

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 72 OF 2013**

Maria Fatima @ Silo Silva Coelho,
72 years,
r/o H. No. 189/4,
Travaso de Magres,
Corte de Oitero,
Panaji Goa. Appellant

V e r s u s

1. Shri Vaman Narayan Kundaikar,
(since deceased) through his
legal representatives
1(a) Smt. Savita @ Shubhalaxmi V.
Kundaikar
1(b) Kum. Daksha V. Kundaikar,
1(c) Kum. Kirtitha V. Kundaikar,
1(d) Shri Devendra v. Kundaikar,
All of major age,
r/o H.No.189/224,
Corte de Oitero,
Panaji Goa. Respondents

Mr. Nigel Da Costa Frias, Advocate for the appellant.

Mr. S. S. Kantak, Senior Advocate with Mr. P. Talaulikar and Ms. Aleesha Dos Reis Falcao, Advocates for the respondents.

Coram:- F. M. REIS, J.

Date:- 28th April, 2017

ORAL JUDGMENT

Heard Mr. Nigel Da Costa Frias, learned counsel appearing for the appellant and Mr. S. S. Kantak, learned Senior Counsel appearing for the respondents.

2. The above appeal came to be admitted by an order dated 7th April, 2015 on the following substantial questions of law.

(1) Whether the suit of the respondents for specific performance of the agreement dated 11.12.1980 was barred by limitation ?

(2) Whether the agreement dated 11.12.1980 was unenforceable and void, its essential terms being uncertain as provided under Section 29 of the Indian Contract Act, 1872 ?

(3) Whether under the facts and circumstances of the case the Trial Court was justified in exercising its discretion and ordering specific performance of the contract ?

3. Briefly, it is the case of the appellant that the respondents instituted a suit bearing Special Civil Suit No. 147/1994 in the Court of the learned Civil Judge Senior Division, at

Panaji inter alia praying that the appellant be directed to specifically perform the agreement dated 11.12.1980 and the addendum/declaration dated 12.12.1980 and also to hand over the possession of the suit house to the respondents. It is the case of the respondents/original plaintiff in the suit that the appellant is the owner of a house property described in the Land Registration Office at Panaji under No.8271 of book B-22 New and registered in the revenue register (Matriz) under No. 224 and in the new survey records under Chalta No.85 of P.T. Sheet No.86 and that by an agreement dated 11.12.1980, the appellant/original defendant agreed to sell the suit property to the respondents for a total consideration of Rs.60,000/-. It is further the case of the respondents that he was a tenant in possession of a part of the house no.189(224) and that by a declaration dated 12.12.1980 the appellant agreed to give possession of other portion of the suit house which was occupied by another tenant to the respondents after the eviction of the said tenant. It is further their case that from the subsequent conduct of the appellant, it appears that the appellant was not willing to honour the two agreements and

claiming that the respondent has always been and is ready and willing to perform the part of his contract, the respondents filed a suit for specific performance. It is the case of the appellant that though the appellant has admitted that she is the owner of the suit property, it is contended that her son by name Alfred Antonio Rosario D'Souza is one of the co-owners of the suit property. It is further the case of the appellant/original defendant that she never agreed to sell the suit property to the respondents for a consideration of Rs.60,000/- and has raised a preliminary objection that the suit is void ab initio since the documents which the respondents relying are not legally valid documents but a nullity in the eyes of law. Accordingly, it was prayed that the suit be dismissed. The learned Trial Judge framed five issues and by judgment and decree dated 03.03.2011 the learned Judge directed the appellant to specifically perform the agreement of sale dated 11.12.1980 and to execute the sale deed in respect of the subject property.

4. Being aggrieved by the said judgment, the appellant preferred an appeal before the learned Lower Appellate Court which came to be dismissed. Being aggrieved by the said judgment, the appellant preferred the above Second Appeal which came to be admitted on the aforesaid substantial questions of law.

5. Mr. Nigel Da Costa Frias, learned counsel appearing for the appellant has pointed out that the agreement allegedly was executed in the year 1980 and the suit was filed in the year 1994 which is hopelessly barred by law of limitation. The learned counsel has thereafter taken me through the impugned judgment passed by the learned Judge and submitted that there is no material on record to show that the respondents were always ready and willing to perform their part of the contract. It is further submitted that the respondents have woken up after the eviction of the tenant which clearly shows that the respondents were not ready and willing to perform their part of the contract. The learned counsel further submitted that the execution of the agreement itself has been challenged and the terms of the alleged agreement clearly show that

