

IN THE HIGH COURT OF BOMBAY AT GOA.

FIRST APPEAL NO. 59 OF 2011.

Kayji Real Estate Pvt. Ltd.,
a Company duly constituted
under The Companies Act, 1956
and registered with the Registrar
of Companies at Panaji, Goa,
Having its registered Office
at House No.14/752, First Floor,
Anand Bhavan, Old Station
Road, Margao, Goa 403 601.

..... Appellant.

V/s

1. Mr. Nazario Sebastiao Pinto,
Son of Jose Camilo Pinto,
aged about 51 years,
married, businessman,
and his wife
2. Mrs. Betsy Judith Pinto,
daughter of late Filbert
Peres, aged about 43 years,
housewife.
Both residing at House no.435,
Gunnea Vaddo, Varca
Salcete, Goa – 403 721.
3. Mr. Thomas Rodrigues,
son of late Melwyn Rodrigues,

aged about 40 years, unmarried,
businessman, Flat No.20,
Fourth Floor, Meera
Apartments, Pajifond,
Margao, Goa – 403 601.

..... Respondents.

Mr. A. F. Diniz, Advocates for the Appellant.

Coram :- N.M. Jamdar &

Prithviraj K. Chavan, JJ.

Date:-26 September 2018.

ORAL JUDGMENT (Per Prithviraj K. Chavan, J).

Feeling aggrieved with the dismissal of a suit for Specific Performance of Contract by the Civil Judge, Senior Division Margao being Special Civil Suit No.27/2008/A by a judgment and decreed dated 26 April 2011, the plaintiff has preferred this appeal. Parties shall be referred to as the plaintiff and the defendants as per their original status for the sake of convenience.

2. Brief facts of the case may be summarised as follows:-

The Plaintiff is a private limited company constituted and registered under the Companies Act 1956 which deals in carrying real estate business.

3. The defendant no.1 is a constituted attorney for defendant nos. 2 and 3. The defendant no.1 had approached the plaintiff with a proposal to sell their land denominated “Aforamento de Nova Cultura de Trinta E Uno Lancos alias Praia Isidore” situated in the village Colva of Salcete Taluka in Goa. The said land shall be referred to as “Suit property” for the sake of brevity.

4. It is the contention of the defendants that they are absolute owners of the suit property which is surveyed for the purpose of records of right under Goa Land Revenue Code under survey no.55/2. The suit property admeasures 13025 sq. mts.

5. It is not disputed that half share of the suit property belong to one Mrs. Maria Auta Dionosia Mascarenhas Portugal, widow of John Jose Abdonio Pires. The defendant no.1 purchased the suit property from said Mrs. Maria Auta Dionosia Mascarenhas Portugal vide Deed of Sale dated 27 January 1994. It is also an undisputed fact that remaining half of the property belong to one Thomas Agostinho Pires, Mrs. Ana Helvetia Cintia Santana Pires e Braganza, Mrs. Claudina Alexandria Alphonso, Mr. Jose Francis Anthony Jovito Alfonso, Mrs. Querobina Matty Pires, Mr. Sebastiao Pires and Miss Anna Catherina

Pires. The defendant no.3 purchased the said other half of the suit property vide Sale Deed dated 27 July 2005 from these persons.

6. It is the contention of the plaintiff that one Mrs. Maria Zelia Filomena Maura Mascarenhas Portugal has filed a Special Civil Suit No.44/2004/II in the Court of Civil Judge, Senior Division, Margao against one Thomas Agostinho Pires, the defendant no.1 and others in respect of the suit property. However, the said suit is without any substance because Mrs. Maria Zelia Filomena Maura Mascarenhas Portugal and her husband had already relinquished their rights to the inheritance of their predecessors, late Pedro Mascarenhas e Portugal and his wife late Maria Innoncencia da Exaltacao Mascarenhas e Portugal vide Deed of Relinquished dated 15 June 1968. The plaintiff, inter alia, contends that the Defendants agreed to get the said suit and Inventory Proceedings no.18640/70 which was instituted upon the death of Mr. Pedro Joaquim Carlos Mascarenhas Portugal and his wife, Mrs. Maria Innoncencia da Exaltacao Mascarenhas e Portugal, closed or settled within eight weeks from execution of Memorandum of Understanding between the plaintiff and defendants dated 20 December 2006 (Exh. 29). It is contended that proceedings have become infructuous.

7. After settlement of the aforesaid proceedings, the defendants agreed to sell to the plaintiff part of the suit property admeasuring 10995 sq. mts. free from all encumbrances.

