

Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA

**FIRST APPEAL NO. 2 OF 2021
ALONG WITH MCA.NO.439 OF 2023**

Shri Shyam Pundalik Chodnekar, son of
Shri Pundalik Chodnekar, aged about 52
years, contractor, and resident of H.No.
2228, Near Raghvendra Swamy Mutt,
Monte Hill, Margao, Goa

... APPELLANT

Versus

1. Shri Vishwas Saantosh Malvankar
Son of late Shri Santosh Vassudev
Malvankar, Daughter of Shri Vaman Vitu
Naik, of major age, housewife and her
mother in law;

2. Smt. Sarita alias Shivani Viswhas
Malvankar, daughter of Shri Vaman Vitu
Naik, of major age, housewife and her
mother in law;

3. Smt. Suhasini Santosh Malvankar
(EXPIRED)

widow of late Shri Santosh Vassudev
Malvankar, of major age, housewife, All
residents of Sai Santosh Bldg., Murida,
Fatorda, Margao, Taluka, Salcete, Goa.

(Since deceased through legal heirs)

3a. Vishwas Santosh Malvankar (deft.
no.1)

3b. Smt. Sarita Vishwas Malvankar (deft.
no.)

3c. Shri Pranay Vishwas Malvankar
(EXPIRED)

(since deceased through legal heirs)

... RESPONDENTS

(i) Miss Pranali Pranay Malvankar, major
in age, All r/o Sai Santosh Bldg., Murida,
Fatorda, Margao, Goa.

(Amendment carried out as per Order

dated 30.06.2018)

3d. Smt. Pranita Pranay Malvankar,

3e. Shri Damodar Santosh Malvankar

3f. Smt. Devaki Damodar Malvankar,

3g. Smt. Kunda Ramdas Naik,

3h. Shri Ramdas Naik.

(Amendment carried out as per Order dated 06.04.2017 & 07.06.2017)

All above residents of Sai Santosh Bldg,
Murida, Fatorda, Margao, Goa

Mr. Sudin Usgaonkar, Senior Advocate with Ms. Tanisha Mashelkar, Advocate for the Appellant.

None present for Respondents.

CORAM:

BHARAT P. DESHPANDE, J.

RESERVED ON:

12th OCTOBER 2023

PRONOUNCED ON:

19th OCTOBER 2023

JUDGMENT:

1. Admit.

2. The Appellant/Plaintiff preferred present appeal thereby challenging the impugned judgment dated 31.12.2019 in Special Civil Suit no.16/2011, by which the learned Trial Court partly decreed the suit thereby restraining the defendants/respondents from interfering with the plaintiff while carrying out construction as per Agreement dated 02.10.2006. The learned Trial Court rejected other prayers by which plaintiff sought alternative reliefs of compensation, damages, etc. The appellant/plaintiff is basically challenging rejection of the prayers for compensation and

damages on the main ground that injunction granted by the Trial Court is ineffective since the construction license as well as the Power of Attorney were already revoked and thus the plaintiff was unable to carry out any construction.

3. The appellant filed an application for production of additional document under Order XLI Rule 27 of the Code of Civil Procedure praying therein that leave be granted to produce the copy of bank statement showing payment made to Margao Municipal Council towards renewal of license for and on behalf of defendants. It is the contention of the Appellant that even though receipt was placed in evidence, which is in the name of defendants though plaintiff paid the fees, learned Trial Court rejected contention of the plaintiff on some extraneous grounds and hence there is a need to produce bank statement. Such application for additional documents is taken up along with the appeal.

4. When the matter was called before this Court on 12.10.2021, notice was issued for final disposal. Respondents were thereafter served by way of publication. However, no one appeared.

5. On 03.08.2022, the matter was taken up before this Court and the following Order was passed:

“1. Heard Mr. Sudin Usgaonkar, learned Senior Counsel for the appellant.

