

IN THE HIGH COURT OF BOMBAY AT GOA.**APPEAL FROM ORDER NO.32 OF 2015.**

1. Savia Melo Furtado e Barros
w/o late Servulo Barros, aged 55 years,
resident of Roldao Henriques Enclave Bldg.,
Behind Hiralal And Company,
Vasco da Gama, Goa.
 2. Vidatha Barros,
Daughter of late Servulo Barros,
Major of age,
And her husband,
 3. Amit Kenny,
Major of age,
Both residents of Forward Carrier
Consultancy, Grace Heritage,
Near Sharda Classic Restaurant,
Fatorda, Margao, Goa.
 4. Vrinda Barros,
Daughter of late Servulo Barros,
Major of age,
 5. Viveka Barros,
Daughter of late Servulo Barros,
Major of age,
Both residents of Roldao Henriques
Enclave Bldg., Behind Hiralal
and Company,
Vasco -da- Goa.
-Appellants.

Versus

1. Heritage Princes Real Estate Developers,
"Heritage Symphony" Building, 1st Floor,
B-101, Opposite Syndicate Bank,
Behind Silveira Super Market,
Caranzalem, Goa, By its Partners:
2. Mr. Paresh Madeva Pai,
Son of Mr. Madeva Pai,
Aged 44 years, married,
businessman, Indian National,
Resident of Miramar, Panaji-Goa.

3. Mr. Manoj T. Manwani
Son of late Mr. Tarachand Manwani,
Major of age, married,
Businessman, Indian National,
Resident of 20, Princess House 89-90,
Saket, Indore, Madhya Pradesh.Respondents.

Shri Shivan Desai, Advocate for the appellants.
Shri Sudin Usgaonkar, Senior Advocate with Ms. Vinita Palyekar,
Advocate for the respondents.

CORAM : NUTAN D. SARDESSAI, J.
RESERVED ON :15/04/2016.
PRONOUNCED ON :28/04/2016.

JUDGMENT:

Heard

2. Admit.
3. Ms. V. Palyekar, learned Counsel waives notice on behalf of the respondents.
4. This is an appeal at the instance of the original defendants assailing the order passed by the learned Adhoc Senior Judge, Mapusa dated 12/05/2015 pursuant to which she allowed the relief of temporary injunction in favour of the respondents/plaintiffs and secured them with the relief of injunction to restrain the appellants from interfering or trespassing the suit plot or alienating the suit plot or any portion thereof pending the final disposal of the suit. The defendant assailed the order on several grounds taken in the appeal memo which are not reproduced herein to avoid repetition.

5. Be that as it may, Shri Shivan Desai, learned Advocate for the appellants took me through the various documents including the Memorandum of Understanding("MOU" for short) dated 25.08.2010 and the pleadings to canvass a case that there were no pleadings on the readiness and willingness of the respondents expressed in terms of Section 16(c) of the Specific Relief Act, 1963. The conduct of the respondents was very much obvious inasmuch as there was no readiness and willingness on their part to perform their part of the agreement and yet the trial Court in its wisdom secured them with the relief of injunction assuming that the respondents were in possession of the suit property which was admittedly with the appellants and passed the order under challenge. He placed reliance in **Mst. Sugani Vs. Rameshwar Das & Anr.** [AIR 2006 2172] in support of his case for a reversal of the order under challenge.

6. Shri S.M. Usgaonkar, learned Senior counsel on behalf of the respondents placed reliance on the celebrated judgment in **Wander Ltd. and another Vs. Antox India P. Ltd.** [1990 (supp) SCC 727] to buttress a plea that this appeal being on principle, a reversal of the impugned order was not warranted unless the order under challenge was shown to be illegal, arbitrary and perverse on the face of it and by substituting its discretion for that exercised by the trial Court. He further relied in **Mohd. Mehtab Khan and others Vs. Khushnuma**

Ibrahim Khan and others [(2013) 9 SCC 321] which reiterated the principles culled out in **Wander limited** (supra), again took me through the MOU dated 25.8.2010 and the correspondence exchanged between the parties to canvass a case that the MOU was not terminated nor could it be unilaterally terminated and it was concluded between the parties. There was a contract in subsistence which was accepted by the appellants and in respect of which the learned trial Court had rightly taken such a view. There was no perversity in the impugned order and the appeal was liable for dismissal while relying in **Gaurishankar Govardhandas Todi Vs. Evershine Homes Pvt. Ltd., Mumbai and another** [2009(2) Mh.L.J.259] to wrap his argument.

