IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL No.85 OF 2017

Atmaram Raya Parulekar (dec.)
thr, his LRs. ... Appellant

V/S

Diago Luiz Sebastiao Francisco
Xavier Dessai Colaco De Fonseca
And 4 Ors. .... Respondents

Mr. Mahesh Amonkar, Advocate for the Appellant.

Mr. Terence Anthony Vaz, Advocate for the Respondents No.1, 2, 3 and 4.

AND
SECOND APPEAL No.13 OF 2019

Punaji Pandurang Achrekar (dec.)
rep. by his LRs. ... Appellant

V/S

Diago Luiz Sebastiao Francisco
Xavier Dessai Colaco De Fonseca
And 4 Ors. .... Respondents

Mr. Anirudha A. Sinai Borkar, Advocate for the Appellant.

Mr. Terence Anthony Vaz, Advocate for the Respondents No.1, 2, 3 and 4.

Mr. Mahesh Amonkar, Advocate for the Respondents No.5(i) to 5(xi).

CORAM: M. S. SONAK, J

DATE: 14th July 2021

COMMON ORDER:

Heard Mr. Mahesh Amonkar, learned Counsel for the appellant in Second Appeal No. 85 of 2017, and Mr. Anirudha Sinai Borkar, learned Counsel for the appellant in Second Appeal No. 13 of 2019 and Mr. Terence Vaz, learned Counsel for the respondents No.1 to 4 in both the Second Appeals.

2. Both the second appeals question the judgments and decrees made by the Trial Court in Special Civil Suit No.69/2000/B, Regular Civil Appeal No.12/2012 and Regular Civil Appeal No.49 of 2011 by which, both, the Trial Court and the Appellate Court have decreed the suit instituted by respondents No.1 to 4 (plaintiffs) seeking a declaration that the agreement dated 12.02.1992 entered into between the plaintiffs and the appellants in Second Appeal No.13 of 2019 (original defendant No.1) is unenforceable and not binding on the plaintiffs for the failure of the defendant No.1 to honor his commitments.

3. The appellant in Second Appeal No.85 of 2017 (original defendant No.2) claims to have entered into an agreement dated 05.10.1996 with defendant No.1, who purportedly acted on the Power of

Attorney issued in his favor by the original plaintiffs.

4. For purposes of these second appeals, the parties will be referred to as plaintiffs, defendant No.1 and defendant No.2, respectively.

5. Mr. Amonkar submits that the evidence on record bears out that the agreement dated 12.02.1992 and the Power of Attorneys issued by the plaintiffs in favor of defendant No.1 were terminated only on 08.05.1998 and not before. He submits that on 05.10.1996, defendant No.1 already entered into an agreement with defendant No.2 based on the agreement dated 12.02.1992 and the Power of Attorneys which were very much valid on the said date. He, therefore, submits that no decree could have been made against defendant No.2, and the finding that the termination of agreement and Power of Attorneys was sometime in the year 1992 is perverse. Mr. Amonkar submitted that the agreement dated 05.10.1996 entered into between defendant No.1 and defendant No.2 was not required to be registered under the law and, therefore, the two Courts, erred in finding fault that the agreement was not registered.

6. Mr. Amonkar, based on the aforesaid submits that the following substantial questions of law arise in second appeal No.85 of 2017:

'(a) Whether the findings of the First appellant court that the agreement dated 5.10.1996 was executed by the Respondent No.5/defendant No.1 in favour of

the appellants/defendant No.2 much after revocation of power of attorney of the defendant No.1 and therefore plaintiffs are not bound to honour said agreement dated 5.10.1996 is no perverse in view of the admitted evidence on record shows that said agreement dated 5.10.1996 was executed much prior to the alleged revocation of power of attorney of defendant No.1 by plaintiff?

(b) Whether the agreement of sale of immovable property is required to be registered either before the Notary or any authority and therefore findings of the District court that since the agreement of sale dated 5.10.1996 is not executed before any Notary nor registered before any authority is not binding on plaintiff is correct findings?'

7. Mr. Anirudha Borkar, learned Counsel for the appellant in the Second Appeal No. 13 of 2019 endorses the submissions made by Mr. Amonkar. He submits that the alleged termination letter of 24.10.1992, was not a termination letter at all but demand for payment. He submits that some payments were made and it is only because the plaintiffs failed to comply with their terms of the agreement, the balance payments remained to be made. He submitted that the two Courts have referred to varied reasons pleaded by the plaintiffs for the alleged unenforceability of the agreement dated 12.02.1992. He submits that such reasons are not tenable and there is no evidence in support of any such reasons.

8. Mr. Borkar also submitted that there is evidence that in pursuance of the agreement dated 12.02.1992, defendant No.1 was placed

in possession of the suit property. He submits that since the plaintiff merely sought the relief of declaration without seeking consequential relief of recovery of possession, the suit should have been dismissed by relying on the proviso to Section 34 of the Specific Relief Act, 1963.

