



Shakuntala

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO. 710 OF 2024**

1. Mr. Damodar Suba Prabhu,
Son of Subha Prabhu,
72 years of age,

2. Mrs. Nutan Damodar Prabhu,
Wife of Damodar Prabhu,
66 years of age, both r/o F-204,
Second Floor, F Building,
Devashri Garden, Soccorro,
Porvorim, Bardez, Goa.

...PETITIONERS

VERSUS

1. Mr. Ghanashyam Vasant Pai,
Son of Vasant Pai, Major of age,
With his office at F-12, Building
No.A-1, Kudtarkar Jairam Complex,
Neugi Nagar, Panaji-Goa.

2. M/s Kurtarkar Real Estate Pvt. Ltd,
A Company incorporated under
The Companies Act, 1956
Having its registered office at
Kurtarkar Towers, Malbhat,
Margao-Goa, Through its
Director Shri Santosh ...RESPONDENTS

Ms. Sailee Kenny, Advocate for the Petitioner.

Mr. Esperdiao Dias Do Rosario, Advocate for the Respondent.

CORAM:- BHARAT P. DESHPANDE, J.

DATED :- 16th October, 2024

ORAL JUDGMENT

Rule.

- 1A Rule is made returnable forthwith.

2. Heard finally with consent.

3. The petition challenges the order passed by the learned Trial Court, thereby allowing amendment to the written statement filed after the evidence of Plaintiff started, on the

ground that it is clarificatory in nature and there is due diligence.

4. Ms. Kenny appearing for Petitioner would submit that the Defendant filed a third application for amendment of written statement, incorporating some facts which are not germane to decide the suit and the issues framed therein. It is her contention that the suit filed by the Plaintiff is for mandatory injunction, recovery of possession and damages. She submits that there was a mortgage deed executed in the year 1997 between the Plaintiff and Women's Co-operative Bank Ltd. for a loan of Rs.1,85,000/- (Rupees One Lakh Eighty Five Thousand only) which was taken by the Plaintiff for financing the purchase of the suit premises. Since the suit premises were lying vacant, around September 2000, the Defendant no.1 approached the Plaintiff with a request to purchase the suit property for consideration of Rs.1,80,000/- (Rupees One Lakh Eighty Thousand only). The Plaintiff agreed to sell the suit property to the Defendant No.1 but since there were dues of the Women's Co-operative Bank

Ltd., out of the sale price of Rs.1,80,000/-(Rupees One Lakh Eighty Thousand only), the Defendant No. 1 agreed to make initial payment of Rs.50,000/-(Rupees Fifty Thousand only) as part payment towards the purchase price. The Defendant accordingly paid an amount of Rs.50,000/-(Rupees Fifty Thousand only) by cheque and then agreed to pay the remaining amount of Rs.1,30,000/-(Rupees One Lakh Thirty Thousand only) within a short time. Accordingly, the Plaintiff and Defendant No. 1 agreed to execute a Sale Deed. However, after making the part payment of Rs.50,000/-(Rupees Fifty Thousand only), the Defendant No.1 requested Plaintiff to handover possession of the suit property since he was in urgent need to set up an office. Accordingly, on 16/10/2000, the possession of the suit property was handed over to Defendant No. 1 in good faith with the expectation that he would perform his part by paying the remaining amount.

5. It is further argued by Ms. Kenny that the Defendant No. 1 neglected to pay balance amount and to execute the Sale Deed or agreement, and in the meantime, the loan

amount started mounting because of the interest. In spite of assurance, Defendant No. 1 neglected and failed to pay the balance amount or to execute the agreement and kept delaying the matter. The Defendant on insistence from the Plaintiff then gave an undertaking on 08/04/2002 that he will pay the interest on the balance amount or other related charges.

6. It was further agreed that the agreement of sale for the suit property will be executed on 15/04/2002 before the Sub-Registrar. The Plaintiff even visited the premises of Defendant No. 1, who took the signature of the Plaintiff on the Agreement of Sale, however, failed to sign it and present it before the Sub-Registrar for registration. The Plaintiff waited before the Sub-Registrar's office for the Defendant No. 1 to arrive for registration of the document, but there was no response. Thereafter, Plaintiff made several requests to the Defendant to register the said agreement and to pay the balance amount along with interest. However, Defendant No.1 was delaying the matter.

7. Ms. Kenny would further submit that subsequently, the Plaintiff had to pay the interest along with loan and since there was no response from the Defendant, a notice dated 17/06/2002 was issued to the Defendant to quit and vacate the suit premises and to handing the possession. It is also informed that in case he fails to vacate the premises, he will have to pay the compensation/damages at the rate of Rs.5,500/- (Rupees Five Thousand Five Hundred only) per month. Though the notice was received by the Defendant No.1, he failed to vacate, and accordingly the suit was filed for mandatory injunction, directing Defendant No. 1 to quit and vacate the suit premises and handover possession as well as to pay the compensation of Rs.1,48,000/- (Rupees One Lakh Forty Eight Thousand only) together with interest at the rate of 12% per annum.

8. Ms. Kenny would submit that initially written statement was filed by Defendant No. 1 and the same was amended on two occasions. She submits that issues were framed and then Plaintiff stepped into the witness box by

filings his affidavit in evidence in the year 2010. She submits that till date cross-examination of Plaintiff (PW1) is not completed and the matter is still adjourned for further cross-examination.

