

IN THE HIGH COURT OF BOMBAY AT GOA.

APPEAL FROM ORDER NO. 35 of 2016.

- 1 Shri Nabraj Alias Nagraj Anant Prabhu,
major r/o Alto Duler, Mapusa Goa.
- 2 Shri Vinayak Dattatraya Kamat,
Major resident of Dessai chawl
Ratnagiri Maharashtra State
- 3 Shri Shantaram D. Kamat,
Major resident of Dessai chawl
Ratnagiri Maharashtra State
- 4 Shri Vinayak Vassant Shanbag,
major, Resident of Near Congress
Bhavan, Ratnagiri, Maharashtra State.
- 5 Shri Narsinha Vasant Shanbag,
Major residing
Near Congress Bhavan, ... Appellants
Ratnagiri, Maharashtra State.

Appellants no.1, 2, 3, 4 and 5 are
represented by POA Yograj Narsimha
Shanbag residing at Hotel Sanyog,
Panaji, Goa aged 42 years.

Versus

- 1 The Goa Urban Cooperative Bank Ltd.
Head Office, Dr. A.B. Road,
Panaji Goa through their General
Manager and Secretary Vilas Mahadeo
Narkar Resident of Panaji Goa
- 2 Nizari Builders,
A partnership firm registered with the
Registrar of Firms,
Flat No.4, Bldg. No.A-5,
Karimabad Society,
Dayanand Bandodkar Marg,
Panaji Goa.
- 3 Shri Ashrafali Peermohamed Nizari,
major
Partner, M/s. Nizari Builders,
R/o Flat no.4 Bldg No.A-5,
Karimabad Society,
D.B. Road, Panaji, Goa.

- 4 Shri Amirali Peermohamed Nizari,
Major, Partner M/s. Nizari Builders,
R/o Flat no.4 Bldg No.A-5,
Karimabad Society,
D.B. Road, Panaji, Goa.
- 5 Smt. Edna Ribeiro Miranda E Souza,
Major, W/o Architect Bruno Dias Souza,
R/o Panaji Goa.
- 6 Shri Bruno Dia Souza,
Major, Architect, r/o Panaji Goa.
- 7 M/s. V.T. Harmalkar & Co.
Major, Registered partnership by
Managing Partner, V.T. Harmalkar,
Near Police Residential Qtrs, Altinho,
Panaji, Goa.
- 8 Shri Laxman P. Shirodkar, Major,
Portais, Mala Panaji Goa.
- 9 Mrs. Saritabai Shirodkar,
Major, Portais Mala, Panaji, Goa.
- 10 Shri Ratnakar R. Prabhu,
Major, C/o. Hotel Sanyog Nizari Bhavan
Panaji-Goa.
- 11 Ajit Madhav Kamat, Major
C/o. Hotel Sanyog Nizari Bhavan
Panaji-Goa. ... Respondents

Ms. A. Agni, Senior Advocate with Ms. A. Kamat, Advocate for the appellants.

Shri R. G. Ramani, Advocate for the respondent no.1.

CORAM : NUTAN D.SARDESSAI, J.

RESERVED ON : 4th August,2016.

PRONOUNCED ON : 22nd September,2016.

JUDGMENT:

Heard Ms. A. Agni, learned Senior Advocate for the appellant and Shri R.G. Ramani, learned Advocate for respondent

no.1.

2. Admit.

3. Shri R.G. Ramani, learned Advocate waives service on behalf of the respondent no.1.

4. The appellants have taken exception to the judgment and decree dated 25/04/2016 passed by the Adhoc District Judge-II Panaji, partly allowing the appeal filed by the respondent no.1 quashing and setting aside the judgment and decree passed in the suit dismissing it on merits after allowing the respondent no.1 to amend the plaint. Mrs. A. Agni, learned Senior Counsel came to be heard on behalf of the appellants who adverted to the Agreement dated 02/12/1982, the pleadings in the suit filed by the respondent no.1 and the plea carved in defence apart from the judgment of the High Court. Besides she adverted to the judgment passed by this Court in the Second Appeals No.24, 36 and 111 of 2010 where the learned Single Judge had clearly recorded a finding that the learned Lower Appellate Court had failed to examine the circumstance in which the specific performance of an Agreement could be granted against the subsequent purchaser in terms of Section 19(b) of the Specific Relief Act, 1963 and that there was failure by the learned

Judge to take note of the fact that as on the date of the disputed Agreement in favour of the respondent no.1 dated 02/12/1982, the plans of the proposed new construction and the area reserved by the plaintiff was not in accordance with the approved plan as on that date and ultimately allowed the appeals quashing and setting aside the judgment of the Lower Appellate Court, restoring the appeals to its file and directing the Lower Appellate Court to decide the appeals after hearing the parties in accordance with law as expeditiously as possible.

