
(2005) 08 BOM CK 0139
In the Bombay High Court
Case No : First Appeal No. 41 of 1998

Adelia Dos Remedios

APPELLANT

Vs

Anand Giri Keni (Deceased by Lrs).

RESPONDENT

Date of Decision : 24-08-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 152, 47
Limitation Act, 1963 — Article 54

Citation : AIR 2005 Bom 421 : (2006) 1 ALLMR 530 : (2006) 2 BomCR 822 :
(2006) 1 MhLj 627

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : S.D. Lotikar and S. Naik, for the Appellant; R.G. Ramani and A.P. Cardozo, for the Respondent

Final Decision : Allowed

Judgement

R.M. Lodha, J.—The first appeal is directed against the Judgment and Decree passed by the Civil Judge, Sr. Division, Panaji on 23-7-1997. By the said Decree, the trial Court decreed the plaintiffs suit partly and directed the defendants Nos. 1 to 16 to sell the suit plot No. 43 to the plaintiff as agreed upon by them within 90 days from the date of decree.

2. The original defendants No. 1, 4, 11, 12, 13, 14, 15 and 16 are in appeal aggrieved by the said judgment and Decree.

3. Anand Guiri Keni (since deceased) and now represented by his legal representatives (respondents No. 1 to 6 hereinafter, referred to as "the plaintiff") filed the suit for specific performance of the agreement, though styled as the suit for declaration, mandatory and permanent injunction and damages. He set up the case in the plaint that by an agreement dated 12-7-1971, the late Luciano Jovita Francisco Pinto and his wife agreed to sell their property to Sharada Mandir Trust known as "Nagally" and "Queundem" situated at Teleigao, Ilhas, Goa bearing Land Registration No. 1436 at Book B 4 old and Revenue Nos. 216,

217, 219, 223, 224, 225, 630 and 642 directly or through its nominee or nominees. That in terms of the said agreement, Sharada Mandir Trust appointed him to carry out sub-divisions and development of the said property and to arrange for sale of the sub-divided plots. On 9-9-1971, the said Luciano Jovita Francisco Pinto and his wife executed another agreement with the said Trust and the plaintiff, specifying the terms and conditions relating to the subdivision and sale of the plots. The said property was sub-divided into plots subsequently and their approval from the Town Planning Department was secured and the sale of the resulting plots was partially effected. When the sale was in process and the plots were yet to be completely sold as per the agreement, the dispute arose between the plaintiff, Sharada Mandir Trust and Luciano Pinto and his wife. That led to the Sharada Mandir Trust in filing the suit bearing No. 37/81/A in the Court of the Civil Judge, Sr. Division, Panaji. The said suit was settled between the parties by the Consent Decree dated 7-9-1981. The plaintiff averred that pursuant to the Consent Decree, the said Luciano Pinto and his wife executed various sale deeds of the plots. When the plaintiff wanted the said Luciano and his wife to execute the sale of five plots including Plot No. 43, by his letters dated 3-3-1982 and 19-8-1982 he refused to execute the sale of the five plots. The plaintiff then wrote a letter dated 31-8-1982 to Luciano Pinto explaining to him that the said five plots including Plot No. 43 formed part of the Consent Decree and that the said plots had been approved by the Town Planning Department. In response to his letter dated 31-8-1982, Luciano Pinto recorded that he would verify from the plan whether the said plots existed in fact or not and in case he was satisfied, he would sign the sale deed within the time mentioned in the letter dated 31-8-1982. Luciano Pinto and his wife after scrutinizing the plan signed the sale deed pertaining to the four plots, but did not sign the sale deed relating to Plot No. 43 on the ground that plot No. 43 was not included in the Consent Decree. In the plaint, the plaintiff averred that in the Consent Terms dated 7-9-1981, by mistake, two plots were mentioned as plot No. 48; one of these plots is in fact Plot No. 43. The plaintiff further averred that in the Consent Decree it has been clearly mentioned that Luciano Pinto and his wife shall sell to Sharada Mandir Trust or to such person as may be named by it all the 89 plots approved by the Town Planning Department as mentioned in the plan annexed to the application for Consent Decree. According to the plaintiff, Plot No. 43 was one of those 89 plots. Luciano Pinto expired on 25-3-1984 and, therefore, in the suit besides his wife who was impleaded as defendant No. 1, his other heirs were impleaded as defendants Nos. 2 to 10. The trustees of Sharada Mandir Trust were impleaded as defendants Nos. 17 to 21. The plaintiff claimed that the defendants Nos. 1 to 16 were bound to sell plot No. 43 to the plaintiff or to such person as may be named by him. According to the plaintiff, the said plot was agreed to be sold at the rate of Rs. 25/- per sq. metre, out of which Rs. 8.50 was part of consideration to the defendants Nos. 1 to 16. Because of refusal by late Luciano Pinto and his wife in executing the sale deed in respect of plot no. 43, the plaintiff set up the case that he suffered loss of Rs. 10,000/-. The plaintiff in the backdrop of the afore-narrated facts prayed for a decree of declaration that