8. Believing the representation by the Defendants as true, the plaintiff agreed to purchase part of the suit property admeasuring 10995 sq. mts. from the defendants and executed a Memorandum of Understanding (for short“MOU”) dated 20 December 2006(Exh. 29). The said MOU contained the terms of oral agreement entered into between the plaintiff and the defendants in respect of sale of 10995 sq. mts of land for a consideration of 5,49,75,000/-. Out of the agreed sale price, the plaintiff had already paid a sum of Rs.29,75,000/- to the defendants vide cheque no.395195 dated 20 December 2006 drawn in favour of defendant no.1.

9. It is stipulated in MOU(Exh29) between the parties that after settling the proceedings in the suit no.44/2004/II and Inventory Proceeding No.18640/70 within eight weeks from 20 December 2006 i.e. on or before 14 February 2007 a final agreement for sale would be executed and balance consideration of Rs.5,20,00,000/- shall be paid by the plaintiff to the defendants in the manner stipulated in the MOU(Exh29) and more particularly described in paragraph 9 of the

Plaint.

10. It is contented by the plaintiff that possession of the suit property was handed over to it by the defendants in part performance of the sale as contained in Exh. 29.

11. Even after completion of eight weeks from the date of execution of Exh.29 asking the defendants to tender the documents showing closer of the aforesaid Special Civil Suit and Inventory Proceedings to execute the final Sale Deed, the defendant dilly dallied by giving one or other excuse. The letter and notice sent by the plaintiff to the Defendants by registered post was also not replied. Thus, the plaintiff was constrained to file a suit for Specific Performance of terms of agreement or in the alternative for refund of earnest money.

12. In the Written Statement, the defendants admit execution of MOU(Exh29). However, they contend that MOU executed is inadmissible in evidence for non-payment of stamp duty in accordance with Stamp Act. It is the contented that it has performed their part of MOU, however, the plaintiff failed to execute the agreement. The defendants were always ready and willing to perform their part of agreement. The defendants denied delivery of possession of the suit

property to the plaintiff in part performance of the agreement dated 20 December 2006.

13. The defendants, thus, prayed for dismissal of the suit with costs.

14. The learned Trial Court after framing the necessary issues and recording the evidence of plaintiff and the defendants witnesses by the impugned judgment and order dismissed the suit. It is held by the learned Trial Court that though the MOU(Exh29) has been duly proved as well as payment of earnest money to the tune of Rs. 29,75,000/- to the defendants by the plaintiff, he dismissed the suit. The learned Trial Court returned its finding on issue no.5 in the negative which can be reproduced as under:-

“5 Whether the defendants prove that on account of the failure on the part of the plaintiff to perform the terms of MOU, the amount paid by the plaintiff to the defendants is forfeited? Not proved.”

15. We heard Mr. A. F. Diniz, the learned Counsel for the Appellant. Despite opportunities none appeared for the Respondents.

16. The learned Counsel for the plaintiff has argued that the

plaintiff would be satisfied if the suit is decreed to the extent of the return of earnest money alongwith appropriate damages and interest.

17. The following points arise for our determination. We record our findings with the reasons as shown herein below.

<u>SN.</u>	<u>POINTS</u>	<u>FOR</u>	<u>FINDINGS</u>
	<u>DETERMINATION</u>		
1	Whether MOU(Exh29) contained terms of agreement for Sale of the suit property?		Affirmative.
2	Whether the defendants were ready and willing to perform their part of contract to execute final agreement for Sale on or before 14 February 2007 as stipulated in clause 9 of the MOU(Exh29)?		Negative.
3	Whether Doctrine of unjust enrichment would attract in the given proceedings?		Affirmative.
4	What order?		Plaintiff is entitled for return of earnest money with interest at the rate of 8% per annum.

18. The execution of MOU(Exh29) between the parties to the suit, as already stated is not disputed. Equally it is not disputed that the defendants had already received earnest amount of Rs.29,75,000/- from the plaintiff by a cheque drawn on Saraswat Co-operative Bank Ltd dated 20 December 2006 as stipulated in the MOU(Exh29). The defendant Nazario Pinto in his cross examination has clearly and unequivocally admitted receipt of earnest amount which is corroborated from the letter of Saraswat Bank proved at Exh. 31.

19. The relevant clause in MOU(Exh29) can be reproduced as below:-

“AND WHEREAS the Proposed Vendor herein are desirous of getting the said Suit and the Inventory Proceedings No.18640/70 instituted upon the death of Mr. Pedro Joaquim Carlos Mascarenhas Portugal and his wife Mrs. Maria Innocencia da Exaltacao Mascarenhas e Portugal closed, having become infructuous. AND WHEREAS in view of what is mentioned hereinabove, the Proposed Vendor requires some time i.e about eight weeks to get the above case and the Inventory Proceedings settled. AND WHEREAS upon the settlement of the above matter, the Proposed Purchaser shall purchase and the Proposed Vendor shall sell the part of the said property admeasuring 10995 sq. mts as delineated in red in the plan annexed

hereto, known as “Aforamento de Nova Cultura De Trinta E Um lancos’ alias “Praí Isidore”, surveyed under Survey No. 55/2 of Colva Village for the purpose of developing the same and construction buildings/bungalows or any other construction as may be desired by the proposed purchasers and for which purpose a necessary Agreement for Sale shall be executed and registered by the parties hereto.

