to delay and defeat the legitimate claim of the respondents No.1 and 2 to the Flat No.9 in the subject-building. In such circumstances, the contention of the learned Counsel appearing for the appellants, on that count, cannot be accepted.

8. Apart from that, the respondents No.3 and 4, who are defendants No.3 and 4 in the suit, have chosen not to challenge the Judgment passed by the learned Trial Judge. The relief granted in the suit is also directing the respondents No.3 and 4 to deliver possession of the subject flat to the respondents No.1 and 2 herein. In such circumstances, the relief granted as against respondents No.3 and 4 has attained finality.

9. The learned Judge, whilst passing the impugned Judgment, has also noted that though it is contended by the appellants that the whole area of the subject property was agreed to be exchanged for the

consideration of two flats on the ground floor, nevertheless, the learned Judge found that such consideration was only for constructing the ground floor plus first floor. It appears that the appellants were thereafter permitted to put up the second floor and in consideration thereof the appellants had agreed to deliver a flat of 50 sq. metres as consideration for putting up the second floor. Though it is contended by Shri D'Souza, learned Counsel appearing for the appellants that the two floors were constructed based on the permissions issued by the Statutory Authorities, I find that the learned Judge has also noted that the Statutory Authorities had even issued a show cause notice to the respondents No.1 and 2 as to how the second floor was being put up without obtaining the requisite permissions from such authorities. This itself suggests that the permissions for putting up the subject-building was initially restricted to ground floor plus one floor, and the second floor was added thereafter, on account of which the appellants had agreed to deliver the flat admeasuring 50 sq. metres being flat No.9 on the second floor of the subject building. The learned Trial Judge has also noted the date on the stamp paper of such agreement which was executed, to come to the conclusion that the contention that such agreement was executed based on undue influence or fraud deserves to

be rejected.

10. Apart from that, on a bare perusal of the agreement, I find that the rubber stamp of the partnership concerned of the appellants is also found thereon. In such circumstances, I find that there is no perversity in the finding of facts arrived at by the Courts below that the claim of the appellants that the said agreement was executed by fraud and undue influence, has no substance, which would call for interference by this Court under Section 100 of the Civil Procedure Code. Both the Courts below have minutely analysed the evidence on record to come to the conclusion that the respondents No.1 and 2 were entitled for the relief in the suit. There is nothing shown by the learned Counsel appearing for the appellants that such findings are rendered by misreading of evidence or by not considering crucial piece of evidence to come to any contrary finding.

11. On perusal of the Judgment of the learned Lower Appellate Court dated 6/2/2015, I find that on appreciating the evidence on record, learned Judge came to the conclusion that the respondents No.1 and 2/plaintiffs are ready and willing to perform their

part of the contract as per agreement of extension dated 29/11/1986 and, as such, entitled for the specific performance of the agreement. The learned Lower Appellate Court has held that it was for the appellant No.1 to specify the amount required to be deposited or paid by the respondents No.1 and 2 as per the rate agreed in clause 2 of the agreement. The learned Judge also found that the appellant No.1 had admitted that he had not pleaded any threat or coercion exercised by the respondents No.1 and 2/plaintiffs on him in the written statement. The learned Judge further noted that the extension of the agreement dated 20/2/1984 clearly provides that additional terms and conditions were added and agreed upon and the consideration fixed for transfer of Flat No.9 was the permission to construct one more storey to the building already constructed in the property of the respondents No.1 and 2/plaintiffs by the appellant No.1. The learned Judge further rejected the contention of the appellants that the readiness and willingness was not shown by the respondents/ plaintiffs. The learned Judge further found that the conduct of the appellants in connection with the transactions with the original defendant No.3 itself shows that some foul play by the appellants in not performing the contract that was executed with the respondents/ plaintiffs in 1986. Consequently,

the learned Lower Appellate Court dismissed the appeal preferred by the appellants. Even, on perusal of the Judgment of the learned Trial Judge, it is seen that the evidence of the parties has been scrutinized and appreciated whilst coming to the conclusion that the respondents/plaintiffs are entitled for a decree and, inter alia, to obtain vacant possession of the completed Flat No.9, on the second floor of the building. As already pointed out herein above, there is no perversity in the concurrent findings of fact arrived at by the Courts below.

12. The Apex Court in the Judgment reported in (2011) 15 SCC 247 in the case of **Jogendra Ram vs. Phullan Mian (dead) by LRs., and ors.** has observed at para 18, thus :

“18. We have heard Mr Amarendra Sharan, learned Senior Counsel appearing for the appellant-plaintiff and Mr Arindam Mukherjee, learned counsel appearing for the respondents/defendant-second party. Having given our anxious attention to the rival contentions, we find ourselves unable to sustain the decision rendered by the learned Single Judge of the High Court for the reasons as follows:

(a) In a second appeal, the Court can exercise jurisdiction only on the basis of substantial

question of law framed at the time of admission as held by this Court in *Dnyanoba Bhaurao Shemade v. Maroti Bhaurao Marnor* (1999) 2 SCC 471. But in the present case, the High Court framed more issues at the time of hearing without giving any opportunity to the parties to lead their respective evidence.

(b) The question whether the plaintiffs were always ready to perform their part of the contract and entitled for a decree for specific performance does not raise any question of law (refer: *Harjeet Singh v. Amrik Singh* (2005) 12 SCC 270), but such questions have been framed and concurrent finding of the trial court and the first appellate court has been reversed by the impugned judgment.

(c) The question whether a proceeding was collusive or not is essentially a question of fact, and it cannot be considered in a second appeal, as held by this Court in *Nagubai Ammal v. B. Shama Rao* AIR 1956 SC 593), but by the impugned judgment the learned Single Judge decided such questions though there was no such issue framed.

(d) In a second appeal the reappreciation of evidence and interference with the finding of fact ignoring the question of law is not permissible but such interference has been made by the impugned

judgment.”

Taking note of the said observations of the Apex Court, and in view of the concurrent finding of facts arrived at by the Courts below to the effect that the respondents/plaintiffs were always ready and willing to perform their part of the contract, I find that there are no substantial questions of law which arise in the present appeal for consideration under Section 100 of the Civil Procedure Code.

13. The appeal stands rejected accordingly.

F.M. REIS, J.

ssm.