

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

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WRIT PETITION 12747 OF 2016

Shri Narayan Namdeo Shirsath ... Petitioner
Versus
Shri Chandrakant Gopala Davare and Ors. ... Respondents

Mr. G. R. Kulkarni for the Petitioner.
Mr. S. D. Ghaisas for the Respondents 1 to 4.

CORAM: ROHIT B. DEO, J.
DATE : 27th JULY, 2022

P.C. :-

. The petitioner is the plaintiff in Regular Civil Suit 61 of 2012 which is brought for specific performance of contract.

2. The suit property is described as Shop 2 situated at Wing A of Davare Complex, which is constructed on land admeasuring 90R assigned Gut 626 situated at Vinchur, Taluka - Niphad.

3. The case of the plaintiff is on the basis of agreement of sale dated 15th February, 2000, which is duly registered at the office of the Sub-Registrar, Niphad. According to the plaintiff, out of the total consideration of Rs.1,11,000/- (Rupees One Lakh Eleven Thousand Only), he has paid Rs.1,00,000/- (Rupees One Lakh Only) to defendants and further amount of Rs.11,000/- (Rupees Eleven Thousand Only) which constitute the balance consideration was paid to respondent 1 as per his request and possession of the shop was delivered to the petitioner on 17th September, 2009.

4. The defendants filed their written statement on 7th June, 2010.

5. The defendants outrightly denied the averment in the suit plaint to the effect that Rs.11,000/- (Rupees Eleven Thousand Only) was paid by the plaintiff as consideration for shop 2. The defendants did not dispute the execution of the agreement. Rather, the defendants contended that it is the plaintiff who has committed breach of the terms and conditions of the agreement. The defendants admitted the execution of the agreement. However, the defendants claim that the agreed consideration was Rs.2,11,000/- (Rupees Two Lakhs Eleven Thousand Only). The defendants contended that except amount of Rs.26,000/- (Rupees Twenty Six Thousand Only), the plaintiff has not paid any other or further amount. The defendants specifically contended that the plaintiff represented that he would need financial assistance and to facilitate the loan, it will have to be shown that the plaintiff has paid the defendants Rs.1,00,000/- (Rupees One Lakh Only). According to the defendants, to enable the plaintiff to secure the loan, they agreed to execute documents acknowledging the receipt of Rs.1,00,000/- (Rupees One Lakh Only). However, the defendants categorically asserted that the said amount was not as of fact received. The defendants did not dispute that the suit shop is in possession of the plaintiff. However, the defendants contended that the plaintiff obtained forcibly possession of shop 2. The defendants contended that the plaintiff has deposited amount of Rs.11,000/- (Rupees Eleven Thousand Only) in the bank account of defendant 1, without the knowledge of defendant 1. This in essence is the original defence taken way back in 2010.

6. The defendants preferred an application under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'Code'). The defendants contended that defendant 1 was suffering from heart ailment. A meeting of well wishers was held on 15th October, 1999 and a committee was formed which drafted a resolution and pursuant to the said resolution an agreement was executed and notarized, which was handed over to the chairman of the committee deceased Mr. Chhabu Thore and copies were given to the members of the committee. The plaintiff Mr. Pralhad Khandagale was the Treasurer of the committee and it was his responsibility to look after the accounts. The defendants contended that after defendant 1 was operated on 25th January, 2001, he started suffering from memory lapse. Defendants contended that the accounts were settled by the treasurer on 31st October, 2012.

7. Despite the strong opposition of the plaintiff to the proposed amendment, the learned Trial Judge allowed the amendment. The learned Appellate Judge passed a cryptic order observing that it is open for the defendants to take all available defences including inconsistent pleas and that opportunity will have to be given to the defendants to take the defence which he proposing to incorporate.

8. It is obvious from the laconic order, that the learned Trial Judge was not alive to the provisions of Order VI, Rule 17 of the Code. The application under Order VI, Rule 17 is preferred after the commencement of the trial. The plaintiff is examined and cross-examined and the affidavit-in-chief of the next witness is on record. The proviso stood triggered. The learned Trial Judge failed to appreciate that in the entire application there is no attempt to satisfy the

due diligence test. The application does not explain why despite due diligence the matter could not have been brought before the Court before the commencement of trial.

9. Even *dehors* the aspect of not fulfilling the due diligence test, I am satisfied that an entirely different statutory is introduced. While it is true that inconsistent pleas can be introduced, provided the pleas are not mutually destructive, considering the stage at which the proposed amendment is sought, I am satisfied that plaintiff shall suffer serious prejudice.

10. In any event, in view of the proviso to Order VI, Rule 17 of the Code the amendment could not have been allowed.

11. The order impugned is quashed.

12. The learned Trial Judge is requested to expedite the hearing of the suit.

13. The petition is allowed in the aforestated terms.

[ROHIT B. DEO, J.]