

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD

FIRST APPEAL NO. 1643 OF 2015

- | | |
|---|--|
| <ol style="list-style-type: none"> 1. Jagannath Madhavrao Chakrawar,
Age : 58 years, Occu : Business,
R/o Vitthal Niwas, Dilipsingh Colony,
Vazirabad, Nanded 2. Mr Sardar Gurdeepsingh Indersingh
Tailor, Age : 48 years, Occu: Business,
R/o in front of Udasi Math, Chikalwadi,
Nanded | <p>.. Appellants/
(Orig.
Plaintiffs)</p> |
|---|--|

versus

1. Smt. Suraiyabegum w/o Mohd. Rauf,
Age : 60 years, Occu: Nil, R/o 177-1,
Okhala Village, New Delhi – 110025
2. Shantilal s/o Bhagwandas Sisodiya,
Age : 75 years, Occu : Business,
R/o Plot no. 41-42, Ahinsa Nagar,
Aurangabad.
3. Mukesh Kumar Khhetmajal Jain,
aged : 45 years, Occu: Business,
R/o Sardar Road, Palod, Dist. Palod,
Chasttisgarh.
4. Virendra s/o Prakash Solunke,
Aged : 30 years, Occu: Business,
R/o Flat no. 803, Marval Ahoxita,
Lane No. 7, Koregaon Park,
Pune 411011
5. Mrs. Sheetal w/o Sales Katriya,
Aged : 35 years, Occu: Business,
R/o A.T. and P. O.Wambori, opp.
Jain Temple, Wambori, Tq. Rahuri,
Dist. Ahemdnagar.
6. Sushil s/o Raichand Bafana,
Aged : 40 years, occ: Business,
R/o B-159, Behind Hanuman Temple,
Waluj, M.I.D.C. More Chowk,
Bajaj Nagar, Aurangabad.
7. Anil s/o Shantilal Sisodiya,
aged : 37 years, Occu: Business,
R/o Plot no.41-42, Ahinsa Nagar,
Aurangabad.

8. Smt. Sureksha w/o Arvind Sisodia,
aged : 48 years, Occu: Business,
R/o Plot no.41-42, Ahinsa Nagar,
Aurangabad.
 9. Akshy s/o Arvind Sisodiya,
aged : 24 years, Occu: Business,
R/o Plot no.41-42, Ahinsa Nagar,
Aurangabad.
 10. Sow. Pratibha w/o Dharmendra
Shantilal Sisodiya, aged : 27 years,
Occu: Business, R/o Plot no.41-42,
Ahinsa Nagar, Aurangabad.
 11. Shripad s/o Sudhakar Bugdne,
aged : 40 years, occu : Business,
R/o Flat No.G-2, Maya Appartemnt,
Ahinsa Nagar, Aurangabad.
 12. Virendra s/o Prakash Solunke,
Aged : 30 years, occu: Business,
R/o Flat no. 803, Marval Ahoxita,
Lane No. 7, Koregaon Park,
Pune 411 011
 13. Sunita w/o Kukund Karpe,
Age : 45 years, Occu: Business,
R/o Sai Nagar, Saidhyan No. 1,
Room No. 5, Shirdi, Tq. Rahata,
dist. Ahmednagar.
 14. M/s Arvind Sisodiya Developers Pvt.Ltd.,
Through its Director, Dharmendra s/o
Shantilal Sisodiya, aged : 43 years,
Occu : Business, R/o Plot no. 41-42,
Ahinsa Nagar, Aurangabad.
 15. M/s Arvind Sisodiya Developers
Pvt. Ltd., Through its Director,
Anil s/o Shantilal Sisodiya,
aged : 43 years, Occu : Business,
R/o Plot no. 41-42, Ahinsa Nagar,
Aurangabad.
- .. Respondents /
Orig.Defendants

Mr A.G. Godhamgaonkar, Advocate for appellants

Mr S.V. Natu, Advocate for respondents no.2,5,6,8,9,10,11 and 13

CORAM : SUNIL P. DESHMUKH AND
S. M. GAVHANE, JJ

DATE : 27th November, 2018

ORAL JUDGMENT : (PER : SUNIL P. DESHMUKH, J.)