7. Shri Shivan Desai in reply once again reiterated that no readiness and willingness was spelt out by the respondents to perform their part of contract and, therefore, their conduct was most relevant from the time of letter dated 17.5.2011 till two years later and, therefore, he was entitled to a reversal of the order.

8. i have considered their submissions at length, the records in the paper book, the judgments relied upon supra and in view thereof formulate points for determination and answer appropriately for the reasons recorded hereinafter.

POINTS FOR DETERMINATION

FINDINGS

- (i) Whether the learned trial Judge had misdirected himself in appreciating the pleadings on the aspect of the readiness and willingness of the respondents to perform their part of the agreement and in concluding that they had made out a prima facie case for the grant of injunction? Affirmative.
- (ii) Whether the learned Trial Court had misconstrued the case of the respondents qua the relief sought in the application and erred in securing them with equitable relief of injunction? Affirmative.
- (iii) Whether the impugned order suffers from the vice of illegality, perversity and arbitrariness justifying interference in the appeal? Affirmative
- (iv) What Order? ... As per the final order.

Points 1 to 3:-

9. i would first consider the judgments relied upon supra and in that backdrop appreciate the case carved out by the parties to decide

the appeal, either way.

10. In **Sugani** (supra), the Hon'ble Apex Court reiterated the basic principle behind Section 16(c) read with the Explanation (ii) being that any person seeking the benefit of the specific performance of contract must manifest that his conduct has been blemishless throughout entitling him for the specific relief. The provision imposes a personal bar and the Court is to grant the relief on the basis of the conduct of the person seeking the relief. If the pleadings manifest that the conduct of the plaintiff entitles him to get the relief on a perusal of the plaint, he should not be denied the relief. It further reiterated that Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish as a fact by evidence aliunde that he has always been ready and willing to perform his part of the contract.

11. In **N. P. Thirugnamam**(supra), the Hon'ble Apex Court reiterated the settled law that the remedy of specific performance is an equitable remedy and is in the discretion of the Court, which discretion is required to be exercised according to the settled principles of law and not arbitrarily as adumbrated under Section 20 of the Specific Relief Act, 1963. Under Section 20 of the said Act, the Court is not bound to grant the relief just because there was a valid agreement of sale. Section 16(c) of the Act envisages that the plaintiff must plead and prove that he has performed or has always been ready and willing

to perform the essential terms of the contract which are to be performed by him, other than those terms the performance of which has been prevented or waived by the defendant. The continuous readiness and willingness on the part of the plaintiff is a condition precedent to grant the relief of specific performance.

12. In **N. P. Thirugnamam** (supra), it was further held that this circumstance is material and relevant and is required to be considered by the Court while granting or refusing to grant the relief. If the plaintiff fails to either aver or prove the same, he must fail. To adjudge whether the plaintiff is ready and willing to perform his part of the contract, the Court must take into consideration the conduct of the plaintiff prior and subsequent to the filing of the suit alongwith the other attending circumstances. The amount of consideration which he has to pay to the defendant must of necessity be proved to be available. Right from the date of the execution till the date of the decree he must prove that he is ready and has always been ready and willing to perform his part of the contract. As stated, the factum of his readiness and willingness to perform his part of the contract is to be adjudged with reference to the conduct of the party and the attending circumstances. The Court may infer from the facts and circumstances whether the plaintiff was ready and was always ready and willing to perform his part of contract.

13. In **Hemant M. Deshmukh** (supra), this Court held that granting of specific performance is a discretionary relief and such discretion is to be exercised only if a party acts fairly. In the present case, the conduct of the appellants disclosed that they were delaying the execution of the Sale Deed by taking flimsy excuses. This conduct of the appellants itself disentitled them to any specific performance of the said contract. It considered the judgment in **Pushparani S. Sundaram & others Vs. Pauline Manomani James (Deceased) & others**, [2002 (9) S.C.C. 582], where the Apex Court had held that the plaintiff must aver and prove that either he has actually performed or that he was always ready and willing to perform his essential obligations under the contract. Merely filing a suit for specific performance and taking such a plea would not be a sufficient compliance of Section 16(c) of the said Act. This Court considering the judgment of the Apex Court and the records found that the appellants were not ready and willing to perform their part of the agreement in view of the breaches committed by them and accordingly answered the point for determination appropriately.