a. The Proposed Purchaser has paid to the Proposed Vendor an amount of Rs. 29,75,000/- (Rupees twenty nine lakhs seventy five thousand only) by cheque No. 395195 dt. 20.12.2006 drawn on The Saraswat Co-op. Bank Ltd., as earnest money, the receipt whereof the Vendors doth hereby acknowledge and admit and the balance amount of Rs. 5,20,00,000/- (Rupees Five Crores Twenty Lakhs only) shall be paid as provided hereinafter.

Once the above Civil Suit has been dismissed and the Inventory Proceedings closed, the Agreement for Sale shall be executed within a period of one month from the date the Proposed Vendor informs in writing to the Proposed Purchaser about the settlement of the case.”

20. Thus, it can be seen from the aforesaid clause that the defendants who claimed to be exclusive owners of the suit property made the plaintiff believe that Special Civil Suit No.44/2004 as well as Inventory Proceedings No.18640/70 against them and one

Mr. Thomas Pires become infructuous. The defendants, therefore sought a period of eight weeks to get the said Civil Suit and Inventory Proceedings settled for the purpose of execution of the Sale Deed.

21. Once it is stipulated in the MOU(Exh29), the defendants could not have taken a contradictory stand by stating that they did not agree that they would require period of 8 weeks to settle the said proceedings as indicated in the MOU.

22. When a specific question was asked during cross examination of defendant Nazario Pinto, it was answered in the following manner:-

“Q. At page 4 of the Exh. 29, there is a mention about this Special Civil Suit No.44/2004 and Inventory Proceedings No.18640/1970 and it is stated that proposed vendor that is myself, my wife and Thomas Rodrigues to get the two cases settled within a period of about 8 weeks. What have you to say?”

A. I did not state that I will settle the said cases within a period of about 8 weeks. I further say that Adv. Rodrigues told me that even if there is a mention about the said writing of settlement in the said Exh. 29, there will not be any harm. I further say that the said Advocate told me that he would introduce a clause in the Exh. 29 to the effect that he should give a notice to the plaintiff after disposal of both the above two matters, and within one

months' from the receipt of the fresh notice Agreement of Sale will be executed between us and the plaintiffs."

23. Section 92 of the Indian Evidence Act reads thus:-

"92. Exclusion of evidence of oral agreement.— When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms: Proviso (1) .— Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, 1[want or failure] of consideration, or mistake in fact or law.

Proviso (2).— The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).— The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such

contract, grant or disposition of property, may be proved.

Proviso (4).– The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).– Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).– Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

24. As such, no oral evidence shall be admitted between the parties or their representatives in interest for the purpose of contradicting, varying or adding or subtracting from its terms as it is tried to be contended by the Defendants in view of the stand taken during the course of evidence as stated herein above.

25. This assumes significance in the light of the clear admission of the defendants during his cross examination that Special Civil Suit No.

44/2004 and the Inventory Proceedings have not been disposed of till the date on which evidence of defendant Nazario Pinto came to be recorded.

26. The another important aspect as revealed from the record is the non-performance of their part of agreement by the defendants. It is evident that the plaintiff had issued a letter by registered post to the defendants dated 16 April 2007(Exh. 32). The defendants admit in cross examination the correction of the address of his house over envelope on which there is postal remark "it is unclaimed". By said letter the plaintiff had called upon the defendants to visit its office within 3 days of the receipt of the notice in respect of the MOU(Exh29).

27. Exh.32 indicates that if the defendants failed to approach the plaintiff, the plaintiff would presume that the defendants are not interested in performing their part of the agreement and the plaintiff would be free to take legal steps in the matter. Similarly legal notice Exh. 33 also came to be issued to the defendants by registered post by the Advocate of the plaintiff dated 1 June 2007 indicating agreement between them as well as mode of payment etc. The defendants were called upon to tender documentary evidence about disposal of the

Special Civil Suit and the Inventory Proceeding and attend the office of the plaintiff within 7 days to execute the registered agreement of sale as contemplated in Exh. 29. This notice appears to have been duly received by the wife of defendant no.1 Nazario Pinto, however, the defendant admits in cross that his wife did not show him the said notice no sane man will believe. This conduct of the defendants indicate reluctance and/or refusal on their part to perform their part of agreement as stipulated in Exh.29. Breach of obligation is writ large on the part of the defendants.

28. The learned Trial Court failed to appreciate legal position as enunciated under Sections 91 and 92 of the Indian Evidence Act as well as Section 70 of the Indian Contract Act by arriving at incorrect conclusion.