the defendants Nos. 1 to 16 are bound and liable to sell plot No. 43 to the plaintiff or to such other person or persons as the plaintiff may name in accordance with the Consent Decree for the price of Rs. 8.50 per sq. metre and directions to the defendants Nos. 1 to 16 to sign, execute and register a deed of sale in respect of the said plot No. 43. The plaintiff also prayed for a direction to pay him a sum of Rs. 10,000/- on account of loss and damage and for permanent injunction restraining the defendants Nos. 1 to 16 from transferring the suit plot to any other person.

4. The written statement was filed by defendants Nos. 1, 4, 11, 12, 13, 14, 15 and 16. They raised the objection that the suit was barred by limitation and it was also not maintainable. The said defendants denied that the suit plot was agreed to be sold under the Consent Decree at the rate of Rs. 8.50 per sq. metre or any other rate. They denied that the suit plot was one of the 89 plots to be sold. The said defendants set up a defence that the suit plot was not mentioned in the Consent Decree. They denied that due to an error plot No. 48 was mentioned instead of Plot No. 43 in the consent decree.

5. In the light of the pleadings of the parties, the trial Court framed four issues, namely:

1. Whether the plaintiff proves that the defendants Nos. 1 to 16 are bound and liable to sell the suit plot (no. 43) to him?
2. Whether the plaintiff proves that he has suffered a loss of Rs. 10,000/- and he is entitled to recover it from the defendants Nos. 1 to 16?
3. Whether the defendants prove that the suit is barred by limitation?
4. Whether the defendants prove that the suit is not maintainable?

6. The plaintiff examined himself as PW 1. He was cross-examined by the Counsel for the defendants Nos. 1, 4, 11, 12, 13, 14, 15 and 16. The plaintiff also examined one Subhash Pangam as PW 2. The documentary evidence was also produced by the plaintiff. The defendants Nos. 1, 4, 11, 12, 13, 14, 15 and 16 who filed the written statement did not lead any evidence. The other defendants did not file any written statement.

7. The trial Court heard the arguments of the learned Counsel for the plaintiff. Nobody appeared for the defendants at the time of arguments and accordingly, the trial Court proceeded with the arguments ex-parte against the defendants. The trial Court held that the plaintiff has been able to prove the defendants Nos. 1 to 16 were bound and liable to sell the suit plot No. 43 to him. The trial Court decided the issue of limitation against the defendants and also held that the issue that the suit was not maintainable was frivolous. The trial Court held that the plaintiff has not been able to prove the case of damages. Thus, by its Judgment and Decree dated 23-7-1997, the trial Court decreed the plaintiff's suit partly and directed the defendants Nos. 1 to 16 to sell the suit plot No. 43 to the plaintiff as per the Consent Decree. Aggrieved by the said judgment and Decree,

the present appeal has been filed.

