

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 36 OF 1998.

Mr. Hans Jurgen Buchmann,
major, residing at H.No.416,
First Floor, Opposite Bogmalo
Church, Bogmalo, Goa, and
presently residing at Germany,
represented by the power of
attorney holder Mrs. Ivy Cardozo,
resident of Vasco-da-Gama, Goa.

... Appellant.

VERSUS

1. Mrs. Leopoldina C. Rodrigues,
2. Mr. Alfredo Rodrigues and his
wife:
3. Mrs. Remmy Rodrigues,
all three majors,
residing opposite Bogmalo
Church, Bogmalo, Goa.
4. Rev. Fr. Basilio J.J.F.
Rodrigues, major,
Divine Retreat Centre,
Muringoor, Kerala.
5. Mrs. Gunnel L. Buchmann,
residing at House No.416,
First Floor, Opposite Bogmalo
Church, Bogmalo, Goa,
and presently residing at Germany. ... Respondents.

Smt. A.A. Agni, Advocate for the Appellant.

Shri S.S. Kantak, Advocate for the Respondent Nos.1
to 4.

None for the Respondent No.5.

CORAM: N.A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 23.04.2004.

DATE OF PRONOUNCING THE JUDGMENT: 30.04.2004.

J U D G M E N T:

The appellant herein is the plaintiff in S.C.S.
No.12/98 and his plaint in the said Civil Suit filed on

11.2.98 for specific relief, permanent injunction and other reliefs has been rejected by the learned Addl. Civil Judge S.D., Vasco-da-Gama, by his Order dated 23.4.1998 in terms of Order 7, Rule 11(d) of C.P.C.

2. The parties hereto shall be referred to in the names as they appear in the cause title of the said Civil Suit.

3. Briefly stated, it was the case of the plaintiffs that they were German and Swedish Nationals having their permanent residence in Germany and that they had been visiting India as tourists for over ten years, when they came in contact with defendant No.1 and through her the other defendants. The plaintiffs stated that defendant No.1 being a widow had three minor children to support and was in considerable financial difficulties and was not having a suitable dwelling house as the house in which she was residing was in dilapidated condition and therefore the plaintiffs agreed to provide, through the intervention of defendant no.4, who at that time was posted at Bogmalo Church, financial assistance to develop her property and to assist her to build a new structure in place of the old house and accordingly the plaintiffs provided defendant nos.1 and 4 with regular finance in India and defendant Nos.1 and 4 utilised the finance

for the construction of the present building in which defendant No.1 and her children reside.

4. The plaintiffs stated that right from the beginning it was clearly understood that in return for the financial assistance rendered by them to defendant no.1, through defendant No.4, and at times directly, the upper portion of the building constructed in their property by defendant no.1 would be transferred to the names of the plaintiffs and with this view, a memorandum of understanding was signed between the plaintiffs and the defendants on 17.12.1991 by which the defendant No.1 agreed to hand over the flat with an attic having an area of about 43 sq.m. situated on the first floor of the said building, with the financial assistance provided by the plaintiffs. The plaintiffs stated that the defendant no.1 also agreed, pending completion of the final deed of conveyance, that the plaintiffs as also their families would be permitted to use the said flat for their absolute use and defendant No.1 handed over the exclusive possession of the said flat to the plaintiffs.

5. The plaintiffs stated that the plaintiffs were also providing a monthly stipend to defendant No.1 and that the various amounts given to defendant nos.1 and 4 upto 31.3.97 work out to Rs.9,54,980/-. The plaintiffs

stated that after the execution of the said memorandum of understanding the plaintiffs have been requesting for final conveyance deed to be executed and this was possible only during the yearly visits of the plaintiffs to Goa as they were residing in the said flat and since their visits were for short duration and on account of their personal commitments and working constraints, they were not able to execute the said sale deed in respect of the said flat which remained pending and defendant No.4 who was the main go-between the plaintiffs and the defendants, also left Goa at this stage and was not available when the plaintiffs came down to reside in the said flat.

