

Niti

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.68 OF 2011

Mr Ussein Gazi
Son of Z.A. Gazi,
major in age,
occupation, Business,
resident of House No.84,
D.L. Liyamati, Davorlim,
Salcete-Goa. ... Appellant

Versus

Smt. Razia Shaikh,
Major in age,
resident of Vigneshwar,
Housing Society, F-1,
A/2, Chapel Road,
near Ganapati Mandir,
New Vaddem,
Vasco-da-Gama, Goa. Respondent

Mr Dharmanand Vernekar, Advocate for the Appellant.
Ms Gina Almeida, Advocate under the Legal Aid Scheme for
the Respondent.

CORAM: M. S. SONAK, J.

Reserved on : 25th NOVEMBER 2022

Pronounced on : 28th NOVEMBER 2022

JUDGMENT :

1. Heard Mr D. Vernekar for the Appellant and Ms Gina Maria Almeida for the Respondent (under the Legal Aid Scheme).

2. This Appeal is directed against judgments and decrees dated 29.03.2011 and 01.09.2010 made by the first appellate Court and the Trial Court, respectively, declining the relief of permanent injunction to the Appellant–plaintiff in respect of the suit shop.

3. The Appellant is the original plaintiff, and the Respondent is the original defendant in Regular Civil Suit No.145/07/E, in which the Appellant applied for a permanent injunction to restrain the Respondent from interfering with his possession and occupation of shop no.2 in Estefania Building, Margao, and for a mandatory injunction requiring the Respondent to execute a Sale Deed along with the owners of the building in favour of the Appellant, in terms of the agreement reached between the parties.

4. The Respondent denied the Appellant's case and urged the suit's dismissal. The Respondent also raised a counterclaim seeking eviction of the Appellant from the suit shop and for payment of a licence fee at the rate of ₹25,000/- per month from November 2006 till the possession of the suit shop is handed over to the Respondent.

5. The Trial Court, by judgment and decree dated 01.09.2010, dismissed the suit and the counterclaim. The Appellant's Regular Civil Appeal No.552/2010 was dismissed by

the first appellate Court by judgment and decree dated 29.03.2011. Hence, the present Second Appeal.

6. This Second Appeal was admitted on 23.08.2011 on the following substantial questions of law:

Whether the Court below could have refused relief of permanent injunction in favour of the Appellant after recording the finding that the Respondent has failed to prove that it was a leave and licence agreement and that the Appellant was put in possession pursuant to the agreement dated 04.11.2006 and after dismissing the counterclaim of the Respondent to recover possession?

7. Mr Vernekar, the learned Counsel for the Appellant, submits that the trial Court disbelieved the Respondent's case about the Appellant being a mere licensee. Consequently, after the trial Court dismissed the Respondent's claim for recovery of possession, the trial Court and the first appellate Court could never have refused the relief of permanent injunction to protect the Appellant's possession in respect of the suit shop. He submits that the two Courts should have granted such relief as a matter of course.

8. Mr Vernekar submitted that the Respondent, vide letter dated 04.11.2006, offered to sell the suit shop to the Appellant for a total consideration of ₹14,00,000/-. This offer was duly accepted by the Appellant, resulting in an Agreement for the Sale/Purchase of the suit shop for total consideration of ₹14,00,000/-. He submitted that an amount of ₹1,50,000/- was paid at that time, pursuant to which the Respondent placed the Appellant in possession of the suit shop. He submitted that by written notice, the Appellant offered to pay the balance amount to the Respondent against the execution of the Sale Deed involving *inter alia* the owner of the building. However, the Respondent neither accepted the balance amount nor executed any Sale Deed favouring the Appellant. Instead, the Respondent began interfering with the Appellant's possession. Mr Vernekar submits that in such circumstances permanent injunction should have been granted as a matter of course.

9. To the Court's query whether the Appellant would be willing to deposit the balance consideration amount together with interest, Mr Vernekar, on instructions, stated that the Appellant is now not in a financial position to pay the amount.

10. Ms Gina Almeida, the learned Counsel for the Respondent (appointed under the Legal Aid Scheme), submitted that the

substantial question of law as framed does not arise and, in any case, should be answered against the Appellant. She pointed out that the Appellant, by paying ₹1,50,000/- and refusing to pay the balance amount for frivolous reasons, continues to enjoy the suit shop without having any right to do so. She submits that once the two Courts declined the decree of specific performance, the Appellant has no right or title to retain possession of the suit shop. Therefore, the two Courts were entirely justified in declining relief of permanent injunction to the Appellant.

11. The rival contentions now fall for determination.

12. By instituting the suit, the Appellant had applied for a mandatory injunction for the execution of the Sale Deed in pursuance of the agreement reached with the Respondent. Though the relief was styled as one for mandatory injunction, the same was a relief for the specific performance of the alleged agreement. In addition, the Appellant also applied for a permanent injunction to protect his possession of the suit shop.

13. The trial Court and the first appellate Court have, for good and valid reasons, rejected the relief of mandatory injunction or specific performance. Yet, the Appellant has not even chosen to question the rejection of the relief of specific performance or

mandatory injunction. This is because the Appellant enjoys the suit shop free and does not wish to pay the balance consideration. No substantial question of law was framed in this regard, nor were any contentions advanced supporting this relief.

