

IN THE HIGH COURT OF BOMBAY AT GOA

Writ Petition No. 751 of 2019

DATTAPRASAD R.
SHIRODKAR.,

..... PETITIONER

VS

VINOD DWARKANTH
KHAPARDE AND 2 ORS.,

..... RESPONDENTS

Mr. Dinesh E. Naik, Advocate for the Petitioner.

Mr. Sudin Usgaonkar, Senior Advocate with Ms. V. Palyekar, Advocate for he
Respondent no.1.**CORAM: DAMA SESHADRI NAIDU, J.****Date: 31st March 2021****O R D E R:**

The petitioner had intended to purchase a residential flat; so in 2007, he contracted with the builder. In the part performance of that registered agreement of sale, he secured possession of the flat and continued to live in it. The agreement, then, exclusively confined itself to the flat without reference to the parking area.

2. Similarly, the first respondent's predecessor also contracted with the builder and later purchased a flat in the same apartment, but on a different floor. The first respondent purchased the flat on 8/10/2014. The petitioner lives on the second floor and the first respondent on the first floor.

3. But there arose a dispute about the parking area. Therefore, the first respondent filed RCS No.189/2017/B before the Civil Judge, Senior Division, Mapusa, for a perpetual injunction. It was in June 2017. Pending that suit, the petitioner completed the purchase formalities in August 2017, for he had been in possession until then only under an agreement of sale. Though this purchase was based on the earlier agreement of sale, the sale deed included the parking area, too. That was not part of the agreement of sale, though. The justification the petitioner supplies in this regard is that

when he contracted with the builder to purchase the flat, he did not have enough money to purchase the parking area. Later, he secured the amount and paid for the parking area as well. Therefore, in August 2017, the sale deed included both the flat and the parking area.

4. At any rate, given the above development—that is, the petitioner purchasing the property allegedly along with the parking area—the first respondent as the plaintiff amended the pleadings, sought a declaration that the sale deed to the extent of the parking area is void. Then, the petitioner filed an additional written statement. He took a specific plea that the first respondent had never been in possession of the parking area. He also contended that a suit for the mere declaration of title cannot be sustained without the consequential relief of recovery of possession.

5. Under these circumstances, the first respondent as the plaintiff once again applied for amendment. This time, he sought an additional prayer for recovery of possession as well. The trial Court allowed it through its order, dated 31/7/2019. Aggrieved, the petitioner has filed this Writ Petition under Article 227 of the Constitution of India.

6. Shri Dinesh Naik, the learned counsel for the petitioner, has strenuously argued that the first respondent as the plaintiff has taken inconsistent pleas in the plaint. According to him, as the first respondent has never possessed the parking area, his losing possession cannot be treated as a subsequent development. In other words, the first respondent ought to have been vigilant, and, as he had no possession of the property, he must have sought recovery of possession at the earliest. And the belated efforts to have the pleadings amended by the first respondent is an afterthought, prejudicing the petitioner's interest. Nor has the first respondent shown any due diligence as required under Order 6 Rule 17 of CPC.

7. On the other hand, Shri Sudin Usgaonkar, the learned Senior Counsel for the first respondent, has submitted that the petitioner may have taken possession of the residential flat under an agreement of sale. But that agreement of sale never included the parking lot. According to him, the

petitioner completed the sale in August 2017—*lis pendens*. That is, after the first respondent's filing the suit. For the first time, in that sale deed the petitioner showed the parking area as if he had purchased it. Therefore, both the purchase and the alleged possession are *lis pendense* developments. Only as a matter of abundant caution has the first respondent sought recovery of possession, too.

8. The learned Senior Counsel has also contended that the trial Court has rightly held that in pre-trial proceedings, the Courts ought to be liberal in allowing the amendments because such amendments only facilitate complete and effectual adjudication of the matter. Therefore, viewed from any prospective, the learned Senior Counsel contends, the trial Court's order allowing the first respondent to amend the pleadings is unassailable.

9. Heard Shri Dinesh Naik, the learned counsel for the petitioner; and Shri Sudin Usgaonkar, the learned Senior Counsel for the first respondent.

10. To begin with, I see nothing wrong in the impugned order. It is elaborate and reasoned. Agreed, elaboration and reason need not go together, though.

11. The plaintiff filed a suit for perpetual injunction. Later, certain developments took place. That prompted him to seek an amendment. Again, he has applied for another amendment. Therefore, eventually, he sought not only a declaration but also recovery of possession. This prayer for recovery of possession is despite the fact that the initial suit was for a perpetual injunction.

12. Indeed, the petitioner contends that the first respondent had never been in possession of that property. Therefore, he ought to have sought the relief of recovery of possession earlier. However attractive that plea is, it is a matter of evidence; we cannot pre-judge on that count. Even otherwise, the petitioner occupied the flat under an agreement of sale, and that agreement of sale had no reference to any parking area. The parking area stood conveyed to him, if it were legally permissible, only in August 2017.

That is, after the first respondent's filing the suit. Thus, without an iota of doubt, we may note that it is a *lis pendens* development.

13. Of course, as pointed out by the learned Senior Counsel for the first respondent, the question of somebody's exclusively purchasing a parking lot detached from the substantial portion of the building, say a flat, is a matter to be decided by the Court. Because parking is usually treated as a common area to be enjoyed by all the co-owners proportionate to their share in the main structure. The English call on the "commonhold", distinguished from "freehold" and "leasehold",

14. At any rate, before the trial could commence, the first respondent wanted to amend the plaint. It was on the premise that he had to incorporate subsequent events. And the trial Court exercised its discretion and allowed it. And its order is a reasoned one.

I am therefore disinclined to interfere. Nevertheless, I observe that any observations made in this disposition shall affect neither party during the trial.

DAMA SESHADRI NAIDU, J.

AP/-

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