they are one sided and cannot be of specific performance. The learned counsel further pointed out that granting of specific performance is a discretionary relief and as such the Courts below have erroneously exercised the discretion while granting specific performance. The learned counsel further pointed out that the learned Lower Appellate Court has erroneously dismissed the appeal filed by the appellant on untenable ground. It is further pointed out that the terms of the agreement were vague which clearly show that no specific performance can be granted. The learned counsel further submits that the Courts below have failed to consider that no discretion can be exercised to sell the property in the city of Panaji for a sum of Rs.60,000/-. The learned counsel further pointed out that the litigation to evict the other tenant lasted for more than 10 years and the appellant had substantially incurred expenses which clearly show that the claim on the basis of the agreement is suspicious. The learned counsel further submitted that the alleged addendum was not voluntarily executed by the appellant and as such the Court below were not justified to pass the impugned judgment.

6. On the other hand, Mr. S. S. Kantak, learned Senior Counsel appearing for the respondents has supported the impugned judgment. The learned Senior Counsel has pointed out that both the Courts below have concurrently found that the respondents are entitled for specific performance. The learned Senior Counsel further pointed out that all the ingredients as required for grant of specific performance have been duly satisfied by the respondents. It is further pointed out that the Courts below have discretion in granting specific performance which has been correctly exercised and on this ground the question of any interference in the present Second Appeal would not at all arise. The learned Senior Counsel further pointed out that merely because the price is faulty does not by itself disentitle the respondents from claiming specific performance. The learned Senior Counsel thereafter has taken me through the impugned judgments passed by the learned Trial Judge as well as the learned Lower Appellate Court to point out that the learned Judge has rightly examined the material on record to come to the conclusion that the respondents are entitled for specific performance. The learned Senior Counsel further pointed out that

the respondents have performed their part of the contract and on untenable ground claiming that the son is one of the co-owners of the subject property, the relief cannot be defeated. The learned Senior Counsel has thereafter taken me through the impugned judgment and pointed out that the Courts below have rightly decreed the suit for specific performance. The learned Senior Counsel as such submits that the appeal be accordingly rejected.

7. Before I proceed to deal with the rival contentions advanced by the learned counsel appearing for the appellant and the respondents, I will briefly record the findings of the learned Trial Judge. The learned Trial Judge by judgment dated 03.03.2011 and on the basis of the evidence on record and the pleadings of the parties had framed five issues. While dealing with issue no.1 as to whether the agreement was established, the learned Judge upon examining the material on record decided the issue in favour of the respondents herein. While dealing with the second issue as to whether the respondents have established that they are entitled for specific performance, the learned Judge found that the agreement

was executed in the year 1980 and the suit was filed in the year 1994 and that time was not an essence of the contract and as such the respondents were entitled for specific performance of agreement dated 11.12.1980. While dealing with the other issues framed in the suit, the learned Judge found that upon the death of the mother of the appellant/defendant, the suit property devolved solely upon the appellant and her son, if any, could not have inherited the property along with the defendant. The learned Judge as such found that the consent of Alfred Antonio Rosario D'Souza was not required for the purpose of the agreement. The learned Judge as such partly decreed the suit and directed specifically perform of the agreement of sale and to execute the sale deed in respect of the subject property.

8. On perusal of the judgment of the learned Lower Appellate Court, it is to be noted that the learned Lower Appellate Court vide judgment dated 12.02.2013 framed three points for determination. While dealing with the first point for determination, the learned Judge found upon appreciating the evidence on record that the appellant had entered into the agreement dated 11.12.1980.

While dealing with the second point for determination, the learned Judge found that the appellant had evicted one Kapadia who was residing in the suit house only in the year 1994 which according to the learned Judge was the date of the cause of action and as such the suit was within time. While dealing with the third point for determination, the learned Judge came to the conclusion that the respondents were entitled for specific performance as they are ready and willing to perform their part of the contract.

9. The suit filed by the respondent is essentially for specific performance of an agreement dated 11.12.1980 and addendum/declaration dated 12.12.1980 and a direction to the appellant to forthwith hand over possession of the portion of the suit property. The agreement was executed in the year 1980 whereas the suit was filed in the year 1994. In terms of the agreement, the sale deed had to be executed within a period of two months from the date of completion of all the legal documents by the appellant. The averments in the plaint disclose that the cause of action arose on 27.06.1994 when the other portion occupied by the trespasser had

fallen vacant. It is pleaded by the respondents that one Mr. Kapadia who was occupying the portion of the house was evicted by the appellant in the same year after the subject agreement. It is also pointed out that thereafter one Shahabuddin trespassed into such portion of the property. On perusal of the agreement and the addendum, there is nothing to show that such responsibility to evict the said trespasser was cast on the appellant herein. On the contrary, the agreement stipulates that the sale deed would be executed within two months after the legal documents were prepared. The agreement also provides that within one month all documents would be submitted to the respondents herein. There is nothing shown by the respondents that within such period of one month, any requisition was made by the respondents seeking any documents from the appellant herein. The appellant was residing in the same house on the upper floor. In such circumstances, the contention of the appellant that the suit is barred by limitation would have to be considered. Considering the view I propose to take in the above appeal, I find that the findings of the learned Judge that the suit is not barred by limitation would have to be

considered afresh in the context of the observations made herein above.