1. This first appeal is by plaintiffs in special civil suit bearing no.17 of 2012 for specific performance of contract dated 05-12-2017 which had been dismissed by the 7th joint civil judge, senior division, Aurangabad, on 25-04-2015.

2. In said suit, plaintiffs have pleaded to the effect that ;

There had been a previous litigation in the form of special civil suit no. 606 of 2010 for specific performance of the contract and the same had been withdrawn with the permission of the court with liberty to file fresh suit on the same cause of action.

Having regard to said previous litigation as per pleadings of parties, execution of agreement dated 05-12-2007, payment of ₹ 20,00,001/- by plaintiffs as earnest amount, total consideration being ₹ 3,00,00,001/- and balance payment of ₹ 2,80,00,000/- on or before 05-12-2008 is admitted position. Transaction between parties for purchase and sale is not in dispute. So is the case with regard to notices and responses thereto between the parties viz; notice dated 14-11-2008, and reply dated 19-11-2008, notice dated 14-10-2010 and reply dated 25-10-2010.

According to plaintiffs, in present suit, only controversy arising from admitted facts is whether reference to time for performance would constitute essence of contract, whether time is essence of contract and as to whether forfeiture of earnest amount on alleged failure is result of time as essence.

The plaintiffs have pleaded that time can never be essence of contract in the case of immovable properties and reference to time and forfeiture of earnest amount would *ipso facto* not make time as essence of contract.

Plaintiffs claim, intention of parties at the time of entering into agreement for sale and their conduct would play a prominent role in present matter. Various circumstances as have been referred to in the plaint, particularly in paragraph no. 5, may have to be taken into consideration and obligation about balance payment and eligibility to receive the amount would depend upon several factors referred to. The defendants had had been harping upon that the transaction of sale and purchase between the parties dated 05-12-2007 had been on "as is where is" basis. "

The plaintiffs, in paragraph 7 of the plaint, have averred :

" 7.,
but it remains a reality that the intention in the earlier suit of

readiness and willingness were there and further the plaintiffs submit they were and are ready to perform their part of the contract, pay the remaining consideration amount to the defendant or deposit the same in the court as per the directions of the court, they are ready and willing to bear the registration and the stamp duty expenses along with the readiness to have a conditional decree for specific performance of contract i.e. for execution of the sale deed and getting possession by evicting the tenants, by permission for sale even at their own cost. "

Paragraph 8 of the plaint reads as under :

" 8. All the facts stated in the plaint constitute the cause of action for the suit, which finally arose on 02.11.2010 when Special Civil Suit No.606/2010 is filed and when the court vide its order dated 10.11.2011 granted permission to file a fresh suit on the same cause of action. "

In paragraph 11 of the plaint, plaintiffs have averred to the effect :

" 11. Without prejudice to the above if for any technical reason the court comes to the conclusion that Specific Performance cannot be granted then the amount of ` 20,00,001/-be paid with interest @ 24% per annum from the date damages of Rs. 25,00,000/- for the loss caused to the plaintiffs not only of the property but also for utilizing the amount Rs.20,00,001/- of the plaintiffs by the defendant for more than 4 years and for future utilization of the amount by the defendant. "

3. The plaintiffs accordingly had approached the court for execution of sale deed and to put them in possession by directing defendants to obtain necessary permission under Tenancy Act and Ceiling Act and also sought directions to defendants to initiate necessary proceedings therefor and in case of failure by defendants, sale deed be executed through court. Plaintiffs had also sought injunction restraining defendants from creating third party interest in suit property including its sale. Alternatively, refund of ₹ 20,00,001/- with interest thereon at the rate of 24 per cent per annum from the date of suit till the amount is realized and ₹ 25,00,000/- as special damages, are sought.

4. Defendant no. 1 had put in her appearance in the suit through general power of attorney and had filed written statement.