5. Ms. A. Agni, learned Senior Advocate also invited attention to the judgment passed by another single Judge of this Court in Writ Petition No.299 of 2015 between the same parties whereby the learned Judge had recorded the concession on behalf of the respondent no.1 after considering the contentions on behalf of the present appellants as the petitioners and held that the Lower Appellate Court should take up the application for remand alongwith the final hearing of the appeals on merits. She relied in **Zarif Ahmad (Dead) through Legal Representatives and another v/s. Mohd. Farooq** [(2015) 13 SCC 673] and **Hameed (Dead) by Lrs. And others v/s. Kummottummam Kunji P. P. Amma (dead) by Lrs. and others** [(2007) 15 SCC 155] and urged that the impugned order had to be set aside and the appeal had to be

decided on merits by the Lower Appellate Court.

6. Shri R. G. Ramani, learned Advocate for the respondent no.1 referred to Section 21 of Specific Relief Act,1963 and the amendment sought to the pleadings. The decree of the High Court was not sustainable. The appellants as the defendants had not taken any specific plea in defence that they were the purchasers in good faith and for consideration. There was no reason to interfere with the Appellate judgment and no prejudice would be caused to the appellants. He relied in **P. Purushottam Reddy and another v/s. Pratap Steels Ltd.**[(2002) 2 SCC 686] and concluded his arguments that the Appellate Court had correctly exercised its power and therefore no illegality was found in the impugned judgment as to justify interference in appeal.

7. Ms. A. Agni, learned Senior Counsel for the appellant in reply submitted that the appeal was not argued on merits by the respondents. A retrial was not necessary as held by the Appellate Court and the judgment on any premise was not sustainable.

8. **Zarif Ahmad** (supra) was an appeal which is against the judgment and order passed by the High Court of Judicature of Allahabad allowing the Second Appeal and restoring the decree

passed by the Civil Judge (Junior Division) Havali, Saharanpur. In the brief facts, the respondent had instituted a suit seeking permanent injunction against the appellant no.1 and another to restrain them from interfering with the possession of the premises in his occupation on the premise that the land shown at the foot of the plaint with distinct letters was owned and possessed by him and the adjoining land shown by the different sets of distinct letters was belonging to the defendants. It was also the plaintiff's case that he was paying the house tax with which the appellant -defendant had no concern. The defendant constructed their house over the land towards the south of the plaintiff's land and threatened the plaintiff that they would forcibly take possession of the premises held by him.

9. In **Zarif Ahmad** (supra), the defendants contested the suit denying the title and possession of the plaintiff over the land in the suit and took a specific plea that the disputed land originally belonged to one Zamindar of Town Behat before abolition of Zamindari and the vacant piece of land, occupied by the defendant no.1 who constructed his residence and planted trees. The defendants plea was that the plaintiff had been given his share in the house of his father in the ancestral property where he lived with his family and the plaintiff had got his name entered in the

municipal record in connivance with the Chairman and got the disputed property numbered in his name. The Trial court had framed the issues casting the burden on the plaintiff of his ownership and possession, whether the defendants were illegally interfering with his possession, whether the suit was barred by the provisions of Sections 38 and 41 of the Specific Relief Act and other issues.

10. In **Zarif Ahmad** (supra), the trial Court on hearing the parties and discussing the evidence decided all the issues in favour of the plaintiff and decreed the suit giving rise to the appeal at the instance of the appellant before the District Judge which allowed the appeal. The plaintiff challenged the judgment of the First Appellate Court before the High Court in the Second Appeal which set aside the order of the First Appellate Court and restored the decree passed by the High Court giving rise to the appeal by special leave at the instance of the defendants. It was contended on their behalf that the suit property was not identifiable and the First Appellate Court committed no error of law in dismissing the suit. Their Lordships further did not find force in the arguments that the land in the suit was non-identifiable. It was next contended that the decree passed by the Trial Court was liable to be set aside as it could not have been executed, which again did not find favour for

the reason that it had been a case of mandatory injunction requiring restoration of the possession of land to the plaintiff or demolition of the construction raised by the defendants, what the defendants could have been pleaded, could have been accepted but the present suit was for the relief of permanent prohibitory injunction in respect of the land described with the boundaries and its municipal number and therefore it could not be said that the decree passed by the trial Court is unexecutable.

