

IN THE HIGH COURT OF BOMBAY AT GOA**APPEAL FROM ORDER NO. 13 OF 2013**

Shaikh Vahidulla

.... Appellant

Versus

Essar Builders & 2 Others

.... Respondents

Mrs. A.A. Agni, Senior Advocate with Mr. Shaikh Vahidulla,
Advocate for the Appellant.

Mr. J.F. Melo, Advocate for the Respondents.

CORAM : C.V. BHADANG, J.**DATE : 29th August, 2019****ORAL ORDER:**

The challenge in this Appeal, at the instance of the appellant (original plaintiff), is to the order dated 10.10.2012, passed by the learned Senior Civil Judge at Panaji in Special Civil Suit No. 41/2007/A. By the impugned order, the learned Trial Court has dismissed an application, filed by the appellant, seeking injunction. The respondents are the original defendants before the learned Trial Court.

2. The aforesaid suit is filed by the appellant against the respondents for specific performance of an agreement dated 09.01.2003. The case made out in the plaint is that somewhere in 1997, the second respondent was in search of a bungalow for his personal occupation, in and around Panaji. The appellant had taken possession of a duplex bungalow, more

specifically described in plaint para 1 (suit bungalow), which was incomplete. Having come to know of this, the second respondent is alleged to have approached the appellant offering to complete the unfinished work, at his cost and to occupy the same for a temporary period, as the second respondent was constructing a bungalow for himself in a property being developed by the first respondent at Dona Paula. In short, the second respondent intended to occupy the bungalow for a temporary period.

3. According to the appellant, the second respondent was allowed to occupy the suit bungalow as licensee from July, 1997 to December, 2002 on license fee of ₹ 30,000/- per month, which the second respondent failed to pay. In January, 2003, the appellant demanded possession of the suit bungalow and the arrears of the license fee, as the license period was over. The second respondent requested for extension of the license upto 31.03.2003, offering to pay the license fee from July, 1997 to March, 2003 in lumpsum and in kind, by way of transfer in the name of the appellant, two fully developed plots of land, one admeasuring 1,000 square metres from survey no. 113 and another admeasuring 3,500 square metres from out of survey no. 128, both of village Khandola.

4. Accordingly an agreement dated 09.01.2003 was executed between the parties. It was contended that both these properties were being developed by the first respondent of which, the second and the third respondent are the partners. The said properties were being developed by the first respondent, pursuant to development agreements with their owners. It is a matter of record that survey no. 113 belongs to the family of Colvalcar's, while survey no. 128 belongs to the family of Saldanha's. There was a dispute pending between the first respondent and the Colvalcar's in respect of survey no. 113 in Special Civil Suit No. 129/1999/B, before the learned Senior Civil Judge at Panaji. It was contended that pursuant to the consent terms dated 06.05.2006 and 13.07.2006, the said dispute was amicably settled and inspite of that, the second respondent failed to transfer the aforesaid two plots as agreed in the agreement dated 09.01.2003. It was in these circumstances that the appellant filed the aforesaid suit *inter alia* for specific performance of the agreement dated 09.01.2003, for arrears of license fee from 01.04.2003 to 31.12.2006 alongwith mesne profits, as well as for a decree of eviction of the second respondent from the suit bungalow.

5. The appellant also filed an application for temporary injunction, restraining the respondents or anybody on their

behalf, from alienating or transferring or creating any third party interest in the suit properties.

6. The respondents resisted the suit as well as the application for temporary injunction. It was denied that there was conscious execution of the agreement dated 09.01.2003. It was contended that the appellant, who is a legal practitioner was representing the respondents, who took undue advantage of the said fact in drafting the agreement dated 09.01.2003, incorporating the term of transfer of two properties totally admeasuring 4,500/- square metres, which was never agreed upon. It was contended that the appellant had acted as a mediator and broker in respect of the transaction between the first respondent and the owners of survey nos. 113/0, 112/0, 56/3 and 65/1 of village Orgao and Khandola. It was contended that towards brokerage, it was agreed that an area admeasuring 1,000 square metres was given to one Hamida Bi, who was stated to be a relative of the appellant and there was yet another agreement to give 1,000 square metres to Mr. Sunil Pednekar, who is claimed to be the appellant's staff member. It was thus contended that there was no agreement to transfer the two plots totally admeasuring 4,500 square metres of village Khandola, allegedly towards the license fee of the suit bungalow from July, 1997 to March, 2003. It was also

contended that agreement dated 09.01.2003 was not a concluded contract.

