

Aura

IN THE HIGH COURT OF BOMBAY AT GOA

Second Appeal No. 42 Of 2014

1.Usha Gajanan Kholkar, Appellant
Since deceased, through her legal heirs:

1 (a) Raghunath Kawthankar, widower,
Major, Indian National,
resident of Kawthankar Niwas,
176, B. B. Borkar Road, Opp.
General Pool,
Govt. Quarters, Porvorim, Bardez, Goa.

(b) Sneha Siddharth Sinai Borkar, daughter

(c) Siddharth Soguna Sinai Borkar, son-in-
law, both (b) and (c) are Major,
Married, Indian National,
Residents of GPD, 3/3,
Opposite Primary Health Centre,
Porvorim, Goa

(d) Sunil Raghunath Kawthankar. Son,
Major, bachelor, Indian National,
Resident of Kawthankar Niwas,
176, B.B. Borkar Road, Opp. General
Pool, Govt. Quarters, Porvorim,
Bardez, Goa.

Versus

1. Shri Chandrakant Ladu, Naik,
Major in age, Indian National, Builder,
Residing at Building no.3, Neugi Nagar, Rua Respondents
de Ourem,

Panaji, Goa. and 24 ors.

Mr. S. G. Desai, Senior Advocate with Mr. Pavithran A.V, Advocate for the Appellant
Mr. A. R. Katak with Mr. R. Katak, Advocates, for the Respondent no.1.

CORAM: MANISH PITALE, J
DATED: 28th September, 2021

Oral Order:

1. By this Second Appeal, one of the original plaintiffs i.e. plaintiff no.8 is before this Court assailing concurrent Judgments and orders passed by the two Courts below, whereby a suit filed by the appellant and other plaintiffs was dismissed.

2. The original plaintiffs, including the appellant, filed the aforesaid suit claiming that the contesting respondent (original defendant) had entered into agreements to sell flats to the original plaintiffs in one building no.3, on a representation that the said building was being constructed on a plot admeasuring 1200 sq. mtrs. According to the plaintiffs, the cause of action arose for them when they saw some construction activity being undertaken on part of the said plot. According to them, this was in violation of the agreements and the representation made in the said agreements. It was claimed that the plaintiffs were entitled to the relief of permanent injunction restraining the contesting plaintiffs from undertaking such construction.

3. The contesting respondent filed his written statement denying the claims of the original plaintiffs and by relying upon documents, including agreements executed between the original owner and the contesting respondent, who was a developer and was constructing the said building and also the agreement entered into between the said contesting respondent and the individual flat purchasers i.e. the plaintiffs, it was claimed that the said flats were being constructed on a plot area of 1000 sq.mtrs. It was contended that the documents on record clearly indicated that the original owner had sold 1000 sq.mtrs. of the plot to the contesting respondent and in turn the said respondent had entered into agreements with the appellant and the other plaintiffs for sale of individual flats and in such agreements also, it was specifically represented that the flats were being constructed on a plot admeasuring 1000 sq.mtrs. On this basis it was claimed that the suit deserved to be dismissed.

4. After completion of the pleadings and upon evidence being recorded, the trial Court took into consideration the material on record and found that in the agreement executed between the original owner and the contesting respondent, it was specially stated that 1000 sq.mtrs. of plot of land was sold to the contesting respondent. It was also recorded that the contesting respondent had specifically relied upon such documents and denied the claim of the original plaintiffs, including the appellant herein, that the flats in question were to be constructed on a total plot area of 1200 sq.mts. The trial Court found that in such circumstances, the original owner ought to have been made a party to the suit and this was a defect in the suit filed by the plaintiffs. It was also recorded that mere violation of municipal

rules would not inure to the benefit of the plaintiffs for the simple reason that they were bound by the documents executed in their favour by the contesting respondent. It was further found that there was no representation made by the original plaintiff and the flats were being constructed on plot admeasuring 1200 sq.mts.

5. Aggrieved by the dismissal of the suit, the original plaintiffs filed appeal before the District Court. By the Judgment and order dated 29/7/2013, the District Court dismissed the appeal and confirmed the Judgment and order passed by the Trial Court. The appellate Court took into consideration the pleadings and evidence on record. It was specifically recorded that there were admissions given by the defendants themselves which were relevant and that the documents on record clearly supported the stand of the contesting respondent that the plot area of only 1000 sq.mtrs was purchased from the original owner for construction of the flats. Therefore, there was no scope to contend that the contents of the documents required any further interpretation. The appellate Court relied upon section 92 of the Indian evidence Act, particularly, proviso 1 thereto, to conclude that the original plaintiffs were not entitled to lead any evidence contrary to the contents of the document, particularly, when there was no pleading that such a document was got executed by fraud, intimidation or illegality. On this basis, the appeal was dismissed.

6. Mr. S. G. Desai, the learned Senior Advocate appearing for the appellant/original plaintiff no.8, submitted that documents on record unequivocally indicated that the plot area in question was 1200 sq.mtrs. By inviting attention to the approved building plan dated 9/4/1986, it was contended that the plot area was

actually 1204 sq.mtrs, as per the dimensions specifically stated in the said document. It was then submitted that the documents on record, particularly the agreements executed between the original owner and the contesting respondent as well as the said respondent and the appellant sufficiently demonstrated that the flats in question under construction were on plot of land admeasuring 1200 sq.mrs. and that the reference to 1000 sq.mtrs was to the built up area available for the contesting respondent to construct. It was further submitted that the documents on record also indicated that the plot area of 1200 sq.mtrs was specifically stated in the agreements in question and that the original plaintiffs, including the appellant, had clearly made out a case in their favour. It was further submitted that even as per the agreements on record, a Cooperative Society was to be formed and that this was another indication about the obligation on the part of the contesting respondent to take steps in that regard and to ensure that the area of the plot in question was in terms of the approved plans i.e. 1200 sq.mtrs. On this basis it was submitted that substantial questions of law as proposed arose in the appeal for consideration.