11. In **Zarif Ahmad** (supra), Their Lordships held in their opinion that the High court had rightly held that the First Appellate Court had erred in law in dismissing the suit by holding that the land was not identifiable. The First Appellate Court had wrongly framed the additional issue as to whether the property in dispute is identifiable or not particularly when there was no such plea in the written statement and therefore they were in agreement with the High Court that there was no need on the part of the first appellate court to remit the matter to the trial Court as contented by the defendants before it to allow the parties to adduce evidence on the additional issue. In that backdrop Their Lordships further observed that no doubt, Section 107 of C.P.C. empowers the appellate Court to remand a case, but it simultaneously empowers the appellate Court to take additional evidence or to require such evidence to be

taken. Rule 24 Order XLI C.P.C. provided that where evidence on record was sufficient, the appellate Court may determine the case finally and it was not a healthy practice to remand a case to the trial Court unless it was necessary to do so as it makes the parties to wait for the final decision of a case for the period which is avoidable. Only in rare situations, should a case be remanded when the trial Court had disposed off a suit on a preliminary issue without recording evidence and giving its decision on the rest of the issues.

12. **Zarif Ahmad** (supra), considered the judgment in **P. Purushottam Reddy** (supra), where the trial Court did not dispose off the suit on the preliminary points but by recording the finding on all the issues. The High Court in its appellate judgment under appeal had recorded its finding on some of the issues, not preliminary and then framed three additional issues leaving them to be tried and decided by the trial Court. It was not a case where a retrial was considered necessary. Besides neither Rule 23 nor Rule 23A of Order XLI applied and none of the conditions contemplated by Rule 27 existed so as to justify the production of additional evidence by either party under that Rule. Even otherwise the question could have been gone into by the High Court and a finding could have been recorded on the available material inasmuch as the High court being the court of first appeal, all the questions of

fact and law arising before it in the case were open before it for consideration and decision.

13. **Hameed** (supra), was an appeal directed against the final order/ judgment passed by the High Court of Kerala, whereby the High Court, after setting aside the decree and judgment of the courts below, remanded the matter back to the trial court for reconsideration. In the brief facts the respondents had filed the suit for the recovery of possession on the strength of title of the plaint schedule property from the possession of the defendants no. 4 to 6 and for partition of the same among the tavazhi members and also for prohibitory injunction and damages. The appellant /defendants resisted the suit contending that the title and possession of the property was with them and if at all the title of the property was found to be with the plaintiffs, the same was lost by adverse possession and limitation. The Trial Court on a consideration of the evidence held that the respondents had failed to prove their title and the defendants, the appellants herein, were in continuous and uninterrupted possession of the suit property and dismissed the suit with costs to the contesting defendants and in appeal by the plaintiffs, the High Court remanded the matter back to the Trial Court for reconsideration.

14. In **Hameed** (supra), it was contended on behalf of the appellants that the High Court was not justified in remanding the matter back to the Trial Court for a reconsideration with liberty to adduce further evidence without entering into a finding that the judgment and decree were erroneous and without considering the case on merits, in view of Order XLI, Rule 23A of the Code of Civil Procedure. Quite on the contrary, it was contended on behalf of the respondents that the order of remand passed by the High Court was perfectly in order and that the High Court after satisfying that it was a case whereby the parties were given sufficient opportunity to adduce evidence, both documentary and oral, had remanded the matter and therefore no interference was called for with the judgment. Their Lordships found from the judgment passed by the Trial Court that apart from Exhibits A1 and A2 which were the copies of Adangal registers, no other documents were produced by the plaintiffs to show that they or their predecessors have got title to the plaint schedule property. That apart, the plaintiff was given sufficient opportunity to produce the documents. In spite of which no other documents were filed and in the circumstances, held that the High Court should not have remanded the matter with liberty to produce documents in order to fill lacuna in the evidence and set aside the order remitting the matter to the High Court for consideration of appeal before it on merits only on the materials

already on record.