Defendant has contended that all the facts and allegations in the suit stand denied by defendant as having been traversed, except to the extent of contents which have been specifically admitted. It is contended that the suit is vexatious, devoid of any merits and is abuse of process of law and that suit is with ulterior motive and has been filed suppressing facts and, as such, plaintiffs are not entitled to any equitable relief including that of specific performance.

The plaintiffs had approached her in Delhi after due verification of status of the property and thereupon had offered to

purchase the same, excluding the portion already sold by defendant, for a total consideration of rupees three crores.

5. Defendant refers to that the property had been agreed to be sold on "as is where is" basis. It is specifically contended that the plaintiffs were under obligation to pay to defendant a sum of ₹ 2,80,00,000/- on or before 05-12-2008 and it had been agreed that in case of failure of plaintiffs to pay balance amount within stipulated period, earnest amount received at her end would stand forfeited. It has also been referred to that interim injunction application filed by plaintiffs in earlier special civil suit bearing no. 606 of 2010 had been dismissed and appeal therefrom as well had been dismissed by the high court. She purports to claim that withdrawal of suit for want of appropriate pleadings for reliefs sought, is not proper reason to withdraw the suit and as such section 11 of the Code of Civil Procedure, 1908 ("CPC" for brevity) is attracted. Since, in earlier suit, Exhibit – 5 had been contested upto the high court, the same cannot be reopened by trial court. No notice had been served on defendant about application for withdrawal of suit. It is denied that plaintiffs were ready and willing to perform their part even after expiry of period of contract. The orders passed from time to time against the interest of the plaintiffs would operate as *res-judicata* between the parties and suit amounts to multiplicity of litigation. The jurisdiction of court as well has

been questioned, stating that the agreement had been entered into at Delhi and, as such, the trial court had no jurisdiction to deal with the matter. The cause of action as referred to by the plaintiffs is denied and, thus, dismissal of the suit has been sought.

6. It has been referred to by defendant no. 1 that the plaintiffs had handed over to her three demand drafts and had agreed to pay balance amount of ₹ 2,80,00,000/- to defendant no.1 on or before 05-12-2008 i.e. within twelve months and it had been agreed that in case plaintiffs fail to pay balance amount within stipulated period of 12 months i.e. on or before 05-12-2008, in that event earnest money of ₹ 20,00,000/- received by defendant would stand forfeited and further that in case the defendant failed to execute the document of sale in favour of the plaintiffs or their nominees within thirty days of receipt of full and final payment, then the plaintiffs shall have right to get sale deed executed through court by filing appropriate proceedings. It is submitted that agreement for sale had been binding on plaintiffs.

7. The plaintiffs are distorting the facts and circumstances which stand denied by the defendant. The agreement had already suffered adjudication.

8. Denying the claim of the plaintiffs that pleadings and contentions in earlier suit and present one are different, it has been contended by defendant that Order II, rule 2 of the CPC would

come into play and as such present suit for different relief would be barred, and also in view of section 11 of the CPC present suit is not sustainable.

9. It has been adverted to that the defendants had created third party interest in the property soon after expiry of period under the agreement and after orders had been passed on Exhibit – 5 and in appeal from order. It is contended that adjudication of Exhibit – 5 and appeal from order on the same had been on the ground that there was no cause of action for plaintiffs to file any proceedings and, as such, question of fresh proceedings does not arise.

10. Based on pleadings as aforesaid, following issues had been framed by trial court.

1. *Does time was essence of contract in the agreement between parties ?*
2. *Does plaintiff Nos. 1 and 2 prove their readiness and willingness ?*
3. *Does plaintiff Nos. 1 and 2 are entitled for specific performance of agreement to sale dated 05/07/2007 ?*
4. *Does plaintiff Nos. 1 and 2 are entitled for perpetual injunction ?*
5. *Does plaintiff Nos. are entitled for refund of earnest amount with interest, in alternative ?*
6. *Does suit in present form is maintainable ?*
7. *Does Court has jurisdiction to entertain and try the suit ?*
8. *What order and Decree ?*

11. It appears that the plaintiffs had led evidence through plaintiff no. 1 by filing his affidavit of examination – in – chief and

producing notice dated 14-10-2010, reply to it dated 25-10-2010 as well as agreement for sale dated 05-12-2007 and two *bharna pawatis* which were exhibited respectively as Exhibits 51, 52, 53, 54 and 55. An order of no cross examination by defendants came to be passed on 10-11-2014 since defendants and their advocate were absent and there was no re-examination of the plaintiff.

