

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 81 OF 2016**

Sharad Padwalkar,
C/o. Victorina Rodrigues,
Flat No. 119/1, Ground Floor,
Fondvem, Ribandar – Goa.

..... **Appellant.**

Versus

1) Santosh V. Shetye, alias
Santosh V. Xetio, major, bachelor,
businessman, Indian National,
Near Opp. “Eash Krupa” Building,
Near Gomantak Printing Press,
St. Inez, Panaji, Goa.

2) Govind Gholve,
major, married, businessman, and
his wife,

3) Mrs. Sunita Gholve,
major, housewife, both Indian Nationals,
and r/o. Flat No.G-3, Ground Floor,
“B” Kamat Arcade,
St. Inez, Panaji, Goa.

4) Subodh Kumar Yadav,
major, married,
businessman and his wife

5) Mrs. Kajal Subodh Kumar Yadar,
major, housewife, both Indian Nationals,
residing at do Albert D'Souza,
Bairo Bhat, Behind Church, St. Cruz, Goa.

..... **Respondents.**

Mr. J. P. Mulgaonkar, Advocate for the appellant.

Mr. S. Karpe, Advocate for the respondents No.2 and 3.

Mr. V. Pangam, Advocate for the respondents No.4 and 5.

CORAM :- F.M. REIS, J.

Date : - 17th February, 2017

ORAL JUDGMENT :-

Heard Mr. J. P. Mulgaonkar, learned Counsel appearing for the appellant, Mr. S. Karpe, learned Counsel appearing for the respondents No.2 and 3 and Mr. V. Pangam, learned Counsel appearing for the respondents No.4 and 5.

2. Admit, on the following substantial question of law.

Whether, the District Court misconstrued the amended pleadings in the plaint by failing to see that the relief for compensation was being sought in substitution of specific performance in the alternative only in case the Court decides the specific performance ought not to be granted and based on the findings given by the Court there was no warrant for deciding that specific performance ought not to be granted ?

3. Learned Counsel appearing for the respondents waive service. Heard forthwith, with the consent of the learned Counsel as it was indicated that the matter may be disposed of finally at the stage of admission.

4. The challenge in the above appeal is to the refusal of the relief for specific performance by the Lower Appellate Court. It is not in dispute that the property originally belonged to the respondent No.1 herein. It is the case of the appellant that the respondents No.2 and 3 and the respondents No.4 and 5 had, by an agreement of sale, agreed to jointly purchase the subject plot from the respondent No.1. It is further the case of the appellant that the original agreement was retained by the respondent No.1 and, as such, the original agreement, nor copy thereof was placed on record. It is further his case that the plot was agreed to be purchased at the rate of Rs.1500/- per sq. metre, having a total area of 800 sq. metres, bearing Survey No.4/2 of Village Panelim, Tiswadi Taluka. It is further the case of the appellant that the appellant had paid a sum of Rs.1,30,500/- being his share towards part consideration and an equal sum was paid by the respondents No.2 and 3 and by the respondents No.4 and 5. It is further contended by the

appellant that in breach of the understanding between the appellant, the respondents No.2 and 3 and the respondents No.4 and 5, the respondent No.1 executed a sale deed of the entire plot in favour of the respondents No.2 and 3 and the respondents No.4 and 5. It is further his case that when he learnt about the said sale deed, he filed the suit for specific performance of the agreement, *inter alia*, to cancel the sale deed and direct the respondent No.1 to execute a fresh sale deed in favour of the appellant. The respondents No.2 and 3 and respondents No.4 and 5 disputed the claim and pointed out that as the amounts were not paid within the time prescribed, the agreement was terminated and consequently, the respondent No.1 destroyed the said agreement. It is further the case of the respondents that thereafter as the appellant defaulted in payment of the amounts, the respondents No.1, the original owner of the plot, executed a sale deed in favour of the respondents No.2 and 3 and the respondents No.4 and 5. The learned Trial Judge, after framing issues and recording evidence, by Judgment and Decree dated 19th May, 2015 partly decreed the suit, directing the respondent No.1 to refund to the appellant the sum of Rs.1,30,500/-, along with interest at the rate of 9% p.a. Being aggrieved by the Judgment and Decree, the appellant preferred an appeal before the

Lower Appellate Court which came to be disposed of by a Judgment and Decree dated 20th April, 2016 whereby the appeal was partly allowed and the learned Judge, besides confirming the refund of the said sum of Rs.1,30,500/- along with interest at the rate of 9% p.m., directed the respondents to jointly and severally pay compensation of Rs.1,00,000/- to the appellant. Being aggrieved by the said Judgment and Decree, the appellant preferred the present appeal.