14. In the celebrated judgment of **M/s Gujarat Bottling Co. Ltd** (supra), the Hon'ble Apex Court observed that the object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in

his favour at the trial. The need for such protection has, however, to be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated. The Court must weigh one need against another and determine where the 'balance of convenience' lies. It considered the oft repeated principle in **Wander Ltd.**(supra).

15. In **M/s Gujarat Bottling** (supra), their Lordship of the Apex Court reiterated that under Order XXXIX of the CPC, the jurisdiction of the Court to interfere with an order of interlocutory or temporary injunction was purely equitable and, therefore, the Court, on being approached, will, apart from other considerations, also look to the conduct of the party invoking the jurisdiction of the Court, and may refuse to interfere unless his conduct was free from blame. Since the relief is wholly equitable in nature, the party invoking the jurisdiction of the Court has to show that he himself was not at fault and that he himself was not responsible for bringing about the state of things complained of and that he was not unfair or inequitable in his dealings with the party against whom he was seeking relief. His conduct should be fair and honest. These considerations will arise not only in respect of the person who seeks an order of injunction under Order XXXIX Rule 1 or Rule 2 of the Code of Civil Procedure, but also in respect of the party approaching the Court for vacating the ad-interim or temporary

injunction Order already granted in the pending suit or proceedings.

16. In **Dalpat Kumar** (supra), the Hon'ble Apex Court held that the exercise in the grant of injunction which is a discretionary relief is subject to the Court satisfying itself (i) there is a serious disputed question to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled for the relief asked by the plaintiff/defendant; (ii) the Court's interference is necessary to protect the party from the species of injury. In other words, irreparable injury or damage would ensue before the legal right would be established at trial; and (iii) that the comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than that would be likely to arise from granting it.

17. In **Bhawana Arbind Bapat** (supra), the learned Single Judge of this Court at Nagpur held what constitutes a prima facie case being a case which is reasonably arguable, which raises debatable and serious issues, which enables the plaintiff to say something in favour of the plaintiff and therefore, necessitates the matter to be proceeded to trial. It considered the Apex Court judgment in **Van Vibhag Karmachari Griha Nirman Sahakari Sanstha Maryadit Vs. Ramesh Chander and others**, [AIR 2011 SC 41] where the Hon'ble Apex Court held that when the prayer for specific performance is sought to be included in a suit initially only filed for permanent

injunction, the Court would have to consider whether the bar under Article 54 of the Limitation Act would come into picture or not.

18. In **Bhawana Arbind Bapat** (supra), the suit was initially filed in the year 1991 when the cause for seeking specific performance of contract had already arisen even then no prayer for specific performance was made. The prayer for specific performance of the contract was made about 11 years after the filing of the suit, therefore, the Hon'ble Apex court held that the amendment sought in that case could not relate back to the date of filing of the original plaint in view of the clear bar under Article 54 of the Limitation Act, apart from observing that the inclusion of the plea of specific performance of contract by way of amendment had virtually altered the character of the suit.

19. In **M. Gurudas** (supra), Their Lordships of the Apex Court considered the question which was of some importance required to be posed and answered was as to whether in a situation in a nature at large the plaintiff would be asked to furnish any security in the event of the dismissal of the suit in respect of any of the properties would the defendants be sufficiently compensated? This judgment was pressed into service by learned Advocate Shri Shivan Desai, to contend that if at all the plaintiffs were still to be secured with the order of injunction they had to be fastened with the liability to provide adequate security.

20. Coming to the facts of the case, it was the plaintiffs who had carved a case that they had agreed to purchase the plot from the defendant no.1 and her late husband for a total consideration of ₹6,10,00,000/- and an Agreement of Sale styled as a MOU dated 25.08.2010 was entered into between them spelling out the terms and conditions of the consideration and the mode of payments thereof with the Sale Deed to be executed on or before 20.12.2010. However, it was their case that they lacked the title in view of the judgment of this Court in **Gorakshwadi Shantinagar Vs. State of Goa, 2002(2) GLT 407**, and a cloud was raised on the title of the defendants. They had received a letter from the defendants dated 16.2.2011 to execute the Sale Deed to which they had replied with their letter dated 26.3.2011 and the plaintiffs were thereafter compelled to address a letter dated 17.5.2011 requesting the defendants to return the earnest money paid under the MOU.

