

Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.33/2022

MR K. NAGESH SHET, son of
late Manunath Shet, married,
aged 78, resident of G/1, Classic
Apts., Behind Cafe Porvorim,
Krantinagar Alto Betim,
Porvorim, Bardez, Goa.

... APPELLANT

Versus

1. DR. ANTONIO TEOTONIO
CARDOSO, son of late Rodrigo
Francisco das Mercedes Peres
Cardozo, aged 69, and his wife,

2. MRS JAYANTI GRACIAS E
CARDOSO, aged 69, retired,
both residents of H.No.520 of
Caitanwado, Mercedes, Tiswadi,
Goa.

... RESPONDENTS

Mr Ajit Kantak, Advocate for the Appellant.

Mr Amey Kakodkar, Advocate for the Respondents.

CORAM: M. S. SONAK, J.

DATED: 23rd February 2023

ORAL JUDGMENT:

1. Heard Mr Kantak for the appellant and Mr Kakodkar for the respondents.

2. This Second Appeal challenges the Judgment and Decree dated 22.02.2021 made by the Appeal Court in Regular Civil Appeal No.91/2019 dismissing the appellant's (plaintiff's) suit for specific performance.

3. Mr Kantak, the learned counsel for the appellant urges the formulation of the following substantial questions of law, which according to him, arise in this appeal:-

(A) Whether the reasoning of the learned District Judge of the applicability of Section 2 of the Goa land Use Act and consequently Section 23 of the Indian Contract Act could be said to be applicable when the competent authority viz. the Mamlatdar under the GDD Agricultural Tenancy Act had held Shamba Kavlekar not to be a tenant and when the respondent too contended that Shamba Kavlekar was not tenant.

(B) Whether the learned District Judge could have interpreted the wordings **“one year from the date the plaintiffs obtain all the relevant permissions from the competent authorities for carrying out construction in the suit property”** to hold the applicability of Section 46

of the Indian Contract Act that no time for specific performance is specified.

4. Mr Kantak submits that in this case Shamba Kavlekar was never declared as a tenant under the provisions of the Goa Agricultural Tenancy Act. He therefore submits that there was no vesting of property in the said alleged tenant. In the absence of vesting, the provisions of the Goa Land Use (Regulation) Act, 1991 were not attracted. Therefore, the appeal court erred in holding that the agreement, of which specific performance was applied for, was opposed to public policy or otherwise hit by the provisions of Section 23 of the Contract Act.

5. Mr Kantak submitted that in terms of Clause 2(b) of the agreement dated 25.10.1996, the balance consideration of Rs.6.5 lakhs had to be paid to the respondents within a period of one year of obtaining all the relevant permissions from the competent authorities for carrying out construction on the said property. He submits that the construction permissions were admittedly not obtained. Notice was served by the respondents concerning this agreement on 18.04.2012. Within three months, the appellant offered to pay the entire balance consideration even though no permissions had been obtained. Mr Kantak submits that in such circumstances neither did the bar of limitation apply nor can it be

said that there was any lack of readiness and willingness on the appellant's part to comply with his part of the bargain. Mr Kantak submits that considering this factual situation, provisions of Section 46 of the Contract Act were not attracted.

6. In the above regard, the following averments in paragraph 7 of the plaint are quite telling:

“7. That in terms already agreed upon in the discussions and settled upon by the Plaintiff with Smt. Mira Shamba Kavlekar and Smt. Ashwini Ashakant Kavlekar, a tripartite Agreement dated 25.10.1996 and was entered into between the Defendants as the owners of the property, the plaintiff and Smt. Mira Shamba Kavlekar and Smt. Ashwini Ashakant Kavlekar, the heirs of Late Shamba Janu Kavlekar, this agreement executed before the Notary Shri Ashok S. Mashelkar under No.2977 on 25.10.1996. In terms of this Agreement, it was agreed that the heirs of Late Shamba Janu Kavlekar would declare that the name of Late Shamba Janu Kavlekar was erroneously recorded in the Survey Records and the Plaintiff in return was to give them an amount of Rs.1,00,000/- at the time of execution of the Agreement and thereafter a double bedroom Flat admeasuring a Super Built up area of 80 square metres to be located on the First floor of the Building to be constructed on the SUIT PROPERTY.”