5. Mr. J. P. Mulgaonkar, learned Counsel appearing for the appellant has pointed out that the learned Lower Appellate Court, after coming to the conclusion that the appellant was entitled for specific performance of the agreement, was not justified to refuse the relief of specific performance and direct the payment of Rs.1,00,000/- as compensation to the appellant. The learned Counsel further submits that the learned Judge has misconstrued the provisions of Section 21 of the Specific Relief Act as merely because the appellant prayed for an alternate relief in lieu of specific performance, it was erroneously interpreted by the learned Judge that the appellant was entitled for payment of compensation. The learned Counsel further points out that the appellant was entitled for specific performance of the agreement

and according to him, the middle plot of the entire plot was reserved for the appellant which had to be conveyed by the respondent No.1 in favour of the appellant No.1. The learned Counsel further points out that in any event, the sum of Rs.1,00,000/- directed to be paid by the Lower Appellate Court as compensation is arbitrary and, as such, the impugned Judgment deserves to be quashed and set aside and the suit filed by the appellant for specific performance be decreed.

6. On the other hand, Mr. S. Karpe, learned Counsel appearing for the respondents No.2 and 3, has submitted that grant of specific performance is within the discretion of the Court and, as such, the learned Judge has rightly exercised discretion in refusing the relief of specific performance. The learned Counsel further points out that the learned Trial Judge, upon examining the financial status of the appellant, has come to the conclusion that the appellant was not ready and willing to perform his part of the contract, as the appellant did not have finance to make the payment. The learned Counsel further points out that the agreement executed was for 15 days and, as such, as there was default on the part of the appellant in contributing his share of contribution, the respondent No.1 was justified to terminate the

agreement and thereafter to enter into a fresh agreement with the respondents No.2 and 3 and the respondents No.4 and 5 by executing the disputed sale deed. The learned Counsel further points out that there are no substantial questions of law which arise for consideration in the present appeal and the one, as framed by this Court, be answered against the appellant as, according to him, the compensation awarded is justified.

7. Mr. Pangam, learned Counsel appearing for the respondents No.4 and 5 has adopted the contentions advanced by Mr. Karpe, learned Counsel appearing for the respondents No.2 and 3.

8. I have considered the submissions of the learned Counsel and I have also gone through the records. Section 20 of the Specific Relief Act, provides that grant of specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so. In the present case, the Lower Appellate Court, upon appreciating the evidence on record, has come to the conclusion that discretion cannot be exercised in granting specific performance in favour of the appellant. In fact, on perusal of the claim of the

appellant, I find that it is the contention of the appellant that the middle plot was reserved to be sold in favour of the appellant. This middle plot has not been identified by the appellant by any material on record. A crockie has not been admitted in evidence nor proved by the appellant showing such middle plot. Apart from that, the appellant himself has pleaded in the plaint that the question of severing a portion would not at all be practicable. In such circumstances, I find that the discretion exercised by the learned Courts below in refusing specific performance of the agreement cannot be faulted and, as such, the contention of the learned Counsel appearing for the appellant on that count cannot be accepted.

9. With regard to the claim of compensation, I find that the appellant, in the alternative, has prayed for compensation of Rs.3,00,000/- . The learned Trial Judge has directed refund of the sum of Rs.1,30,500/- with interest at the rate of 9% p.m.. In such circumstances, taking note that the Lower Appellate Court has come to the conclusion that the appellant was entitled for specific performance of the agreement and considering the overall facts and circumstances of the case, I find that the appellant is entitled for a sum of

Rs.3,00,000/- as compensation in lieu of grant of specific performance in terms of Section 21 of the Specific Relief Act. To that extent, the impugned Judgment deserves to be modified. The substantial question of law is answered accordingly.

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

ORDER

- (I) The appeal is partly allowed.
- (II) The impugned Judgment of the Lower Appellate Court dated 29th April, 2016 passed in Regular Civil Appeal No.74/2015 stands modified and besides the sum of Rs.1,30,500/- along with interest at the rate of 9% p.a. from 11/05/2006 till payment as awarded by the Lower Appellate Court, the respondents No.2 and 3 and the respondents No.4 and 5 are directed to pay to the appellant jointly and severally a sum of Rs.3,00,000/- as compensation within five months from today.
- (III) In case of default in payment of such amount, it will carry interest at the rate of 9% p.a.

from the date of the judgment until actual payment.

F.M. REIS, J.

ssm.