

(1999) 01 BOM CK 0062

Bombay High Court (Goa Bench)

Case No: Civil Revision Application No"s. 49 and 103 of 1998

Shri Umakant B. Kenkre and
another

APPELLANT

Vs

Shri Yeshwant P. Shirodkar and
others

RESPONDENT

Date of Decision: Jan. 30, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1
- Contract Act, 1872 - Section 10, 73
- Specific Relief Act, 1963 - Section 15, 21

Citation: (1999) 3 BomCR 611

Hon'ble Judges: R.K. Batta, J

Bench: Single Bench

Advocate: M.S. Usgaonkar, S.A., A.R. Katak, F.E. Noronha, Sudin Usgaonkar and Miss A. Razak, for the Appellant;

Judgement

@JUDGMENTTAG-ORDER

R.K. Batta, J.

Both these revisions arise out of the same Order passed by Civil Judge in the same suit. Civil Revision 49/98 is filed by original defendants 1 and 2 and Civil Revision 103/98 is filed by original defendants 3 and 4 (hereinafter referred to as "defendants"). By impugned Order dated 17th September 1997, the trial Court had allowed the amendment sought by the respondents/original plaintiffs (hereinafter referred to as "plaintiffs").

2. In order to appreciate the matter it is necessary to give brief background in which this amendment was sought by the plaintiffs. The plaintiffs had filed suit for specific performance seeking to direct the sole defendant, at that stage, to specifically perform the agreement of sale made in June 1981 and to execute sale deeds in

favour of the plaintiffs conveying Plot Nos. 6 and 7. No compensation for its breach either in addition to or in substitution of such performance was sought. However, in the alternative, the plaintiffs had sought damages for breach of contract to the tune of Rs. 5 lakhs. By amendment application dated 27th September 1993, the plaintiffs sought to delete some of the paragraphs of the plaint as well as relief relating to specific performance. This amendment was allowed by the trial Court. After this amendment was allowed the principal prayer which remained was in relation to damages for breach of contract to the tune of Rs. 5 lakhs. This amendment was granted vide order dated 25th November 1994. After this there was change of advocate and an application for amendment, which is subject matter of these revisions, was filed by the plaintiffs on 2nd April 1997. In this application for amendment the justification for moving the application is stated to be as under in paragraph 3 of the said application:---

"3. Recently the plaintiffs have changed their advocate who on going through the pleadings and records pointed out to plaintiffs, that through obvious inadvertence certain necessary amendments were not made and also certain relevant paragraphs were erroneously deleted. Plaintiffs state that they were not at all aware of the above nor understood their legal implications."

By this application for amendment, the plaintiffs sought to join the vendees to whom the plots were sold as well as seeking restoration of prayer for specific performance which had been earlier deleted and other reliefs. Learned advocate Shri Ajit Kantak argued Civil Revision 49/98 on behalf of the petitioners; learned advocate Shri Usgaonkar argued Civil Revision 103/98 on behalf of the petitioners and learned advocate Shri F.E. Noronha argued both the revisions on behalf of the respondents/original plaintiffs.

3. Learned advocate Shri Kantak placed before me letter dated 22nd June 1981 signed by F.B. Kenkre and addressed to plaintiff No. 1 on the basis of which the plaintiffs had filed the suit for specific performance and in the alternate damages for breach of contract to the tune of Rs. 5 lakhs. It was pointed out that this letter is signed only by F.B. Kenkre, who had received sum of Rs. 20,000/- from the plaintiffs on 22nd June 1981; that the said F.B. Kenkre expired in December 1982 and that the said letter dated 22nd June 1981, though stated to have been signed for U.B. Kenkre, cannot bind the said U.B. Kenkre; Plot No. 6 in question was sold by wife of F.B. Kenkre, who is defendant No. 3 and Plot No. 7 was sold by defendants 1 to 4 in the year 1988 by registered sale deeds and the suit was filed after three years on 24th June 1991. It has been pointed out that these facts relating to sale of the said plots were placed before the Court vide affidavit dated 4th March 1993, which is on record at pages 40 and 41 and it was only after this that the plaintiffs had filed the first amendment application deleting prayer relating to specific performance. In these circumstances, according to learned advocate Shri Kantak, the trial Court could not have restored the relief relating to specific performance and the other