6. The plaintiffs stated that in 1986 discussions were held between the plaintiffs and defendant No.4 with a view to bring the matter to an end so that the suit flat could be brought in the name of the plaintiffs and the plaintiffs also initiated steps to obtain necessary permission from the Reserve Bank of India and other authorities concerned for acquiring immovable property in India but due to reluctance of defendant no.4 who raised one or the other objection the final sale deed remained unexecuted and the defendants were forced to return to Germany in 1996-1997 which was the last time they visited India, apart from their present visit.

7. The plaintiffs stated that it has now become obvious that the defendants are unwilling to transfer the title to the said flat and seeing no other alternative, the plaintiffs sent a legal notice to the defendants on 3.4.1997 calling upon the defendants to make necessary arrangements to execute the deed in their favour within one month which notice was received by the said defendants and the defendant no.1 who received the same came with a reply that the plaintiffs had advanced only nominal sum for the purpose of repairs to the said house. The reply denied any obligation on the part of the defendant No.1 and disclaimed any liability on her part to execute any deed of conveyance in favour of the plaintiffs.

8. The plaintiffs stated that at the time of the said reply the plaintiffs were in Germany and they had to wait for their arrival in India and after reaching to Goa on 31.1.98 they hastened to file the present suit as they have realised that they are left with no alternative if they have to get the legal possession of the said flat, physical possession of which has been with them all along.

9. The plaintiffs further stated that they fear that taking advantage of their absence from India, the defendants particularly defendant no. 1 who resides

along with her children in the building where the flat is situated will take forcible possession of the suit premises in which case they would be put to irretrievable loss and this was more so because of the continued reluctance and belligerent attitude displayed by defendant no.1 whenever the question of conveyance deed was brought up by the plaintiffs and the plaintiffs were forced to stop the personal financial assistance rendered to her with effect from March, 1997. The plaintiffs stated that they were not bound in any manner to assist the defendant No.1 with any pecuniary help every month which however was done out of goodness and it is on account of this and judging by the behaviour of defendant No.1 that the plaintiffs feared that the suit premises may be broken open during their absence from India by defendant No.1 and her so called well wishers/supporters.

10. The plaintiffs stated that judging by the past behaviour of defendant no.1, the defendant no.1 may close/barricade the access of the ground floor to the said flat and therefore it is necessary that she be prevented from doing so as otherwise the plaintiffs will not be able to gain access to the said flat and therefore it was necessary that the defendants, specially defendant No.1 be prevented either from interfering or preventing or blocking the said

passage/access to the said flat.

11. The plaintiffs stated that the conveyance deed in respect of the suit flat was to be completed within fifteen days from the signing of the memorandum of understanding, (emphasis supplied) but on account of the delay and hurdles placed by the defendants, the execution of the deed has been delayed over the years. The plaintiffs stated that the cause of action arose when the defendants refused to comply with the legal notice issued through their Advocate on 3.4.97 and again when the defendant No.1 refused to execute the deed through her Advocate on 26.4.97 and therefore the suit was filed in time. The plaintiffs valued the suit at Rs.2.8 lakhs for the purpose of valuation and jurisdiction and paid the necessary court fees thereon.

12. As already noted, the plaintiffs filed the suit:-

(a) To direct the defendants/duly authorised representative to execute the conveyance deed in respect of the suit premises in favour of the plaintiffs forthwith;

(b)

(c) To pass an order of permanent injunction restraining the defendants, their family members, agents or anyone acting through them not to interfere with the suit premises or the enjoyment of the same by the defendants or their family members or blocking the access thereto;

(d) For temporary injunction.

(e) ...

13. The defendant No.1 filed a written statement, inter alia, taking the plea that the suit which was filed under the Specific Relief Act, 1963 based on the memorandum of understanding dated 17.12.91 was barred under Article 54(2) of the Limitation Act 1963 and in terms of the said plea, defendant No.1 also filed an application dated 20.2.98 for rejection of the plaint under Order 7, Rule 11(d) C.P.C. which application came to be decided by the impugned Order dated 23.4.1998.

14. Admittedly, the learned Trial Court has dealt with the aspect of limitation only as far as prayer (a) of the plaint is concerned and has remained silent as far as prayer (c) of the plaint is concerned.