29. Payment of earnest money itself is clear indication that contract has been concluded. Though it may not be a conclusive factor in itself. The circumstance that the earnest money has been accepted by the defendants is an undoubtedly one which shows that parties have progressed beyond negotiation and have entered into binding contract as it is evident from recitals of Exh.29. Had the defendants been willing to perform their part of agreement, they would have responded

to the notice Exh. 32 and 33 issued by the plaintiff. Rather, it is evident from the cross examination of defendant no.1 Nazario Pinto that they had not sent any notice to the plaintiff to execute the agreement for sale.

30. The learned Counsel for the plaintiff has, therefore, placed useful reliance on the judgment of the Supreme Court in the Case of K. S. Satyanarayana Vs V. R. Narayana Rao¹ held at paragraphs 8, 9 and 10 thus:-

“8. It was a case where instead of going into a protracted trial, trial court could have decreed the suit of the plaintiff against the 1st defendant as well at the stage of Order X (Examination of Parties by the Court) of the Code of Civil Procedure. After the 1st defendant admitted having received rupees one lakh from the plaintiff he could not retain that money on the spacious plea that there was no privity of contract between him and the plaintiff. Amount of rupees one lakh had been given to him by the plaintiff as he wanted to purchase ground floor of his property. The agreement to sell for the purpose was entered into through the 2nd defendant whom the 1st defendant had authorised to enter into any such agreement on his behalf. The plaintiff could not have paid to the 1st defendant rupees one lakh but for the

1 1999 AIR(SC) 2544.

agreement to sell in respect of ground floor of his property. It is only on the basis of this agreement (Exh.P-2) which is entered into by the 2nd defendant on the strength of Exh.P-1 that the plaintiff paid rupees one lakh each to the 1st and 2nd defendants. If we accept the pleadings of the 1st defendant then the amount of rupees one lakh had been given by the plaintiff under some mistake. In any case, it was not a payment gratuitously made. Doctrine of undue enrichment would squarely apply in the present case and the plaintiff would be entitled to restitution. In this connection Sections 70 and 72 of the Indian Contract Act, 1872 may be referred to, which are as under:-

"70. Obligation of person enjoying benefit of non-gratuitous act.- Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. 72. Liability of person to whom money is paid, or thing delivered, by mistake or under coercion.- A person to whom money has been paid, or any thing delivered, by mistake or under coercion, must repay or return it."

9. *In Mulamchand Vs. State of Madhya Pradesh, the contract between the appellant and the State Government was held to be void as it was entered into in contravention of the provisions*

of the Government of India Act, 1935. Appellant, however, sued for return of his deposit and for the goods supplied and services rendered. This Court said: -

"In other words if the conditions imposed by Section 70 of the Indian Contract Act are satisfied then the provisions of that Section can be invoked by the aggrieved party to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that in doing the said thing or delivering the said thing he must not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another or delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach of the contract, for the simple reason that there is no contract between him and the other person for whom he does something or to whom he delivers something. So where a claim for compensation is made by one person against another under Section 70 it is not on the basis of any subsisting contract

between the parties but on a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or restitution."

This Court quoted with approval two decisions of the English Courts, which are quite illuminating and which we reproduce as under:-

1. *"In Bibrosa v. Fairbairn, 1943 AC 32 Lord Wright has stated the legal position as follows:*

".... any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution."

2. *In Nelson v. Larholt, (1948) 1 KB 339 Lord Denning has observed as follows:*

"It is no longer appropriate to draw distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important

category of cases where the court orders restitution if the justice of the case so requires."

10. *It is unfortunate that the courts below were not attentive to the procedural laws and their duty to do substantial justice in the case. Had that been so the plaintiff would have been spared the tribulations of knocking at the doors of the highest court of the land. Courts below fell into error in going into the question of privity of contract and lost sight of the basic issue involved in the case."*

31. Thus, the defendants cannot be allowed to be unjustly enriched as they have failed to discharge obligation created by MOU(Exh29).

32. The learned Counsel for the plaintiff stressed for granting damages and interest at the rate of 16% per annum. However, taking into consideration overall facts of the case and as per the present market trend, we grant interest at the rate of 8% per annum till the entire amount is realised.

33. In the light of the discussion made herein above, the following order is expedient.

ORDER

- i. First Appeal is partly allowed with proportionate costs.

- ii. The judgment and decree dated 26 April 2011 passed by the learned Civil Judge, Senior Division, Margao in Special Civil Suit No.27/2008/II is quashed and set aside.
- iii. The defendants are directed to refund the amount of Rs.29,75,000/- to the plaintiff.
- iv. The said amount shall carry interest at the rate of 8% per annum from 21 December 2006 till its realisation.
- v. A decree be drawn accordingly.

Prithviraj K. Chavan, J.

N.M. Jamdar, J.