9. She submits that issues were framed on 01/09/2004, however, the present amendment application was filed somewhere in August 2023, which has been allowed by the Trial Court by the impugned order.

10. Mr. Dias learned counsel appearing for Respondent No.1 would submit that the order of the Trial Court needs no interference as the Defendant No. 1 has shown due diligence and the amendment is necessary for deciding the issue in the matter.

11. Rival contention fall for determination.

12. It is found that the issues were framed in the year 2004, which reads thus:-

- 1) Whether the plaintiffs prove that they are owners of the suit premises ?*
- 2) Whether the plaintiffs prove that defendant No.3 is a trespasser in the suit premises ?*
- 3) Whether the plaintiffs prove that that they are entitle to recover sum of Rs.1,48,000/- together with interest at the rate of 12% compounded quarterly rest of defendant No.1 on the date of filing of the suit till realisation?*
- 4) Whether the plaintiffs prove that they are etitle to mesne profits of Rs. 5500/- per month from defendant No.1 from the date of filing of the suit till vacant possession of suit premises ?*
- 5) Whether the defendant No.1 proves that the suit is bad for non-joinder of necessary parties namely Women's Co-operative Bank*

Ltd.?

13. A perusal of these issues would show that the Plaintiff is required to prove issue numbers 1 to 4 in connection with the pleadings in the plaint. Whereas issue numbers 5 is on Defendant No. 1 to prove as to whether the suit is bad for non-joiner of necessary parties.

14. The written statement along with additional written statement filed by Defendant No.1 would clearly go to show that the defence raised therein is regarding the Agreement of Sale and handing over to him of the suit property. Admittedly, there is no counter-claim for specific performance of the said agreement. Thus, it is clear that the issues which are framed by the Trial Court in the year 2004, are only with regard to the contentions raised by the Petitioner/Plaintiff as to whether the possession of Defendant No.1, is now, as that of Trespasser and if so, whether Plaintiff is entitled for any compensation.

15. Mr. Dias would submit that a separate suit is filed by Defendant No.1 for specific performance of the agreement, which is pending before the same court.

16. Be that as it may, the proposed amendment which is filed in the year 2023, i.e. after a period of around 20 years from the date of framing of issues, is entirely based on some information received by the Defendant No.1 on the basis of an application filed under the Right to Information Act. The proposed amendment would go to show that it relates to the payment made by Defendant No.1 to the concerned Bank in respect of the loan of the Plaintiff. It is the contention of Mr. Dias that the Plaintiff was not disclosing how much amount he paid to the concerned Bank and therefore, the Defendant No.1 had to obtain such information under the Right to Information Act.

17. Such contention as found in the draft amendment is not relevant for the purpose of deciding issues framed by the Trial Court. At the most such aspect could be necessary to

decide the suit filed by Defendant No.1 against the Plaintiff for specific performance of contract.

18. The impugned order would clearly go to show that there is no observation as to how the proposed amendment is necessary to decide the controversy in the matter. Paragraph 12 of the impugned order refers to the relevancy, wherein the Trial Court observed that the claim of Defendant for adjustment of amount will be relevant to decide the controversy in hand, is clearly perverse to the record, for the simple reason that there is no counter-claim filed by Defendant to claim any relief of adjusting the amount paid by him to the Bank directly. Secondly, the aspect of due diligence would certainly apply to the present amendment application as found in the proviso to the Order VI Rule 17 of the Civil Procedure Code.

19. The claim of Defendant No.1 about due diligence is clearly misplaced. Only because the Plaintiff in his cross-examination is not disclosing the amount paid by him to the

Bank, cannot give any opportunity to the Defendant No.1 to ask information under Right to Information Act from the concerned authority and that too, in the year 2022. First of all, the Defendant No.1 who claimed that he has paid some amount to the concerned Bank, is having his own calculations to his personal knowledge.

20. If the Plaintiff is not disclosing the actual amount paid by him to the Bank, which is otherwise not relevant to decide the issues in the matter, at the most adverse inference could be drawn.

21. The aspect of due diligence is completely missing in the present proceedings. Similarly, the contention of Defendant No.1 that the proposed amendment is clarificatory in nature, could be considered in his own suit filed for specific performance of contract, but the same is clearly irrelevant in the present suit and more particularly, the issues framed therein.

22. The most disturbing aspect in the present proceeding is the fact that PW1 stepped into the witness box by filing his affidavit in evidence in October 2010. However, till date his cross-examination is not complete. The deposition copies of PW1 are placed on record. It shows that lastly he was cross examined on 21/06/2023 and thereafter present amendment application was filed.

23. The record, therefore, would clearly go to show that the concerned Court/Presiding Officer miserably failed to control the Court proceedings and complete the cross-examination of PW1.

24. A perusal of the cross-examination, most of the admitted contents of the plaint have been recorded/repeated, which, to my mind are not necessarily required to be recorded. Accordingly, it is now necessary for this Court to direct the concerned Trial Court to complete the cross-examination of PW1 in time bound manner.

25. Besides, it is clear that the impugned order needs interference on the ground that the Defendant failed to show due diligence and secondly, the proposed amendment is not at all related to the issues framed in the suit. Hence, the impugned order is quashed and set aside and the amendment application stands rejected.

26. The learned Trial Court is now directed to complete the cross-examination of PW1 within a period of two months from today. It is made clear that no further adjournment shall be granted for cross-examination of PW1, and it should be completed as early as possible.

27. Rule is made absolute in above terms.

BHARAT P. DESHPANDE, J.