15. The first question which requires consideration

is whether the plaint as a whole could have been dismissed inspite of the fact that the plaintiffs had prayed for two main reliefs namely for specific performance in terms of prayer (a) and for injunction in terms of prayer (c).

16. The contention of Smt. Agni is that both the reliefs sought by the plaintiffs in terms of prayers (a) and (c) were independent reliefs and the plaint could not be rejected as a whole. Smt. Agni has placed reliance on the case of **D. Ramachandran v. R.V. Janakiraman and others** (A.I.R. 1999 S.C., 1128).

17. On the other hand, Shri Kantak, the learned Advocate for the respondents, has submitted that the prayer for injunction was a consequential relief sought by the plaintiffs and that the entire cause of action of the plaintiffs was for execution of the conveyance and not for injunction. Referring to paras 10 and 11 of the plaint, learned Advocate Shri Kantak has submitted that the entire cause of action and the valuation made by the plaintiffs is for specific performance and not for injunction.

18. The learned Trial Court did observe that the suit of the plaintiffs was for specific relief, permanent injunction and other reliefs and at the same

time observed that the suit was basically for specific performance and therefore the limitation would be governed by Article 54 of Indian Limitation Act, 1963. In para 10 of the plaint the plaintiffs did plead that they feared that taking advantage of their absence from India, the defendants, particularly defendant No.1 who resided along with her children may take forcible possession of the suit premises in which case they would be put to irretrievable loss and that was because of the continued reluctance and belligerent attitude displayed by defendant no.1. whenever the question of conveyance deed was brought up by the plaintiffs. The plaintiffs had also pleaded that judging by the past behaviour of the defendant no.1, defendant no.1 may close/barricade the passage/access from the ground floor of the building to the suit premises and therefore it was necessary that defendant No.1 was prevented from doing so as otherwise the plaintiffs would not be able to gain access to the suit premises and therefore it was necessary that the defendants, particularly defendant no.1, ought to be prevented either from interfering with the suit premises or in any manner preventing or blocking the passage/access to the suit premises. It is true that the plaintiffs in para 14 did not separately value their suit for the purpose of injunction but the fact remains that the plaintiffs did value the suit for the purpose of

jurisdiction at Rs.2.8 lakhs. There is no dispute that on the date of filing of the suit the plaintiffs were granted ex-parte order in their favour directing both the parties to maintain status quo and further directing the Bailiff of the Court to verify in whose possession was the suit flat. The fears and apprehensions expressed by the plaintiffs in the plaint did come true subsequently, as could be seen from the report of the Commissioner dated 7.4.98 and ultimately the dispute relating to the attempts at dispossession of the plaintiffs from the suit premises, landed in this Court, and the matter was settled in terms of the Minutes filed by both the parties by Order of this Court dated 16.2.99.

19. Admittedly, in terms of the memorandum of understanding dated 17.12.91 the exclusive possession of the plaintiffs was recognised by the defendants, possession which the plaintiffs were certainly entitled to protect unless they were evicted under due course of law. The plaintiffs had expressed their fear that they might be evicted because of the belligerent attitude of the defendants particular defendant no.1 after the plaintiffs had stopped the personal financial assistance which the plaintiffs claimed they were rendering to defendant no.1 from 1997. Since the possession of the suit premises was with the

plaintiffs, the plaintiffs could have sought for an injunction against the defendants independently of seeking specific performance for execution of the conveyance deed in terms of prayer (a) of the plaint. The relief of injunction was not incidental to the relief of specific performance sought by the plaintiffs and the relief of injunction sought could not be said to be adjunct to the relief of specific performance. The plaintiffs also would be entitled to amend the plaint to incorporate the subsequent events which took place resulting in the appointment of a Commissioner etc. In my opinion, the pleadings of the plaint were sufficient to grant or refuse either both or any of the reliefs sought by the plaintiffs in terms of prayers (a) and (c) of the plaint and one was not dependent on the other. Order VII rule 11(d) speaks of rejection of the plaint and the plaint to be rejected has to be rejected as a whole and not in part. If any authority is required to support this proposition then reference could be made to the case of **D. Ramachandran v. R.V. Janakiraman and others** (supra) wherein the Hon'ble Supreme Court with reference to Order VII Rule 11 has stated that under the rule there cannot be a partial rejection of the plaint or petition. In this view of the matter, in my opinion, the learned Trial Court fell into error by rejecting the plaint entirely considering the same to be basically based only on prayer (a) and

ignoring that the suit was also filed for injunction in terms of prayer (c) of the plaint.