15. In **P. Purshottam Reddy** (supra), the Trial Court had decreed the suit filed by the respondents for specific performance of the Agreement to sell against which the appellant had filed the First Appeal before the High Court. The High Court allowed the appeal setting aside the judgment and decree of the Trial Court and remanded the case after framing three additional issues to the Trial Court and therefore to decide the case afresh. Their lordships examined the legality and propriety of the order of remand made by the High Court and considered Rule 23A in Order XLI C.P.C. prior to its insertion by the C.P.C. Amendment Act 1976, there being only two provisions contemplating remand by the Court of Appeal under Order XLI C.P.C. and Rule 25 of C.P.C. Their Lordship observed that in the case at hand the High Court had not disposed off the suit upon a preliminary point. The suit was decided by recording the findings on all the issues. By its appellate judgment the High Court had recorded its findings on some of the issues not preliminary and then framed three additional issues leaving them to be tried and decided by the Trial Court. It was not a case where a retrial was considered necessary. Neither Rule 23 nor Rule 23(A) of Order XLI C.P.C was applicable. None of the conditions contemplated by Rule 27 existed so as to justify the production of additional evidence by

either party under that Rule. Hence the validity of the remand had to be tested by reference to Rule 25 and set aside the order of remand made by the High Court.

16. In the facts at large, the respondent no.1 had filed the suit for the relief of injunction and specific performance on the premise that the defendant no.1 the builders had given an undertaking to them to give on rental basis a built up area of the ground floor of the new building having a plinth area of 84.65 square metres i.e. 64.11 square metres on the ground and 20.45 square metres on the mezzanine floor and provide a direct access from the lane and an Agreement was accordingly entered into dated 02/12/1982. It was their case that the defendants no.1 to 3 had reserved only an area admeasuring 31 square metres and parted with the possession of a distinct area in favour of the defendants no.7, 8, 9 to 15 with the corresponding mezzanine area. The respondent no.1 therefore had sought for the recovery of an area of 29.54 square metres from the defendants no.6 to 15 alongwith the corresponding mezzanine area apart from carving a case that they were always ready and willing to perform their part of the contract dated 02/12/1982 pursuant to which the defendants were required to hand over the suit premises within a period of three years, commencing from 07/12/1982 and in default to pay to the

plaintiff a penalty at the rate of ₹50/- per day as liquidated damages.

17. The appellants had contested the proceedings denying the case set out by the respondent no.1 and carved a specific case that they were bonafide purchasers for consideration of the premises constructed by the original Defendant no.1 on the basis of a valid Agreement entered into with the builder and prayed for the dismissal of the suit. The Civil Court by its judgment dated 27/01/2006 had framed issues casting the burden on the respondent no.1-plaintiffs and answered them against the plaintiffs holding that the present appellants were not bound by the Agreement dated 02/12/1982 and that they were bonafide purchaser for consideration.

18. Ms. A Agni, learned Senior Advocate for the appellant also invited reference to the finding recorded by the trial Court vis-a-vis the plan produced by the plaintiffs at Exhibit-52 and his statement qua the area to be handed over pursuant to the Agreement dated 02/12/1982 and further finding of the trial Court that the said plan in question was not an approved plan. The trial Court for that matter had recorded her findings appropriately at the internal page 18 of the judgment that the plaintiffs had not taken

precaution of checking the approved plan before signing the Agreement and the endorsement of the liquidating damages on failure to deliver the possession. The learned Trial Court for that matter on assessment of all the evidence on record clearly concluded that the defendant nos.6 to 15 had established that they were the bonafide purchaser of the premises in the new building and which was seen from the evidence produced on record.

19. The learned Single Judge of this Court after hearing the Second Appeal of the present appellants had given a categorical finding on considering the case carved out by the parties that the learned Lower Appellate Court had failed to examine the circumstance in which the specific performance of an Agreement could be granted against the subsequent purchaser in terms of Section 19(b) of the Specific Relief Act, 1963. It was further observed that the learned Judge has failed to take note of the fact that as on the date of the disputed Agreement of the plaintiff, the plans of the proposed new construction were duly approved and the area reserved for the plaintiffs in terms of the said Agreement was not in accordance with the approved plan as on that date and in these circumstances the Lower Appellate Court would have to consider whether the Agreement in question could be specifically performed or not, considering that directing specific performance

would entail a revision of the construction plan approved by the Statutory Authorities.