21. There was no reply to the said letter nor the refund of any earnest money deposits thereby indicating that the agreement subsisted between them. They had made further payment of ₹10,00,000/- and offered to pay the balance consideration at the time of the execution of conveyance but the defendants had not replied thereby admitting the contents of the letter. The plaintiffs were ready and willing to perform their part of the agreement and continued to be

ready and willing and therefore, seeking the relief of a direction to the defendants to execute the Sale Deed or in the alternative to pay the damages towards the loss suffered and towards the earnest money deposits.

22. The defendants had raised preliminary objections to the maintainability of the suit claiming that there was no valid and subsisting right and no relief could be granted of the nature claimed by the plaintiffs. There was a suppression of the material facts and documents not entitling them to the equitable relief and besides the suit was barred by limitation. The defendant no.1 had learnt that the MOU was drawn between her late husband and the plaintiffs during his lifetime and that upon his death she had come across the MOU dated 25.8.2010 when she learnt for the first time that her late husband had entered into the MOU on his behalf and as her power of attorney in favour of the plaintiffs for the total consideration of ₹6,10,00,000/-. No power of attorney was executed by her in favour of her late husband and thus, the MOU was invalid and lacked legal sanctity. Nonetheless, she had agreed to abide by MOU and in that context had contacted the plaintiffs and had received an amount of ₹21,00,000/- in January, 2011.

23. It was her case that there was no response forthcoming from the plaintiffs and she was constrained to address a letter dated 16.2.2011 to the plaintiffs to execute the Sale Deed and that by the

letter dated 26.3.2011 she was informed that her late husband had agreed to sell the property admeasuring 9250 sq.mts inclusive of the road access. She had addressed another letter to the plaintiffs through Paresh Pai referring to the misstatement in the letter dated 26.3.2011 conveying that the plot area was 8550 sq.mts and not 9250/- sq. mts and that the road access admeasured only 320 sq. mts and not 700 sq. mts. She had received a communication from the plaintiffs that they had no clear and marketable title in the light of the judgment in **Gorakshwadi** (supra) and they were thus constrained to seek the termination of the agreement calling upon the defendants to return the earnest money. She had acknowledged the receipt of ₹75,00,000/- in cheque by her late husband and ₹21,00,000/- in cash by her in January,2011 but denied the plaintiffs' case that an amount of ₹54,00,000/- was paid in cash to her late husband.

24. She was making all efforts to return the entire amount. In the meantime and as late as July, 2013, the plaintiffs despite the termination of the MOU renewed their interest in completing their transaction and called upon her to complete the sale transaction within two weeks by tendering a further amount of ₹10,00,000/-. The MOU was inherently invalid and not binding on them. The plaintiffs had conveyed by their conduct and correspondences that they did not wish to proceed with the transaction and had terminated the MOU and therefore, could not seek the Specific Performance thereof. There was

no readiness and willingness on the part of the plaintiffs to execute the Sale Deed nor was there any legal agreement between them and therefore, the suit for the reliefs as prayed was liable for dismissal.

25. Section 16(c) of the Specific Relief Act, 1963 reads as:-

"Specific performance of a contract cannot be enforced in favour of a person---

(c), who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.

The explanation thereto reads:-

(i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the Court;

(ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction."

26. A bare reading of this provision would indicate that the person seeking the specific performance of a contract has to specifically aver and prove that he has performed or has always been ready and

willing to perform the essential terms of the contract unless he was prevented or waived by the defendants from doing so and otherwise no such relief can be granted in favour of a person. It has therefore, to be seen from the averments in the pleadings and the conduct of the plaintiffs whether they had shown readiness and willingness to perform their part of the contract so as to entitle them to the relief of injunction as prayed for. Without going into the merits or otherwise of the defence pleaded on the authority of the late husband of the defendant no.1 to execute the MOU also on her behalf, the question at large would be whether the plaintiffs have been able to show from their pleadings whether they had been ready and willing to perform their part of the agreement or that they have been otherwise prevented from performing their part of the agreement due to the conduct of the defendants.

27. Admittedly, as the records bear out, the defendants continued in possession of the suit property on which there was no serious dispute at the instance of the plaintiffs and therefore, there was no warrant or justification for the learned Trial Court to secure the plaintiff with the relief of injunction to restrain the defendants from interfering or trespassing in the suit property. That apart, i am also in agreement with the contention of Shri S. M. Usgaonkar, learned Senior Counsel for the plaintiffs that the MOU on its bare reading would show that it was a concluded contract between the parties overlooking the

objections on the purported power of attorney used by the late husband of the defendant no.1 on her behalf to enter into the said MOU being without any authority at her instance, she having later ratified the MOU by her conduct to correspond with the plaintiffs vide her letter dated 5.2.2011.