10. On perusal of the plaint and the pleadings of the respondents, one of the pleas required to get a relief of specific performance is that the plaintiff has to be ready and willing to perform his part of the contract. The readiness and willingness should be for the period from the time such agreement was executed. As pointed out herein above, the agreement itself shows that within one month, the appellant was supposed to hand over the documents to the respondents. There is nothing on record to show that the respondents ever reacted for non supply of such documents. Though there are averments in the plaint that the respondent was ready and willing to perform his part of the contract nevertheless, readiness and willingness cannot be treated as a strait jacket formula but has to be determined from the entire factual position and the circumstances relevant to show the intention and conduct of the party. The readiness and willingness to perform the performance of the contract is a condition precedent for obtaining a relief of

specific performance. The Apex Court in the judgment reported in **(2011) 1 SCC 429** in the case of ***J. P. Builders and another V/s A. Ramadas Rao and another***, has observed at paras 22, 25 and 27 thus :

“22. The words "ready" and "willing" imply that the person was prepared to carry out the terms of the contract. The distinction between "readiness" and "willingness" is that the former refers to financial capacity and the latter to the conduct of the plaintiff wanting performance. Generally, readiness is backed by willingness.

25. Section 16(c) of the Specific Relief Act, 1963 mandates "readiness and willingness" on the part of the plaintiff and it is a condition precedent for obtaining relief of grant of specific performance. It is also clear that in a suit for specific performance, the plaintiff must allege and prove a continuous "readiness and willingness" to perform the contract on his part from the date of the contract. The onus is on the plaintiff.

27. It is settled law that even in the absence of specific plea by the opposite party, it is the

mandate of the statute that plaintiff has to comply with Section 16(c) of the Specific Relief Act and when there is non-compliance with this statutory mandate, the Court is not bound to grant specific performance and is left with no other alternative but to dismiss the suit. It is also clear that readiness to perform must be established throughout the relevant points of time. "Readiness and willingness" to perform the part of the contract has to be determined/ascertained from the conduct of the parties."

11. In another judgment reported in *(2009) 17 SCC 27* in the case of *Azhar Sultana v/s B. Rajamani and others*, the Apex Court has observed at paras 21 and 28 thus :

"21. Execution of the agreement and/or genuineness thereof is not in question. The plaintiff indisputably in view of Section 16(c) of the Specific Relief Act, 1963 was required to make requisite averments that she had all along been and still is ready and willing to perform her part of the contract and also

establish the same. Shri Khanna in his written statement took a specific defence that as the property was in litigation, the plaintiff developed cold feet and did not evince any interest to complete the sale transaction by paying the balance of sale consideration. Even after selling the property, allegedly, the plaintiff's representative was asked to take back the amount of Rs.30,000/-.

28. Section 16(c) of the Specific Relief Act, 1963 postulates continuous readiness and willingness on the part of the plaintiff. It is a condition precedent for obtaining a relief of grant of specific performance of contract. The court, keeping in view the fact that it exercises a discretionary jurisdiction, would be entitled to take into consideration as to whether the suit had been filed within a reasonable time. What would be a reasonable time would, however, depend upon the facts and circumstances of each case. No hard and fast law can be laid down therefor. The conduct of the parties in this behalf would also assume significance.”

12. Taking note of the observations of the Apex Court, I shall now examine whether the Courts below have considered these predicates before coming to the conclusion that the respondents were entitled for specific performance of the contract. On perusal of the impugned judgments, I find that there is no discussion on this aspect by the Courts below. There is vagueness in the pleadings on the aspect of readiness and willingness from the date of the agreement executed in the year 1980 which would itself suggest that the Courts below have not considered this aspect while granting specific performance of the contract in the present case to convey the residential house of the appellant for a sum of Rs.60,000/-. It is contended by the respondents that the entire residential house of the appellant was intended to be conveyed to the respondents for a sum of Rs.60,000/-. What is amazing in such circumstances is that the respondent claimed that he is a tenant of a part of subject house and despite of the execution of the subject agreement, continued to pay rent to the appellant herein. Apart from that, the stand taken by the respondent that the deed of conveyance would be executed only after the tenant was evicted