20. A further observation was made by the learned Judge that the learned Lower Appellate Court had not at all examined the principles laid down to grant the relief in favour of the plaintiffs in terms of Sections 10, 14 and 16 of the Specific Relief Act. Therefore considering that specific performance is a discretionary relief, it was incumbent upon the learned Lower Appellate Court to examine all the aspects and consequences thereof while directing the specific performance of the Agreement. Finally the learned Single Judge observed that the Lower Appellate Court had not examined the contentions of Ms. A. Agni, learned Senior Counsel appearing for the appellants submits that they were bonafide purchasers and not aware about the Agreement in question while granting the relief of specific performance and therefore found it appropriate to quash and set aside the judgment passed by the Lower Appellate Court and remand the matter for deciding the appeals afresh.

21. In Writ Petition No.299 of 2015 involving the same parties, another learned Single Judge of this Court was seized with the petition filed by the present petitioner challenging the order

dated 9/12/2014 passed by the Appellate Court had allowed the plaintiff's application for amendment. The learned Single Judge had found that it was a second round of litigation between the same parties arising from the suit filed by the first respondent for specific performance which was partly decreed by the Trial Court and in an appeal, the suit came to be decreed in its entirety giving rise to the challenge in Second Appeal nos.24, 36, and 111 of 2010. The learned Single Judge observed that the matter had been remanded to the First Appellate Court by this Court in the Second Appeals. In that backdrop the learned Single Judge was seized of the fact that the original plaintiff had filed an application before the Appellate Court seeking a remand of the matter to the trial Court, considering the submission that it would be just and proper that the First Appellate Court takes up the application for remand alongwith the final hearing of the appeal on merits and directing the First Appellate Court to take up the application for remand filed by the first respondent / plaintiff alongwith the final hearing of the appeal on merits.

22. The learned Lower Appellate Court was seized of the fact that the Trial Court had partly decreed the suit in terms of prayer clause 6 permitting the respondent no.1 to take possession of the carpet area of 39.61 sq.mtrs. in the new building and consequently

entitled them to the liquidated damages on failure to comply. The Lower Appellate Court was equally seized of the Second appeal preferred by the appellant herein challenging the judgment of the Lower Appellate Court with direction to decide the appeal expeditiously on hearing the parties as also the direction of this Court to dispose off the appeal in accordance with law after examining all the aspects of the case. Despite this factual backdrop, the learned Lower Appellate Court formulated a point for determination whether the matter was required to be remanded to the learned Trial Court to decide it afresh in view of the amendments allowed to be carried out to the plaint.

23. The learned Lower Appellate Court observed that the issue raised by the appellants herein that they were bonafide purchasers of the premises in question was required to be decided on merits and took a view that in view of the amendment of the plaint, the respondent would be required to file their additional Written Statement, that additional issues would arise precipitating the additional evidence to be recorded by the Trial Court and in her opinion held that the judgment and decree was required to be quashed and set aside restoring the suit to the file and directing the trial Court to decide the suit on merits after allowing the plaintiffs to amend their plaint. This finding of the learned Lower Appellate Court

was partly in contempt of Order of this Court in Writ Petition No.299 of 2015 whereby it had been specifically directed the Lower Appellate Court to decide the application seeking the remand alongwith the appeal on merits. There was a clear direction of this Court in the Writ Petition to decide the application for remand alongwith the final hearing of the matter on merits and despite the direction in the Second Appeal, the learned Lower Appellate Court set aside the judgment and decree of the Trial Court without examining the merits of the case.

24. The learned Lower Appellate Court had not considered the fact that the appellants had argued the appeal on merits and despite the respondents requirement to argue on merits, the Appellate Court allowed the application for remand without considering the appeal on merits and remanded the matter to the Trial Court. No doubt the original plaintiff had sought for the relief of specific performance of the Agreement apart from the relief of injunction simplicitor originally as also for the claim for compensation for its breach. However, the learned Lower Appellate Court could not have acted contrary to the directions of this Court and remanded the file to the Trial Court for a decision afresh without examining the merits of the case. It was also presumptuous for the learned Lower Appellate Court to conclude

that a retrial was necessary merely because it had permitted the amendment of the pleadings. As rightly submitted by Ms. A. Agni, learned Senior Advocate for the appellant, the appeal in question is tenable and therefore i pass following :

O R D E R

The appeal is allowed and the impugned judgment dated 25/04/2016 remanding the matter is quashed and set aside with a direction to the First Appellate Court to hear the appeal afresh on merits. The parties are directed to appeal before the Lower Appellate Court on 7th October,2016 at 10.00 hrs.

NUTAN D. SARDESSAI,J.

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