12. The plaintiffs had also examined a witness on agreement for sale, namely, Manzoor Ahmed s/o Bashir Ahmed. It appears, on the very day, a *pursis* had been filed by plaintiffs at Exhibit – 60 to the effect that they do not want to lead any further evidence.

13. In the judgment impugned under present first appeal, trial court had after narrating pleadings of the parties considered that issues no. 1 to 5 and 7 were redundant and went on to decide issue no.6 as to whether the suit in present form is maintainable, answering the same in the negative.

14. Learned judge has referred to that instant suit is for specific performance of contract dated 05-12-2007 and injunction restraining defendants. The plaintiffs have relied on pleadings of earlier special civil suit bearing no. 606 of 2010 and have filed on record certified copy of the same. Plaintiffs proceeded with present suit on the assumption of admitted position in earlier suit.

15. Since order VI of the CPC requires the plaintiff to plead material facts on which their claim is based, it is incumbent that plaintiffs make necessary averments whenever and wherever required. Trial court considered that the plaintiffs had failed to put forth entire facts before the court. Facts could not have been borrowed directly from earlier suit which had been withdrawn. Although present suit had been filed with liberty granted while allowing withdrawal of earlier suit yet, instant suit is in the form of corollary of earlier suit. Plaintiffs have put forth incomplete set of facts *vis-a-vis* reliefs claimed in present suit.

16. The court has considered that it was essential for the plaintiffs to re-affirm the facts in a straight manner since specific performance had been sought, however, that has not been done. Plaintiffs had not averred about execution of agreement dated 05-12-2007 by defendant no. 1. The defendant had created third party interest, even according to the plaintiffs and, as such, it was mandatory for them to have given sufficient details in respect of the same. A mere admission by defendant no. 1 in this respect would not bind other defendants and, therefore, it was essential for plaintiffs to plead and establish the same. Since pleadings of the plaintiffs are deficient and lacking coherence and alleged admission by defendant no. 1 in earlier suit of certain facts would not tantamount to reference to complete facts as required by law.

17. It appears to have been considered, pleadings of plaintiffs in present suit are not in accordance with principles or procedural aspects under the CPC. There are no assertions as required by law so as to maintain the suit in present form and thus trial court purportedly answered issue no. 6 in the negative.

18. The court further went on to consider that negative finding having been rendered on issue no.6, it would follow that issues no. 1 to 5 and 7 would not survive and, as such, observed that said issues have become redundant and had answered those accordingly. The trial court had, as such, dismissed the suit.

19. Mr Godhamgaonkar, learned counsel appearing on behalf of appellants submits that whole approach of trial court had been erroneous. He submits, pleadings of the parties will have to be considered as a whole. The procedural requirement on pleadings is that there shall be reference to material facts and the pleadings shall be in concise form. In present case, it is not that material facts have not been pleaded at all. The agreement of sale has been specifically referred to and it has also been referred to that execution of the same has not been disputed and stands admitted under the pleadings. In present matter, it is not the case that there is no reference to agreement of sale at all.