28. The defendant no.1 had otherwise conveyed her intention to perform her part of the agreement vide her letter dated 16.2.2011 while the plaintiffs by letter dated 26.3.2011 had raised the issue of access but nonetheless had conveyed their intention to proceed with the MOU. The defendant no.1 by her undated letter but referring to that of the plaintiffs dated 26.3.2011 had reiterated that the sale transaction had to be completed by 20.12.2010, that the access in terms of the MOU was only 320 sq. mts and not 700 sq. mts as claimed by the plaintiffs and to convey if the plaintiffs were ready to proceed with the matter on the execution of the Sale Deed on the new terms and conditions.

29. Quite on the contrary, the plaintiffs by letter dated 17.5.2011 adverted to the MOU dated 25.8.2010, the monies paid to the defendants thereunder, the cloud on their title in view of the provisions of the Goa Land Use (Regulation) Act, 1991 and conveyed their constraint to seek for a termination of the MOU and calling upon the defendants to return their advance and sign the Deed of

Termination of the MOU. Consequent, thereto there was no communication by the plaintiffs with the defendants, in any manner conveying their readiness and willingness to adhere to the MOU and therefore, to all intents and purposes, the intention of the plaintiffs was loud and clear that they did not wish to pursue the MOU.

30. It is by a sudden twist of events that the plaintiffs by the letter dated 19/7/2013 after a lapse of almost two years had a change of mind to convey to the defendants that they had not returned the advance paid under the MOU consequent to the termination thereof and conveying thereby the MOU was very much subsisting and to come ahead to comply therewith. The plaintiffs had also enclosed an amount of ₹10,00,000/- by cheque favouring the defendants assuring to pay the balance amount of ₹4,50,00,000/- which cheque had admittedly not been encashed by the defendants. Therefore, on an assessment of the correspondence exchanged between the parties, it could never be assumed that the plaintiffs were ready and willing to perform their part of the MOU when on their own showing there was nothing to indicate that they were ready and willing and always had been ready and willing to perform their part of the agreement. There was also no explanation at their instance to account for the volte-face, at one time terminating the MOU by their letter dated **17.5.2011** and almost two years later conveying to the defendants that the MOU still subsisted and they were willing to pay the balance amount.

31. There may appear force in the contention of Shri S. M. Usgaonkar, learned Senior Counsel on behalf of the plaintiffs to contend that there could be no unilateral termination of the contract in the absence of any communication by the defendants accepting the termination. However, this aspect alone does not buttress their case that they were always ready and willing to perform their part of the agreement. That apart, what was materially lost on the trial Court was that the defendants were admittedly in possession of the suit property and yet held that there was a prima facie case in favour of the plaintiffs and secured the plaintiffs with the relief of injunction when there was no final relief to protect the possession claimed in the suit. The learned Trial Court could not have granted a relief which was finally not prayed in the suit, the suit being for the relief of execution of the Sale Deed, in the alternative for damages and for the refund of money with interest thereon.

32. The learned Trial Court went off at a tangent in weighing the probability on the extent of the injury which would be suffered by the plaintiffs incapable of being compensated in terms of money when the plaintiffs had alternatively claimed damages apart from the specific performance of the MOU. There was no basis for the learned trial Court therefore to hold that the plaintiffs would suffer irreparable loss and injury in the circumstances and therefore, the impugned order is

fraught with illegalities and perversities writ large on the face of the record. Therefore, although there can be no dispute with the settled principle of law that the Appellate Court would not substitute its discretion for that exercised by the trial Court only because another view is possible as laid down in **Wander Ltd** (supra) nonetheless, this is a case which does justify interference with the impugned order as being manifestly perverse.

33. In the result, therefore, i pass the following:-

ORDER

- i The appeal is allowed.
- ii. The impugned order dated 12.5.2015 securing the plaintiffs with the relief of injunction is quashed and set aside.
- iii. The appellant shall deposit the amount of ₹1,50,00,000/- (Rupees one crore fifty lakhs only) within a period of eight weeks from today.
- iii. The appeal stands disposed off accordingly.

NUTAN D. SARDESSAI, J

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34. Ms. V. Palyekar, learned Advocate appearing for the respondents prayed for a stay of the appellate order which was

opposed by Shri Shivan Desai, learned Advocate appearing for the appellant.

35. Heard both the learned Counsels and stay granted of the operation of the appellate order by four weeks.

NUTAN D. SARDESSAI, J.

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