reliefs or amendment sought by the plaintiffs since the plaintiffs were fully aware of all the facts when the first amendment application was moved. He has also pointed out certain mis-statements of facts recorded by the Civil Judge, to which I shall make reference, at a later stage, while discussing the case on merits. Learned Advocate Shri Kantak had also pointed out that the trial Court had not adhered to the point of limitation which was raised by the defendants. Relying upon judgment of this Court in Smt. Clara Menezes v. John Baptist Rodrigues and another, reported in 1997 (2) Goa L.T. 294, it was urged that the reasons for amendment given in paragraph 3 of the amendment application, due to change of Advocate and inadvertence, cannot be treated as justifiable reasons to allow the amendment in question.

4. Learned Advocate Shri Usgaonkar adopted the arguments advanced by learned Advocate Shri Ajit Kantak and added that a valuable right had accrued on account of limitation, which was not considered by the Civil Judge.

5. Learned Advocate Shri F.E. Noronha conceded that the change of Advocate cannot be treated as a valid ground which is mentioned in paragraph 3 of the amendment application. However, he pointed out that the effect of dropping the prayer for specific performance will be dismissal of the plaintiffs' suit and that the plaintiffs would not be entitled to compensation even for breach of contract. In support of his submission he has placed reliance on Ardeshir H. Mama v. Flora Sassoon, AIR 1928 PC 208; [Gopi Nath Sen and Others Vs. Bahadurmul Dulichand and Others](#), and [Andheri Bridge View Co-op. Hsq. Society Ltd. Vs. Krishnakant Anandrao Deo and others](#), . I shall deal with these authorities in detail at a later stage in the judgment while discussing the matter on merits. It was also urged by him that the idea of specific performance was not totally given up even though the plaintiffs had deleted relief relating to specific performance after the first amendment application was granted. In this respect my attention has been drawn that the title of the suit remained as "suit for specific performance"; paragraph 15 relating to the averment that "the plaintiffs are ready and willing always to perform their part of the contract" was not deleted; that even in the alternative prayer the last four lines "in addition to the damages for breach of contract, in the event the Court comes to the conclusion that the agreement cannot be ordered to be specifically performed", were not deleted. Thus, according to him, germs and rudiments in the suit for specific performance still remained in the plaint and the plaintiffs by way of second amendment seek to revive the said germs and rudiments. He, therefore, submits that the trial Court's order granting the amendment restoring prayer for specific performance, other reliefs and amendment sought, being discretionary in nature, cannot be interfered with in revision specially on account of the fact that courts have to be liberal in granting amendments.

6. I have already pointed out that the suit, as originally framed, was in relation to specific performance of agreement made in June 1981. Alternatively the plaintiffs had sought damages for breach of contract to the tune of Rs. 5 lakhs. Where a party

to the contract either refuses or omits to perform his part of the contract, the other party has two remedies open to him in law:-

(1) he may file a suit for specific performance of the contract, or

(2) he may bring an action for damages for its breach.

There is a distinction between a suit for specific performance u/s 21 of the Specific Relief Act and a suit for breach of contract u/s 73 of the Indian Contract Act. If the party sues for specific performance u/s 21 of the Specific Relief Act, he may ask for compensation either in addition to or in substitution for specific performance. In such eventuality where the plaintiff claims specific performance and compensation in addition to, or in substitution for such performance, he does so on the ground that the contract is subsisting. However, when a party sues for damages for breach of contract u/s 73 of the Contract Act, the party elects to treat that the contract has come to an end and himself as discharged from its obligation and no further performance is either contemplated or has to be tendered. It is open to the party to put forward a claim to specific performance with or without compensation u/s 21 of the Specific Relief Act and in the alternative a claim to damages for breach of contract u/s 73 of the Contract Act, Specific performance and claim for damages under the Contract Act as alternate remedies cannot be concurrently pursued. Where two remedies are sought in the alternative, the plaintiffs may elect between the two remedies at any time down to the hearing if he is not otherwise in default. The abandonment to claim specific performance simpliciter leaves the field clear for the consideration of the question relating to damages under the general law of contract. It is only the claim to compensation u/s 21 of the Specific Relief Act that will fall to the ground on abandonment to claim specific performance, but the claim for damages for breach of contract u/s 73 of the Contract Act would still survive.