20. He submits that in paragraph no. 2 of the plaint, reference to agreement for sale with date has been specifically made, so is

the case in respect of agreed total consideration and payment of Rs.20,00,001/- as earnest amount and about requirement of payment of balance amount and further to that, that is not in dispute and there has been exchange of notices and replies and the controversy revolves around as to whether from admitted facts, time is the essence of contract or mention about time for performance would make the same essence of contract and whether forfeiture of earnest money is a result of time as essence. He submits that the intention of the parties at the time of execution of agreement for sale, in the circumstances in which it had been entered into would play a great deal of role in the matter. Several factors would have to be taken into account while considering as to whether time would form essence of the contract. The ability of the vendor to bring about circumstances for performance of contract has a vital role to play in present matter. Since defendant no.1 had failed to discharge her obligation within time, the plaintiffs cannot be alleged to have not performed their part of contract. He submits, essential material facts had indeed been pleaded including about readiness and willingness of the plaintiffs to pay balance consideration by depositing the same in the court including expenses for registration and stamp duty. Material pleadings with regard to transaction, its acceptance, conduct of the parties have indeed been pleaded in the plaint, including cause of action.

21. He submits, cause of action is a bundle of facts and for the same, learned judge ought to have read entire plaint as a whole which would certainly reflect that cause of action had arisen and had been pleaded. He submits, specific reference to cause of action has been made and other pleadings in the plaint as well do constitute cause of action.

22. He submits that it cannot be said that the suit had not been filed in proper form, for, there has been reference to agreement of sale, payment of earnest money, obligations to be discharged by defendant, earlier suit for specific performance, its withdrawal with permission to file fresh suit. The pleadings refer to, as required, to readiness and willingness to perform plaintiffs' part of the contract. So, all material particulars which are required are indeed available in the plaint and yet, learned judge under erroneous notion carried a wrong impression that plaint is required to be with particular form of pleadings and got carried away by the same. He submits, it cannot be said that pleadings of plaintiffs are not in the form required under the CPC. He submits that a patent error has been committed by learned judge in dismissing suit making a short-work of it considering that the plaint is not in the form as required. He urges that appeal be allowed.

23. Judgment in the case of *Smt. Manjushri Raha and others vs. B. L. Gupta and others*, reported in *AIR 1977 SC 1158* has been

referred to and relied on by the appellants to contend that pleadings have to be interpreted not with formalistic rigour but with latitude or awareness of low legal literacy of poor people.

24. Next judgment counsel for appellants refers to and relies on is the case *Kedar Lal Seal and another vs. Hari Lal Seal*, reported in *1952 SC 47* wherein supreme court has observed, thus ;

" 51. *I would be slow to throw out a claim on a mere technicality of pleading when the substance of is there and no prejudice is caused to the other side, however, clumsily or inartistically the plan worded. In any event, it is always open to a Court to give a plaintiff such general or other relief as just to the same extent as if it had been asked for, provided the occasions no prejudice to the other side beyond what can be compensated for in costs.* "

25. Learned counsel for the appellants has additionally referred to and relied on decision of supreme court in the case of *M/s Ganesh Trading Co. vs. Moji Ram*, reported in *AIR 1978 SC 484* wherein it has been held by supreme court, particularly in paragraph no. 4 thereof, as under :

" 4.
Even if party or its counsel is inefficient in setting out its case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense caused to the other side from its commissions. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued. "

26. He submits that in such a case, instead of throwing out the *lis* on technicality, a proper opportunity ought to have been given to the appellants.

27. On the other hand, Mr Natu, learned counsel appearing on behalf of respondents no. 2,5,6,8,9,10,11 and 13 submits that learned judge has rightly appreciated that there is no specific pleading about cause of action and simply reference has been made in the plaint to that there is admitted position emerging from earlier proceedings. He submits that learned judge has rightly appreciated that there are no material pleadings in respect of execution of agreement or for that matter about the cause of action and only listless statement about cause of action has been made in the plaint that facts stated in the plaint constitute cause of action. He submits, the court has rightly appreciated that pleadings in the plaint being deficient in respect of claim to be raised based on the same, the pleadings are not in the form as required under Order VI, particularly rule 2. He, therefore, urges to consider that first appeal does not carry any substance because the plaint is inherently weak and deficient of requirements which would infuse life in the same and dismiss the same.