9. Mr. Borkar submits that the following substantial questions of law arise in second appeal No.13 of 2019.

> a) *Whether the Courts below erred in law to hold that the Agreement dated 12/02/1992 was unenforceable on account of 'mistake' under Sec.30 of the Indian Contract Act, when the plaint itself was silent, and merely stated that the Agreement couldn't be performed for 'many reasons one of them being escalation in price from 1992-2000'?*
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> b) *Whether the Courts below erred in law to disregard completely the fact that the Respondent nos. - 4 had not sought recovery of possession of the suit property, which admittedly lay with the Appellant, thereby rendering any plea for declaration largely nugatory and unenforceable?*

10. Mr. Terence Vaz, the learned Counsel for the respondents No. 1 to 3 in both the appeals defends the impugned judgments and decrees based on the reasonings reflected therein. He points out that the issue of recovery of possession was never raised by defendant No.1 before the Trial Court, precisely because neither the agreement dated 12.02.1992 nor the evidence on record suggested that defendant No.1 was at any time placed in possession of the suit property. He submits that in terms of the agreement

dated 12.02.1992, defendant No.1 was required to pay a sum of Rs.18 lakhs and after payment of hardly ₹20,000/-, defendant No.1 failed to make any further payments or honor other commitments undertaken by him. Mr. Vaz submits that the agreement between the defendant No.1 and 2 is also a sham, since the defendant No.1, without any right or authority agreed to sell the suit property to defendant No.1 for a sum of ₹20 lakh and allegedly received a paltry amount of ₹35,000/- from the defendant No.2. Mr. Vaz also pointed out that there is the issue of access to the suit property, which issue had to be sorted by defendant No.1. For all these reasons he submits that these appeals lack merit and may be dismissed.

11. The rival contentions now fall for determination.

12. This is a case where the Trial Court and the First Appellate Court have decreed the suit instituted by the plaintiffs. There are concurrent findings of fact and it is not possible to accept the contentions of the learned Counsel for the appellants that these findings suffer from any perversity to give rise to any substantial questions of law.

13. The two Courts have evaluated the oral and documentary evidence on record and held that the agreement dated 12.02.1992 was terminated by the plaintiffs on 24.10.1992 and the notice issued on 08.05.1998 was only a reiteration of such termination. These findings of

fact are borne out from the evidence on record and therefore, cannot be styled as perverse findings. Admittedly, despite the receipt of notice dated 24.10.1992, Defendant No. 1 neither honored his commitments nor paid the balance amount. The notice had made it clear that if the default continued, the agreement was to stand terminated.

14. The record also bears out that defendant No.1 had agreed to purchase the suit property in the year 1992 for a total sum of ₹18 lakh. Defendant No.1 also was required to honor commitments set out in the said agreement, which included the commitment for making the property accessible and developable. This the reason why the plaintiffs had granted Power of Attorney in favor of defendant No.1. The evidence on record bears out that defendant No.1 paid hardly an amount of ₹20,000/- to the plaintiff and failed to honor the commitments or for that matter make the balance payment. It is in these circumstances that the plaintiff called upon defendant No.1 to make the balance payment and to honor the commitment vide notice dated 24.10.1992. This notice made it clear that in case there was a failure, then, the agreement would stand terminated. The two Courts, after concluding that there was no compliance on the part of defendant No.1 had quite correctly held that this was the notice by which the agreement dated 12.02.1992 stood terminated. There is no perversity in the record of this finding of fact.

15. defendant No.1, despite full knowledge of the termination as well as the fact he had not paid the balance amount to the plaintiff or honor his commitment under the agreement dated 12.02.1992, agreed to sell the very same property for consideration of ₹20lakh to defendant no.2 defendant No.1 allegedly received a sum of ₹35,000/- from the defendant No.1. Thus, it is clear that both the defendants, by making paltry payments wished to embroil the suit property in litigation. The two Courts, upon assessing the evidence on record quite correctly decreed the plaintiff's suit.

16. Even it is assumed that this second agreement dated 05.10.1996 entered into between defendant No.1 and 2 was not compulsorily registerable, it is apparent that at least defendant No.1 surely knew that he had no right or authority to enter into this type of agreement with the defendant No.2. Besides, from the circumstance that defendant No.2 allegedly parted with hardly ₹35,000/- to defendant No.1, it cannot be ruled out that this second agreement was only to create hurdles for the plaintiffs. Since this second agreement is neither registered before the Sub-Registrar nor executed before any Notary Public, the two Courts were justified in raising a doubt that such agreement was made only to create some semblance of right in favor of defendant No.2 and thereby create further hurdles to the plaintiff. Besides the non-registration of the agreement between defendants no. 1 and 2 is not the main basis for decreeing the suit. The main basis is the factum of termination in the year

1992 itself which was clearly known to defendant No.1. Since defendant No2 had not purchased the property, defendant No.2 rightly, did not raise any plea of being the bonafide purchaser without notice of the previous encumbrance. Even defendant No.2 claims some interest based only on the agreement dated 05.10.1996, which was neither registered nor executed before any Notary Public. In such circumstances, the two courts quite correctly rejected the defenses of the defendants.

17. In the Trial Court, no plea was raised by defendant No.1 based on the proviso to Section 34 of the Specific Relief Act. If defendant No.1 was indeed in possession of the suit property, then, this would have been possibly the first defense that defendant No.1 would have raised in a matter of this nature. The evidence, at the highest, indicates that some works concerning the access to the suit property were being undertaken by defendant No.1 for some time. This is far from saying that defendant No.1 was in possession of the suit property at any time. Neither does the agreement dated 12.02.1992 speak about possession nor is there any evidence on record suggesting possession. This issue was not raised by defendant No.1 before the Trial Court but was raised for the first time before the Appellate Court. This is an issue involving mixed questions of fact and law. Such an issue cannot be raised for the first time in an appeal. Even otherwise, based on the evidence on record, such an issue does not arise in the appeal instituted by defendant No.1.

18. Therefore, none of the substantial questions of law as urged by the appellants arise in these appeals. The appeals are liable to be dismissed and are hereby dismissed.

19. There shall be no order as to costs.

M. S. SONAK, J.

msr.