7. In fact, none of the rulings quoted by learned Advocate for the respondents in support of his submission that once the prayer for specific performance has been deleted, the plaintiffs would not be entitled to claim damages for breach of contract, are helpful to the plaintiffs.

8. In *Ardeshir H. Mama v. Flora Sassoon* (supra) the suit at inception was a simple action by purchaser for the specific performance of a contract for sale of certain valuable hereditaments on Malabar Hill at Bombay with claims for damages additional or alternative all in terms of section 19 which was previously in force and now corresponds to section 21 of the Specific Relief Act. In this case the plaintiff had decided to abandon his claim for specific performance and instead at the trial pressed for claim against the defendant for breach of contract. It is in this context that the whole issue was examined by the Privy Council and it was in effect held that once the plaintiff had abandoned the relief relating to specific performance, he was not entitled to claim compensation u/s 19 of the Specific Relief Act. Regarding amendments it was held that it did not convert the suit into one for breach of

contract.

9. In *Gopi Nath Sen and other v. Bahadurmal Dulichand and others*, (supra) the plaintiff had filed a suit for specific performance of contract also claiming damages in case the specific performance was not granted. This means that the relief was sought u/s 21 of the Specific Relief Act alone. The claim for specific performance was not pressed at the trial and it was abandoned and it was in these circumstances that the question of damages for specific performance in substitution also failed. However, it was pointed out that the question of claiming damages for breach of contract u/s 73 of the Contract Act is an entirely different issue and the question of granting relief by way of damages in lieu of or in substitution of specific performance is a matter resting entirely with the Court and parties have nothing to do with it and the plaintiff cannot be allowed to abandon the case for specific performance and yet claim damages in lieu thereof u/s 21 of the Specific Relief Act. In this case before the Calcutta High Court no amendment had been sought at any stage of the proceedings to incorporate or claim alternative relief for damages for breach of the contract u/s 73 of the Contract Act. It was further pointed out that the words "in addition to, or in substitution of such performance" in sub-section (1) mean that compensation can be given by the Court in cases where specific performance could have been given either in addition to specific performance or in lieu of it. Thus, under sub-section (1), the power and jurisdiction of the Court to give damages arise in two cases, either in addition to or in substitution of specific performance. The learned Judge, in the instant case, had granted damages in lieu of specific performance after the relief relating to specific performance u/s 21 had been abandoned or given up and there was no claim whatsoever for damages for breach of contract u/s 73 of the Contract Act. Therefore, it was held that damages in lieu of specific performance can be given in cases where specific performance could have been granted. Relying upon the observations of the Privy Council in *Ardeshir H. Mama v. Flora Sassoon*, AIR 1928 P.C. 208 it was held by the Calcutta High Court that it is an election to be exercised by the plaintiff whether to sue for specific performance and claim for damages in addition to or in substitution for it, or to sue for damages for breach of contract. If by election the plaintiff precludes himself from making the averment of readiness and willingness to perform his part of the contract and prove the same which is essential to the success of the suit for specific performance the question of damages in lieu of specific performance would not arise.

10. In [Andheri Bridge View Co-op. Hsg. Society Ltd. Vs. Krishnakant Anandrao Deo and others](#), adverting to the judgment of the Privy Council in *Ardeshir H. Mama v. Flora Sassoon*, AIR 1928 P.C. 208, it was pointed out that two questions were considered by the Privy Council, namely, (i) whether the defendant's agent had no authority to enter into an agreement for sale and (ii) whether the plaintiff by his letter dated 19th March, 1924 had disentitled him from obtaining any relief in the suit. It was pointed out on refusal by the party to perform his part, the party thereto

had two remedies open to him in the event the other party refuses. He might either institute a suit for specific performance or he might bring an action in law for damages for the breach. By resorting to the second type of suit, the party elected to treat the contract as at an end and himself as discharged from his obligations.