7. Mr Kakodkar, learned counsel for the respondents submits that the appeal court was justified in invoking the provisions of Section 2 of the Goa land Use (Regulation) Act 1991. He

submits that the appeal court was justified in holding that the doctrine of reasonable time applies even where the parties have not stipulated a specific period within which permissions could be obtained. He relies on *Manohar @ Prabhakar, s/o Purushottamrao Wakil v/s. Goma, s/o Nagoji Kamble – 2015(4) Mh.L.J. 643* in support of this proposition. Mr Kakodkar points out that the suit was instituted sixteen years after the execution of the agreement and two years after the receipt of notice. He therefore submits that the substantial questions of law as proposed do not arise in this matter and in any case, the same should be answered against the appellant.

8. The rival contentions now fall for my determination.

9. The agreement dated 25.10.1996 and the Tripartite agreement dated 25.10.1996 clearly indicate that both the appellant and the respondents intended to defeat the provisions of the Goa Land Use (Regulation) Act, 1991. For this purpose, even the legal representatives of the tenant Shamba Kavlekar were taken on board.

10. The evidence on record shows that Shamba's name was entered in the survey records as a tenant. The purchase notices were issued to Shamba Kavlekar based on the premise that the

suit property was vested in him. The purchase notices offered opportunity to Shamba Kavlekar or his legal representatives to pay the purchase price. Copy of this notice was also marked to the respondents who were the landlords of the suit property. The suit property is admittedly an agricultural property.

11. The Goa Land Use (Regulation) Act, 1991 provides that notwithstanding anything contended in the Goa, Daman and Diu Town and Country Planning Act 1974 or in any plan or scheme made thereunder, or in the Goa Land Revenue Code, 1968, no land which is vested in a tenant under the provisions of the Goa, Daman and Diu Agricultural Tenancy Act, 1964 shall be used or allowed to be used for any purpose other than agriculture. Precisely to get over the bar created by this Act of 1991, the appellant and the respondents entered into agreements with the legal representatives of Shamba Kavlekar. In order to “settle” them. The terms of the settlement were that the legal representatives were to be paid some amount and also given one flat in the construction that was eventually proposed to be put up on the suit property. Thus, the appellant was clear that the property was to be purchased for non-agricultural purposes of construction and development. The entire intention was to get over the provisions of the 1991 Act by paying the legal representatives of Shamba Kavlekar.

12. At no stage, had the respondents-landlords taken any steps for deletion of Shamba's name from the records. At no stage had the respondents-landlords filed any proceedings for negative declaration. By filing a written statement and also an appeal, it is the respondents who urged that the agreement was hit by the provisions of Section 23 of the Contract Act because the consideration was immoral and in any case the contract was opposed to public policy. Though the Trial Court did not accept this defence, the appeal court accepted this defence and held that the entire object of the agreement was to defeat the provisions of the 1991 Act. The appeal court justifiably held that no specific performance could be granted to any agreement or a contract which was opposed to public policy or intended to defeat the provisions of law. Accordingly, the first substantial question of law must be answered against the appellant.

13. Even on the second issue, the facts are quite eloquent. The agreement was entered into on 25.10.1996. Even though no specific timeline was prescribed for obtaining all permissions, such permissions had to be obtained within reasonable time. However, upto 2012 i.e. for almost sixteen years neither the permissions were obtained nor was any offer made for the payment of balance consideration of ₹6.5 lakhs. In 2012 the respondents issued notice and repudiated the contract. In

response, the appellant did offer to pay the entire price. However, even the suit was instituted almost after two years from the date of the receipt of the notice. Thus, the suit was instituted after eighteen years to enforce the agreement. In such circumstances, the appeal court correctly invoked provisions of Section 46 of the Contract Act to hold that the appellant should have discharged his part of the bargain at least within reasonable time. Accordingly, there is no error and the second substantial question of law also does not arise or must be answered against the appellant.

14. Accordingly, there is no merit in this appeal and the same is liable to be dismissed.

15. At this stage Mr Kantak pointed out that the appellant has paid an amount of ₹50,000/- to the respondents. To the query of the Court to the learned counsel for the respondents whether the respondents would refund this amount, Mr Kakodkar on instructions states that this amount would be refunded with simple interest @ 6% p.a., within four weeks from today. This statement is accepted and the respondents will have to abide by the same.

16. Mr Kantak states that a demand draft for the above amount may be drawn in the name of the appellant and handed over to him so that he can, in turn, hand over the same to the appellant. Mr Kakodkar stated that this will be done.

17. The appeal is dismissed with directions as aforesaid on the issue of refund with interest.

M. S. SONAK, J.

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