7. On the other hand, Shri A. R. Kantak, the learned counsel appearing for the contesting respondents invited attention of this Court to the pleadings of the parties, the relevant agreements in question, as also the relevant portions of the evidence on record. It was brought to the notice of this Court that the building plans and the construction licence were approved and granted in favour of the original owner and not in the name of any Cooperative Society, as sought to be contended on behalf of the appellant. By referring to the documents on record, particularly the agreements

in question, it was submitted that the contents were absolutely clear and there was no scope for confusion or interpretation of the clauses of the said document. It was submitted that the schedule appended to the agreements, particularly the agreement executed between said respondent and the appellant demonstrated that the appellant had purchased a flat admeasuring 62.50 sq.mtrs in a building being constructed on a plot admeasuring 1000 sq.mtrs, as mentioned in the schedule to the agreement. On this basis, it was submitted that two Courts below had correctly rendered findings against the appellant and the original plaintiffs and that therefore, the present appeal deserved to be dismissed.

8. Having heard the learned counsel for the rival parties, it needs to be examined whether any substantial question of law arises in the present appeal. The two Courts below have concurrently held against the original plaintiffs, including the appellant (original plaintiff no.8). In order to examine the contentions raised on behalf of the appellant, it would be appropriate to refer to the pleadings of the parties and the relevant documents on record.

9. According to the original plaintiffs, the contesting respondent had represented that the building, in which they were purchasing flats, was being constructed on a plot admeasuring 1200 sq.mtrs. Much emphasis was placed on the building plan approved by the Municipal authority for the reason that the dimensions of the plot indicated therein showed the plot admeasured 1204 sq.ts. The contesting respondent denied the aforesaid assertion made on behalf of the appellant and relied upon the agreements executed between the parties.

10. In order to examine the rival contentions, this Court has perused the agreements executed between the parties. The agreement dated 5/8/1985, executed between the original owner and the contesting respondent shows that the contesting respondent as a professional builder purchased 1000 sq.mtrs of plot in order to construct 3 floors of flats. It is specifically stated in clause 1 of the said agreement that the original owner agreed to sell plot of land admeasuring 1000 sq.mtrs to the contesting respondent. There is no doubt about the fact that in the narration prior to the specific clauses agreed between the parties, there is a statement that the aforesaid 3 floors were to be constructed above the ground floor in an area of 1200 sq.mtrs. in the said property. But, what is significant is that in the specific clauses agreed between the parties consisting of 15 clauses and also in the schedule to the said agreement, the original owner agreed to sell plot of 1000 sq.mtrs. to the contesting respondent.

11. Thereafter, the building plans were approved and occupancy certificate dated 21/3/1988 was issued in respect of the apartments so constructed. Thereafter, the contesting respondent entered into agreements with the purchasers i.e. the original plaintiffs, including the appellant herein. Perusal of the agreement, dated 18/3/1991, executed between the contesting respondent and the appellant shows that in this agreement also it is specifically stated that by the aforesaid agreement dated 5/8/1985, the contesting respondent had purchased 1000 sq.mtrs. of land from the confirming party (the original owner of the land). It is further stated in the said agreement that the appellant was desirous of purchasing a flat admeasuring 62.50 sq.mtrs. on the second floor of the building. Thereafter, the

operative clauses of the agreement refer to the manner in which consideration was to be paid by the appellant. Schedule 1 to the said agreement again specifically referred to the plot area being 1000 sq.mts on which construction of the flats in building no.3 was undertaken by the contesting respondent. Schedule 2 appended to the said agreement specifically refers to built up area of 62.50 sq.mtrs. of constructed flat purchased by the appellant.

12. A perusal of the said documents clearly indicates that both the Courts below correctly held that there was no scope to contend that there was a representation made to the purchasers, including the appellant herein, that the building in which they were purchasing flats was constructed on a plot admeasuring 1200 sq.mts. When the clauses of the agreement between the parties specifically referred to the plot area being 1000 sq.mtrs., there was obviously no scope for any interpretation against the specific terms of the clauses. In that context, the appellate Court was clearly justified in referring to section 92 of the Indian Evidence Act, particularly, proviso 1 thereof to reject the contentions raised on behalf of the appellant.

13. Apart from this, it is specifically recorded by the Courts below that the original plaintiffs including the appellant (plaintiff no.8) did not enter the witness box for leading evidence in the matter. The contention with regard to the proposed cooperative society is of no consequence in the face of the clear clauses incorporated in the aforesaid two agreements executed between the original owner and the contesting respondent as also the said respondent and the appellant, wherein the original owner was a confirming party. It is in this context that the Courts below have

found that the suit was defective for the reason that the original owner was never made a party.

14. In view of the above, this Court finds that the substantial questions of law as proposed on behalf of the appellant do not arise. Even otherwise this Court finds that no error has been committed by the courts below and that no substantial question of law arises for this Court to exercise jurisdiction under section 100 of the Code of Civil Procedure. Accordingly, the appeal is dismissed.

MANISH PITALE, J.

MARIA
AURA
PEREIRA

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by MARIA AURA
PEREIRA
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