28. While decision of trial court and the submissions on behalf of the parties are as aforesaid, it may have to be taken into account that with reference to the pleadings of the parties in present suit,

trial court, indeed, had framed as many as eight issues. Needless to refer to that issues arise on proposition of facts and law asserted by one party and denied by the other. Issues had been framed with reference to pleadings and learned judge has in fact referred to that " *On the basis of rival pleadings learned predecessor framed issues at exh. 25.* " He had reproduced those in the judgment along with findings thereon.

29. In present matter, one more thing will have to be taken into account that the parties are not at all at loggerheads in respect of execution of agreement of sale or for that matter receipt of certain amount by defendant no. 1. Material disputes, *inter alia*, are about as to whether time is essence of contract, whether plaintiffs prove their willingness and readiness and whether they are entitled to have specific performance of agreement and injunction and refund of earnest amount and accordingly issues have been framed.

30. It further appears from the pleadings in written statement that, there had been no objection at all about the form in which suit has been filed. Maintainability of the suit has been questioned on different grounds. In such a case, as a matter of fact, issue no. 6 would hardly be said to have arisen and, as such, force in the reasons which went into making decision on the issue gets depleted and subsided. Approach of trial court appears to be rather parochial and technical. Procedural law as well requires while issues are

framed, decision generally be rendered on all the issues save if the same can be disposed of in the circumstances and events as referred to under Order XIV, rule 2(2) of the CPC. Order XIV Rules 1 (1), (2) or 2 (1) & 2 (2) read as under :

" 1. Framing of issues.- (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. "

2. Court to pronounce judgment on all issues.- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.

31. It would be worthy to refer to another decision relied on, on behalf of the appellants – plaintiffs. In *Madan Gopal Kanodia vs*

Mamraj Maniram and others, reported in *AIR 1976 SC 461*, supreme court has observed;

" 26.
that it is well-settled that pleadings are loosely drafted in the Courts and the Courts should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds "

32. Supreme court in the case of *Sopan Sukhdeo Sable vs. Assistant Charity Commissioner*, reported in (2004) 3 SCC 137, has considered that pleading has to be read as a whole to ascertain its true import. It is not possible to cull-out a passage and to read it out in isolation out of context. Substance, and not the form, has to be looked into. The intention of the party concerned is to be gathered from the tenor of the pleadings taken as a whole and no pedantic approach should be adopted to deny justice on hairsplitting technicalities. The supreme court had also considered that there is distinction between material facts and material particulars. Material facts are those which are necessary to form a complete cause of action.

33. Except bare reference to that learned counsel for the parties are heard, judgment falls short of depiction of application of mind to the submissions advanced on behalf of parties. Perusal of the judgment would show that it is not so clear as to whether parties had got an opportunity to address themselves on considerations which were being taken into account while deciding issue no.6.

Looking at the scenario, it appears that approach of trial court is unsustainable and the parties would be required to be given proper opportunity in the matter to deal with the case.

34. In view of the facts and circumstances of the case and having regard to position of law as aforesaid, we are of the considered view that the parties be afforded proper opportunity to address themselves in the suit save on issue no. 6.

35. As such, following order;

(i) First appeal is allowed.

(ii) Judgment and order dated 25-04-2015 delivered by the 7th joint civil judge, senior division, Aurangabad, dismissing special civil suit bearing no. 17 of 2012 is set aside.

(iii) The finding recorded by learned judge in respect of issue no. 6, since said issue does not arise from the pleadings, would be ineffective and non operable.

(iv) Having regard to facts and circumstances, invoking powers under Order XLI, rule 25 of the Civil Procedure Code, 1908, we deem it appropriate to remit the matter restoring the suit for reconsideration.

(v) Trial court to proceed with the suit as expeditiously as possible preferably within a period of three months from the date of receipt of writ of this order by giving proper and adequate opportunity to the parties.

- (vi) With aforesaid, appeal stands disposed of
- (vii) Record and proceedings of the suit be sent back immediately to trial court.

S. M. GAVHANE
JUDGE

SUNIL P. DESHMUKH
JUDGE

pnd/-