8. Mr. S. D. Lotlikar, the learned Senior Counsel for the appellants contended that on the face of the facts pleaded in the plaint the suit was barred by time. He would submit that in effect the suit was for specific performance of the contract and as per the averments made in the plaint, the defendant No. 1 and her husband Luciano Pinto had refused to execute the sale deed prior to 31st August, 1982. The said suit was filed on 2-9-1985, which was beyond the period prescribed under Article 54 of the Limitation Act, 1963. He would also submit that the suit was in the nature of the execution of the Consent Decree and, therefore, not maintainable in the light of the provisions contained in Section 47 of the Code of Civil Procedure. The learned Senior Counsel contended that the Plot No. 43 was not part of the consent decree and it was not open to the trial Court to hold that there was an error in the consent decree in mentioning the two plots No. 48 and that one of the plots mentioned as 48 was plot No. 43. The learned Senior Counsel also urged that the suit being for the specific performance, it was required to be pleaded and proved by the plaintiff that he was ready and willing to perform his part of the contract and that there was no pleading of readiness and willingness in the entire plaint. Lastly, the learned Counsel contended that under the Consent Decree, the plots mentioned therein were to be sold to Sharada Mandir Trust and it was not open to the plaintiff to claim a specific performance of the Consent Decree and seek execution of the sale deed in respect of Plot No. 43 in his name or any person or persons named by him.

9. On the other hand, Mr. R.G. Ramani, the learned Counsel for the respondents No. 1 to 6 who are the legal representatives of the original plaintiff submitted that the decree passed by the trial Court was proper and did not suffer from any factual or legal infirmity. He submitted that from the averments made in the plaint, it cannot be said that the suit was barred by time. According to him, the earlier refusal by Luciano Pinto and his wife was not firm refusal in executing the sale deed. As a matter of fact, the learned Counsel submitted that on the copy of the letter dated 31-8-1982, Luciano Pinto made an endorsement that he was going to study the case by 3rd September and, if possible, he would effect the sale deed on 11th September. The learned Counsel also referred to Clause 6 of the Consent Terms and thus submitted that the limitations had not even begun to run before 7th September, 1982 and since the suit had been filed on 2nd September, 1985, it was well within the time under Article 54 of the Limitation Act. The learned Counsel submitted that the Consent Decree was nothing but the agreement between the parties superimposed by the seal of the Court and that suit for specific performance of the said agreement was maintainable. The learned Counsel for the respondents Nos. 1 to 6 did not dispute that Plot No. 43 was not mentioned in the Consent Decree, but according to him, it was a clerical mistake. At two places in the consent terms Plot No. 48 wrongly came to be mentioned. The learned argued that in all 89 plots were agreed to be sold by Luciano Pinto and his wife and 88 plots having been already sold 89th Plot that

remained to be sold was Plot No. 43. The learned Counsel, thus, submitted that the trial Court did not commit any error in passing the impugned Decree.

10. I considered the rival contentions and carefully examined the pleadings and the evidence on record.

11. Prayers (a) and (b) in the plaint read thus:

"a) Declaration that the defendants Nos. 1 to 16 are bound and liable to sell the suit plot (Plot No. 43) to the Plaintiff or to such other person or persons as the plaintiff may name, in accordance with the said Agreement, for the price of Rs. 8.50 per square metre;

b) Directing the Defendants Nos. 1 to 16 to sign and execute and register a deed of sale in respect of the suit Plot (Plot No. 43) in favour of the Plaintiff or such person or persons as the plaintiff may name:"

12. The said prayers conjointly read with the pleadings of the plaint make it clear that the suit filed by the plaintiff was in fact the suit for the specific performance of the consent decree dated 7-9-1981. As a matter of fact, during the course of arguments, the learned Counsel for the respondents submitted that it was true that the "said agreement" referred to in the prayer relates to the Consent Decree dated 7-9-1981. Thus, there is no dispute before me that the plaintiff has sought specific performance of the Consent Decree dated 7-9-1981. The consent Decree dated 7-9-1981 reads thus:

"1. Defendants Nos. 1 and 2 shall convey to the trustees of Sharada Mandir Trust or their nominees the following 89 plots of the sub-division "Nagally" approved by the Town Planning Committee (plan of sub-division is annexed hereto) within a period of one year from 7th September, 1981 on receiving in respect thereof the prices mentioned here-in below from the trustees of the Sharada Mandir Trust: -

2. The conveyances shall be effected as and when demanded by defendant. Nos. 3 (who is hereby authorized by the plaintiffs to make demands on their behalf) but not later than 6th September, 1982.

3. Defendants Nos. 1 and 2 shall not be liable to pay stamp duties and registration fees.

4. Defendant Nos. 3 shall be at liberty to recover from the purchasers charges for the work of the sub-division and development and brokerage/commission due to him/trustees of Sharada Mandir Trust.

5. The sale deed shall, inter alia, include a covenant that the purchaser shall not have any recourse to defendants Nos. 1 and/or 2 in respect of the development of planning of the sub-division/plots, the entire responsibility in that regard being that of defendant Nos. 3.

6. Defendants Nos. 1 and 2 shall sign applications to concerned authorities for no

objections to the sales of the aforesaid plots whenever required but not beyond one year from 7th September, 1981.

7. Parties shall have no claim against each other based on any previous agreement, compromise, in particular the agreements dated 12-7-1971, 9-9-1971 and 27-6-1972, the compromise terms dated 20-9-1975 and the consent decree dated 20-9-1975 in special Civil Court No. 172 of 1975, all of which are hereby superseded.

8. Parties shall jointly apply to the Court of the Judicial Commissioner for Goa, Daman and Diu in Misc. Civil Appeal No. 1 of 1980 for setting aside the order of the Civil Judge, Senior Division Panaji, dated 29-11-1979 in Special Civil Suit No. 162/78/A and for dismissal of the said suit.

13. A bare look at the Consent Decree shows that Plot No. 43 does not find place anywhere. This aspect is not even disputed by the Counsel for the respondents Nos. 1 to 6. However, his submission is that plot No. 48 has been wrongly mentioned twice in the consent decree. According to him, plot No. 48 mentioned after plot No. 5 in the Consent decree is in fact Plot No. 43. Plot No. 48 that is mentioned after plot No. 34, is plot No. 48. I am afraid the contention of the learned Counsel for the respondents can hardly be accepted. If there was any error, clerical or otherwise in the Consent Terms by not mentioning Plot No. 43, an application ought to have been made for necessary correction therein. In a suit for specific performance founded on a particular agreement (here the Consent Decree), it was not open to the Court to read Plot No. "48" as 43. Section 152 of the CPC provides the course for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip. Admittedly, no such course was adopted by the parties to the Consent Decree. How, in a suit for specific performance, the Court could have amended the Consent Decree by reading plot No. "48" as "43". It was not open to read something in the Consent Decree, which was not there. As a matter of fact, right from beginning the case of the defendant No. 1 and her husband had been that plot No. 43 was not part of the Consent Terms. The plaint itself avers this stand of Luciano Pinto and his wife. Admittedly no steps were taken by the plaintiff in getting the Consent Decree corrected and amended. In my considered view, the trial Court committed serious error in reading into the Consent Decree plot No. 43 which was not there and then granting the decree for specific performance; relating to that plot. The impugned Judgment suffers from this fundamental error.