7. The learned Trial Court found that the appellant has failed to establish *prima facie* case for grant of injunction as the agreement dated 09.01.2003 is unenforceable in law. The learned Trial Court has *inter alia* found that although, the agreement refers to a plan, no plan was prepared and annexed to the said agreement. In this regard, the learned Trial Court has relied upon the decision of the Supreme Court in the case of **Vimlesh Kumari Kulshrestha Vs. Sambhajirao & Another (2008) 5 SCC 58**. In that view of the matter, the learned Trial Court by the impugned order, has dismissed the application, which brings the appellant to this Court.

8. I have heard Mrs. Agni, the learned Senior Counsel for the appellant and Mr. Melo, the learned Counsel for the respondents. With the assistance of the learned Counsel for the parties, I have gone through the record and I find that this Appeal deserves to be partly allowed, *inter alia* on the ground of certain subsequent events, of execution of the sale deeds by the respondents in favour of third parties.

9. Mrs. Agni, the learned Senior Counsel for the appellant has submitted that there is a concluded contract dated 09.01.2003, between the parties, by which, the respondents had agreed to transfer the two plots totally admeasuring 4,500 square metres of village Khandola in favour of the appellant, for which the consideration was the amount of arrears of license fee of the suit bungalow from July, 1997 to March, 2003. It is submitted that the learned Trial Court was in error in holding that the agreement is unenforceable and is not a concluded contract. It is submitted that mere absence of the plan is not decisive, as the Court has to gather intention of the parties. It is submitted that at this stage, all that the appellant has prayed for is to restrain the respondents from creating any third party interest, which is necessary for fair and proper disposal of the suit. It is submitted that in the event, if third party interest is created, the object of passing of a favourable decree in the suit, is likely to be frustrated. She, therefore, submitted that the *prima facie* case, as well as the balance of convenience lies in the favour of the appellant, as the appellant would suffer irreparable loss, if the injunction is not granted.

10. Mrs. Agni, the learned Senior Counsel has sought to refer to certain sale deeds, which are annexed to short synopsis of arguments, in order to submit that they clearly indicate misrepresentation on behalf of the respondents, while executing these sale deeds.

11. Mr. Melo, the learned Counsel for the respondents has supported the impugned order. It is submitted that the agreement has rightly been held to be unenforceable, as the terms cannot be legally enforced. The learned Counsel pointed out that there was no agreement to transfer the two plots, admeasuring 4,500 square metres of village Khandola, particularly when the first respondent was not even the owner of the said plots and there was litigation pending between the first respondent and the family of Colvalcar's, at the relevant time in respect of land survey no. 113 of village Khandola.

12. I have carefully considered the rival circumstances and the submissions made. It is now well settled that any agreement, has to be read as a whole and the terms thereof, have to be interpreted having regard to the intention of the parties in general. In the present case, according to the appellant, two plots were agreed to be transferred in lieu of the arrears of the license fee of the suit bungalow, while according

to the respondents, there was an agreement to transfer two plots admeasuring 1,000 square metres each, towards the brokerage, as the appellant had acted as a mediator between the first respondent and the owners of survey no. 113/0 and others, which was in January, 1994. The absence of plan itself may not be decisive and a concluding factor, although, it may be one of the material circumstances, which may be taken into consideration, while considering the agreement as a whole, in consonance with the intention of the parties. There are also subsequent events, in the form of certain sale deeds, which are sought to be relied upon on behalf of the appellant. These sale deeds were not before the Trial Court when the impugned order was passed.

13. In such circumstances, in my considered view, it would be appropriate that the learned Trial Court reconsiders the application for temporary injunction on its own merits, including the subsequent events of execution of certain sale deeds.

14. In the result, the Appeal is partly allowed. The impugned order is hereby set aside. The application for temporary injunction is remitted back to the learned Trial Court for deciding it afresh on its own merits and in accordance with

law and after taking into consideration the execution of certain sale deeds in favour of third parties. The parties herein would be entitled to produce documents before the learned Trial Court. The learned Trial Court shall decide the application for temporary injunction on its own merits and in accordance with law. Rival contentions of the parties, on merits, are left open.

15. At this stage, Mrs. Agni, the learned Senior Counsel for the appellant states that the appellant shall not pursue the application for contempt filed before the learned Trial Court. The statement made so is accepted.

16. In the circumstances, there shall be no order as to costs.

C. V. BHADANG, J.

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