11. In the instant case before me, the plaintiffs had filed a suit simpliciter for specific performance u/s 21 of the Specific Relief Act, without seeking any compensation for its breach either in addition to or in substitution of such performance. It was only alternatively that the plaintiffs had sought damages for breach of contract to the tune of Rs.5 lakhs which is obviously, u/s 73 of the Contract Act, even in paragraph 13 of the plaint, which was deleted, the damages were sought for breach of contract and the alternative prayer was also for damages for breach of contract. The plaintiffs knowing fully well after all facts disclosed by original defendant No. 1 in affidavit-in-reply dated 4th March 1993, sought amendment abandoning the simpliciter relief of specific performance u/s 21 of the Specific Relief Act and elected to choose to continue with the suit for damages for breach of contract u/s 73 of the Contract Act. The prayer for damages to the tune of Rs. 5 lakhs for breach of contract was not in addition or substitution of main prayer for specific performance but it was an alternative prayer. The abandoning of relief of specific relief simpliciter, in the circumstances, would not disentitle the plaintiffs of alternative relief for damages for breach of contract u/s 73 of the Contract Act. The plaintiff is entitled under Order XXIII, Rule 1 CPC to abandon his claim to specific performance and being dominus litis can choose for enforcement of alternative relief. This is what was exactly done by the plaintiffs in the first amendment application which was granted.

12. The change of Advocate, which is given as one of the reasons or justifications for the second amendment to restore the said plea of specific performance simpliciter, obviously and admittedly cannot be a ground or justification for grant of amendment. The other justification given is inadvertence, which, also, obviously, cannot be accepted, since the plaintiffs, knowing all material facts disclosed by defendant No. 1 in affidavit-in-reply dated 4th March, 1993 had elected to delete the prayer for simpliciter specific performance. The plaintiffs referred to the sale of Plot Nos. 6 and 7 in 1988 by the defendant to other parties in the first amendment application but still did not join vendees to whom the property was sold three years prior to filing of the suit in 1991. Seeking to join the vendees in the year 1997 and take about turn after grant of first amendment would be nothing but abuse of process of law, which, obviously, could not have been granted by the trial Judge. The point of limitation raised by the defendants was not even adhered to by the Civil Judge, but, it is not necessary to dilate on this aspect in view of the above discussion and observations relating to abuse of process of law. Moreover as rightly pointed out by learned Advocate Shri Kantak, the trial Judge has proceeded on the basis of certain mis-statements. It is stated in paragraph 6 page 9 of the impugned order that during the pendency of the suit for adjudication defendant No. 1 had entered

into an agreement for sale of Plots 7 and 8 with the defendants 3 and 4. This statement is obviously totally incorrect. The next statement that the case of the plaintiffs is that the suit transaction of sale entered by the defendants 3 and 4 with defendant No. 1 is null and void is again factually incorrect. Again on the same page it is stated that if the present amendment as prayed for in the plaint is not allowed, the same will cause irreparable loss and injury to the plaintiffs and, as stated above, in order to avoid multiplicity of suits, adding defendants 3 and 4 with other defendants does not change the nature of the suit but in case the new defendants are added, the same will bring real controversy that has arisen between both the rival parties. It may be mentioned here that defendants 3 and 4 have been added as parties much prior to the filing of the second amendment application. The arguments which have been advanced by learned Advocate for the plaintiffs before me had, in fact, not been advanced before the trial Judge and, as such, the trial Judge had no opportunity to deal with the same. The said arguments have been advanced only before me in revision, which I have already dealt with and there is no merit in the said arguments of learned Advocate for respondents/plaintiffs. The impugned order in the circumstances, granting second amendment application cannot be sustained and is liable to be set aside.

13. For the reasons mentioned above, the impugned order is, hereby, set aside. The revisions are allowed. In the facts and circumstances, I leave the parties to bear their own costs.

14. Revision application allowed.