14. It may also be noticed that under the Consent Decree said Luciano Pinto and his wife agreed to convey to the Trustees of Sharada Mandir Trust or their nominees the 89 plots mentioned therein. The plots were to be conveyed to the Trustees of Sharada Mandir Trust and not to the plaintiff, by the defendant no. 1 and her husband. The present plaintiff who was the defendant No. 3 in the Suit No. 37/81/A in which the consent decree came to be passed was only authorized to make demand for conveyances on behalf of the Trustees of Sharada Mandir

Trust from Luciano Pinto and his wife. Clause 2 of the Consent Decree does not authorize the plaintiff to claim specific performance of the Consent Decree. Clauses 1 and 2 of the Consent Decree dated 7-9-1981 when read together, leave to no manner of doubt that Luciano and his wife were under obligation to convey in favour of the Trustees of Sharada Mandir or their nominees the 89 plots referred to in the Consent Decree and the demand for such conveyances could be made by the present plaintiff on behalf of the Trustees of Sharada Mandir Trust. The plaintiff did not have any right beyond it under the said Consent Decree. The suit for specific performance of the contract based on the Consent Decree dated 7-9-1981, thus, filed by the plaintiff was not maintainable. The learned trial Judge committed error in mixing up the issue No. 4 with issue No. 3 and thereby holding that the suit having been found within limitation the issue about maintainability of the suit was superfluous the issue regarding maintainability of the suit was distinct from the issue of limitation.

15. Besides, the suit being in the nature of specific performance of the contract, it was incumbent upon the plaintiff to aver the readiness and willingness to perform his part of contract but there is no such pleading in the entire plaint.

16. In view of the discussion aforesaid, the suit is liable to be dismissed and it is not necessary to deal with two other contentions raised by the learned Senior Counsel for the appellants viz., (i) that the suit was barred u/s 47 of the Civil Procedure Code, and (ii) that the suit was barred by limitation. However, before I close, I may deal with these contentions. The suit cannot be said to be barred u/s 47 of CPC. The Consent Decree is nothing but an agreement between the parties superimposed with the seal of the Court and the specific performance of such agreement can always be sought by filing substantive suit. The suit is also not barred by limitation. It is true that in paragraph 9 of the plaint, the plaintiff averred that he asked Luciano Pinto and his wife on 3-3-1982 to execute a sale of five plots, namely 13A, 43, 245, 246 and 250 and he refused to execute the sale. But, in paragraph 10, the plaintiff averred that he wrote a letter dated 31-8-1982 to Luciano Pinto explaining to him that five plots, namely 13a, 43, 245, 246 and 250 were referred to in the consent decree. In paragraph 11, the plaintiff averred that Luciano Pinto on the letter dated 31-8-1982 made an endorsement that he would verify whether these five plots existed in fact or not and in case he was satisfied, he would sign the sale deed within the time mentioned in the letter dated 31-8-1982. Copy of the letter dated 31-8-1982 with the endorsement of Luciano Pinto has been produced by the plaintiff as PW 2 /A. A close look at paragraphs 9, 10 and 11 of the plaint and when read with the endorsement dated 31-8-1982 made by Luciano Pinto, would show that refusal referred to in paragraph 9 by him was not firm refusal and as a matter of fact, he represented to the plaintiff by endorsement made on the letter dated 31-8-1982 that he would study the case by 3rd September and if possible, he would effect the sale deed by 11th September. In the aforesaid facts and circumstances, it cannot be said that the limitation began to run prior to 31st August, 1982, rather it would show that by 3rd September, 1982 said Luciano

wanted to study the case and then, if satisfied, he agreed to execute or effect the sale deed by 11th September, 1982. Thus, there was no refusal even before 11th September, 1982. The suit was filed on 2nd September, 1982 and is not beyond time. It would not be out of context to mention here that as a matter of fact, the defendants did not lead any evidence. From the bare pleadings made in the plaint, it cannot be held that the suit was barred by time. However, for the reasons already indicated by me, I hold that the learned trial Court was not justified in decreeing the plaintiffs suit for specific performance of the Consent Decree dated 7-9-1981.

17. Resultantly, the appeal is allowed. The Judgment and Decree passed by the Civil Judge, Senior Division, Panaji dated 23-7-1997 is set aside. The plaintiffs suit stands dismissed, with no order as to costs.