20. The second submission made by learned Advocate Smt. Agni was that in terms of the said memorandum of understanding between both the parties, no date was spelt out for the execution of the transfer deed in respect of the suit premises and that shows that time was not the essence of the contract for execution of the transfer deed. Learned Advocate Smt. Agni has submitted that the said 15 days had to be reckoned from the service of notice dated 3.4.1997 though the plaintiffs had stated in para 12 of the plaint that conveyance deed had to be completed within 15 days from the signing of the memorandum of understanding. It is the submission of learned Advocate Smt. Agni that the said memorandum of understanding is a document annexed to the plaint and has got to be read along with the plaint and to support this submission Smt. Agni has placed reliance on the decision of this Court in the case of **Gyoki Masajuki Maeda v. M/s Aisha Constructions and Others** (1999 (1) Goa L.T., 142). Smt. Agni has further submitted that rejection of the plaint has got to be done on the basis of the pleadings of the plaint and not on the basis of what the defendant stated in his written statement in answer to the plaint and to support this submission learned

Advocate Smt. Agni has placed reliance on the case of **Shivrudra Shivling Pailway & others v. Prakash Maharudhra Pailwan & Others** (2002 (6) Bom. C.R., 546) and on the case of **Saleem Bhai and others v. State of Maharashtra and others** (2003) 1 S.C.C. 557.

21. On the other hand, learned Advocate Shri Kantak has submitted that both the parties well understood in terms of the memorandum of understanding that the transfer document had to be executed within 15 days of the execution of the said memorandum of understanding. Shri Kantak has further submitted that subsequent meetings or subsequent notice could not save limitation in favour of the plaintiffs as the cause of action to file the suit started on 1.1.92. Shri Kantak also submitted that even if the entire plaint is read as a whole there is nothing contrary to indicate that the parties had not fixed the time for execution of the transfer deed in respect of the said flat and that the plaintiff's statement in para 12 of the plaint clearly indicates that the parties well understood that the transfer deed had to be executed within 15 days from the date of signing the memorandum of understanding.

22. Shri Kantak has placed reliance on the case of **Pandit Bajirao Wabale (since deceased) and Ors. v. Padmawati Ganpatrao Hule & Ors.** (2003 (4) All

M.R.1033). In this case this Court observed that there could not be any difference of opinion whether Art.54 of the Indian Limitation Act attracted to the case. This court observed that Art.54 provides that the period of limitation in case of specific performance of the contract is three years. The cause of action for filing the suit or the period of limitation will begin to run, firstly, if the date is fixed for performance then from that date. Secondly, if no such date is fixed in that case when the plaintiff (vendee) had noticed that performance was refused. In that case the court came to the conclusion that the parties had specifically agreed that the sale deed should be executed within three months from 22.1.72 i.e. the date of agreement of sale and being so, the case of those parties fell under first part of Art.54 of the Limitation Act and the cause of action for filing the suit accrued on 22.4.1972.

23. Right now we are only concerned to find out whether the learned Trial Court was right in rejecting the plaint. From the view I have taken that the plaint could not be rejected in part, it is not necessary to enter the controversy and find out whether the plaint could be rejected in terms of prayer (a) of the plaint. Since there cannot be a partial rejection of the plaint, the controversy whether prayer (a) of the

plaint was time barred or not though decided by the learned Trial Court against the plaintiffs, will have got to be left open to be decided afresh as an issue in the suit.

24. For reasons stated hereinabove, the appeal deserves to succeed. The impugned order of the learned trial court dated 23.4.1998 is hereby set aside. The suit of the plaintiffs shall now proceed in accordance with law. Considering the facts, there will be no order as to costs.

N.A. BRITTO, J.

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