14. Instead, to the query of the Court whether the Appellant was even now in a position to pay the balance consideration amount, Mr Vernekar, on instructions from the Appellant, who was present in the Court, flatly stated that the Appellant would not pay the balance amount. Accordingly, it is pretty clear that the two Courts, upon evaluation of the evidence on record, have rejected the relief of specific performance (mandatory injunction). Accordingly, there is neither any challenge nor infirmity in the concurrent findings on this score.

15. Mr Vernekar, however, submitted that in terms of Section 53-A of the Transfer of Property Act, the Appellant was entitled to protect his possession and, therefore, the decree of the permanent injunction must be granted. However, this contention is entirely misconceived for reasons discussed after this.

16. The doctrine of part performance in Section 53-A of the Transfer of Property Act is an equitable doctrine. Therefore, in a situation where the Appellant's suit for specific performance

(mandatory injunction) came to be rightly dismissed by the two Courts, there is no question of such Appellant's possession being protected by a decree of a permanent injunction. Once the two Courts rightly dismissed the suit for specific performance, the Appellant's so-called possession became unauthorised and illegal. There was no question of protecting such illegal and unauthorised possession.

17. The grant of decree of permanent injunction to the Appellant, even though the two Courts have correctly dismissed his suit for specific performance (mandatory injunction), would amount to permitting the Appellant to continue enjoying the possession of the suit shop, even though the Appellant has failed to pay the balance consideration of ₹12,50,000/-, which, according to the Appellant himself was due and payable to the Respondent way back in the year 2006-07. Admittedly, after paying an amount of ₹1,50,000/- the Appellant has not bothered to make any further payments to the Respondent. Therefore, equitable relief of permanent injunction cannot protect the inequitable situation created by the Appellant.

18. Section 54 of the Transfer of Property Act clearly provides that a contract for the sale of immovable property by itself does not create any interest in or charge on such property. Therefore,

based on the so-called agreement, the Appellant could have only sought a decree of specific performance. The Appellant did seek such a decree but the two Courts below rightly denied the same to the Appellant. Moreover, the Appellant has not even made any grievance about the same in this Second Appeal. In such a situation, the Appellant cannot hold on to the suit shop illegally and unauthorisedly and further claim a decree of permanent injunction to protect his illegal and unauthorised occupation.

19. In *Mr. Prakash Pote & anr. V/s. Mr. John Cruzinho Gonsalves & Ors.*¹, it is held that once a suit for specific performance is dismissed, there is no question of extending the benefit of Section 53-A of the Transfer of Property Act to the prospective purchaser.

20. The above judgment and order dated 28.07.2021 was challenged before the Hon'ble Supreme Court by instituting a petition for Special Leave to Appeal (C) No.3912/2022. However, this SLP was dismissed by the Hon'ble Supreme Court on 07.03.2022, observing thus:

"ORDER

Once the petitioner(s) is/are lost in the suit for specific performance thereafter, the petitioners have

¹ SA No.1109/2021(F)
decided on 28.07.2021

*no right to continue with the possession. All the
Courts have rightly passed an order of eviction.
The Special Leave Petition stands dismissed.
Pending application stands disposed of."*

21. In *Revanasiddayya V/s. Gangamma alias Shashikala & Anr.*², the Hon'ble Supreme Court has held that once a suit for specific performance filed by a prospective buyer is dismissed, his possession becomes unauthorised and illegal. Protection under Section 53-A of the Transfer of Property Act is after that no longer available. The seller is entitled to claim possession from the prospective buyer on the ground of ownership.

22. The Appellant, who was the plaintiff in the suit, cannot rely upon any alleged weakness in the Respondent's case. Therefore, merely because the Respondent's case about the Appellant being a licensee may not have been accepted by the trial Court while dismissing the Respondent's counterclaim, the Appellant was not entitled to relief of permanent injunction, as a matter of course, as contended by Mr Vernekar. The Appellant, as a plaintiff, had to stand or fall on his own feet and could not rely upon any alleged weakness in the respondent-defendant's case.

23. After this Appeal was admitted on 23.08.2011, the Appellant did not cooperate in the matter of procedural

² (2018) 1 SCC 610

compliances and service of notice. Ultimately, the Appeal was dismissed for non-prosecution in the year 2019. The Appellant did apply for restoration but did not bother to circulate such an application for almost three years. The Appellant delayed the proceedings only to hold on to the possession of the suit shop without making any reasonable payments for such a user. By paying ₹1,50,000/- in the year 2006-07 and not paying the balance consideration amount of ₹12,50,000/- for all these years, the Appellant has continued in possession of the suit shop without any right or authority to do the same. In terms of the Hon'ble Supreme Court ruling in *Revanasiddayya* (supra), the possession of the Appellant would be illegal and unauthorised. A decree of permanent injunction cannot protect such possession.

24. For all the above reasons, the substantial question of law as framed is decided against the Appellant. This Appeal is dismissed. The Appellant shall pay costs of ₹25,000/- to the Respondent. Such costs should be deposited by the Appellant in this Court within two weeks, with due intimation to Ms Gina Almeida.

25. The Goa State Legal Services Authority will pay Ms Gina Almeida the fees as per the rules. However, the Goa State Legal Services Authority must also ensure that the costs of ₹25,000/-

are duly paid to the Respondent once the Appellant deposits the same.

26. The Appeal is dismissed with costs. Misc. Applications, if pending are also disposed of.

M. S. SONAK, J.

NITI K
HALDANKAR

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