from the subject premises is not found in written document produced by the respondents. On the contrary, the declaration which has been produced by the respondent itself suggests that what was agreed therein was to hand over possession of the remaining portion of the house occupied by one Kapadia on payment of compensation to the respondents. The said document was admittedly executed much after the subject agreement and as such it clearly shows that such declaration is not in consonance with the subject agreement executed in 1980 based on which the suit has been filed by the respondent. There is nothing produced on record to show that the appellant had taken the responsibility to evict the subsequent trespasser in such portion nor any supplementary agreement entered thereafter with the appellant which is pleaded or proved by the respondents to that effect. In the judgment of the Apex Court reported in **(2005) 7 SCC 60** in the case of ***Rajeshwari V/s Puran Indoria***, has observed at paras 4 and 5 thus :

“4. The right to specific performance of an agreement for sale of immovable property, when filed, raises questions of substantial

importance between the parties as to whether the plaintiff has satisfied the requirements of Section 16 of the Specific Relief Act, whether it is a case in which specific performance of the contract is enforceable in terms of Section 10, whether in terms of Section 20 of the Act, the discretion to decree specific performance should be exercised by the court and in some cases, whether the suit was barred by limitation and even if not, whether the plaintiff has been guilty of negligence or laches disentitling him to a decree for specific performance. These questions, by and large, may not be questions of law of general importance. But they cannot also be considered to be pure questions of fact based on an appreciation of the evidence in the case. They are questions which have to be adjudicated upon, in the context of the relevant provisions of the Specific Relief Act and the Limitation Act (if the questions of limitation is involved). Though, an order in exercise of discretion may not involve a substantial question of law, the question

whether a court could, in law, exercise a discretion at all for decreeing specific performance, could be a question of law that substantially affects the rights of parties in that suit. Therefore, in the case on hand, the High Court was not justified in dismissing the second appeal in the manner in which it has done. Be it noted, that the High Court has also not spoken while dismissing the second appeal. We are therefore of the view that it is necessary for the High Court to consider whether a substantial question of law is involved or not and to give its reasons for coming to its conclusion either way, and if it finds that a substantial question of law or substantial questions of law is or are involved, to frame that question or those questions and to answer it or them in accordance with law. In the context of the notice issued by this Court while entertaining the Petition for Special Leave to Appeal, the proper course to adopt is to set aside the judgment and decree of the High Court in the second appeal and remand the second appeal to the

High Court for a consideration of the question whether any substantial question of law is involved in the case in the light of the pleadings and the facts established and if it arises, to decide whether any interference in second appeal under Section 100 of the Code of Civil Procedure, 1908 is warranted or justified.

5. In view of the fact that we are remanding the second appeal for a proper decision by the High Court, we are not adverting to the contentions raised on behalf of the plaintiff-respondent that there is no question of limitation in this case and that no substantial question of law arose for decision. It is open to the plaintiff-respondent to raise all available contentions before the High Court, while that court considers the second appeal afresh pursuant to the remand. We once again clarify that this remand is based only on the argument that the High Court has not properly applied its mind to the aspects that may have to be considered in the second appeal and has dismissed the

second appeal in a cursory and unsatisfactory manner.”

13. Taking note of the said observations of the Apex Court, without going into the merits of the other contentions raised including the point of limitation, I find that as the Lower Appellate Court has failed to address itself to the predicate as stipulated in Section 16 read with Section 20 of the Specific Relief Act before granting the relief of specific performance whilst granting the relief of specific performance and in the interest of justice, it is appropriate to quash and set aside the judgment of the learned Lower Appellate Court and remand the matter to the learned Lower Appellate Court to decide the appeal preferred by the appellant afresh. The learned Lower Appellate Court would have to consider the well settled principle of law and the provisions as stipulated in the Specific Relief Act to show readiness and willingness of the respondents in continuously performing their part of the contract. I have not gone into detail on this aspect and as such the learned Lower Appellate Court would have to be considered on its own merits after hearing the parties in accordance with law.

14. In view of the above, I pass the following :

O R D E R

- (i) The appeal is partly allowed.
- (ii) The impugned judgment and decree dated 12.02.2013 passed by the learned Lower Appellate Court is quashed and set aside.
- (iii) Regular Civil Appeal No. 129 of 2011 is restored to the file of the learned Lower Appellate Court.
- (iv) The learned Lower Appellate Court is directed to decide the appeal afresh in the light of the observations made herein above after hearing the parties in accordance with law.
- (v) All contentions of the parties on merits are left open.
- (vi) The parties are directed to appear before the learned Lower Appellate Court on 04.09.2017 at 10.00 a.m.
- (vii) The appeal stands disposed of accordingly.

F. M. REIS, J.

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