2. Call for the records and proceedings from the Trial Court.

3. Appellant to file a private paper book within six weeks from today.

4. Although, respondents have been served either by primary mode of service or by publication, none represent them. Therefore, appeal to proceed ex-parte.

5. List the appeal for further consideration on 27.09.2022 for final disposal.”

6. Accordingly, the matter was taken up for final disposal in absence of the respondents.

7. Heard Mr. Sudin Usgaonkar, learned Senior Counsel who appears along with Ms. Tanisha Mashelkar, learned Counsel for the Appellant. None appeared for the Respondents.

8. Mr. Usgaonkar would submit that agreement was executed between Appellant and Respondents by which Appellant was supposed to carry out construction of 2 Single Bedroom Flats and one Studio Apartment on the first floor along with proportionate right in the plot surveyed under Chalta no. 73 of PT Sheet no. 59. Such agreement was executed on 02.10.2006. Accordingly the appellant started construction and paid an amount of Rs.6,00,000/- to the Respondents. Subsequently, the construction license had to be renewed in which the Appellant paid charges and obtained the receipt. Since the original construction license was in the name of the Respondents, it had to be renewed accordingly and thus the receipt is in the name of Respondents though amount was paid by the Appellant.

9. Mr. Usgaonkar would then submit that thereafter some dispute arose due to which the Respondents did not allow the Appellant to carry out construction. The Power of Attorney was revoked and construction license was cancelled at the instance of Respondents. He would further submit that along with the prayer for injunction, the Appellant also sought compensation and damages, since the Agreement cannot be performed in absence of construction license and the Power of Attorney. The learned Trial Court failed to consider this aspect and rejected the claim for damages and compensation. He would submit that accordingly injunction is of no consequence since the Plaintiff/Appellant is unable to carry out construction activities in absence of construction license as well as Power of Attorney. Thus the reliefs which could have been appropriate in the circumstances is grant of damages and compensation. He further submitted that findings of the Learned Trial Court are perverse, arbitrary and therefore same needs to be quashed and set aside.

10. Mr. Usgaonkar placed reliance on the following decisions:

(i) **Vidhyadhar V/s Manikrao and another** reported in **(1999) 3 SCC 573.**

(ii) **Oil & Natural Gas Corporation Ltd. V/s Saw Pipes Ltd.** reported in **(2003) 5 SCC 705.**

11. The points for determination are as under together with my findings against it.

1. Whether the plaintiff is entitled for the reliefs of compensation and damages?
2. Whether the learned Trial Court failed to consider the evidence and came to a wrong conclusion?

12. Parties are herein after called plaintiff as and defendants as arrayed before Trial Court. Plaintiff filed suit against the defendants with the following prayers:

(a) the defendants, their agents, servants, relatives and representatives be restrained by way of perpetual injunction from interfering with the plaintiff while carrying out the construction as per the agreement on the first floor as well as on the second floor of the building situated in the said plot.

(aa) Alternatively the defendants be directed to pay an amount of Rs.20,81,656/- to the plaintiff towards the damages and the compensation and further interest at the rate of 18% per annum from the date of filing of the suit till actual payment.

(b) the defendants be ordered to pay an amount of Rs. 42,303/- (Rupees Forty Two Thousand Three Hundred and Three only) together with the interest at the rate of 15% per annum from the date of filing of this suit till actual recovery.

(c) the defendants also be directed to pay to the plaintiff the compensation/damages for delaying to obtain the licences amounting to Rs. 50,000/-

(d) such other orders as this Honourable Court may deem fit and proper.

(e) Costs of the suit.

13. A perusal of the prayer clause would clearly suggest that prayer clause (a) is for grant of injunction whereas other prayers are in alternative to injunction.

14. The plaint was amended by inserting specific averments which show that since the license for construction in the name of defendants was required to be renewed, defendant no. 1 failed to approach the authority though promise. Defendant failed to take steps to renew the license. The plaintiff approached the Margao Municipal Council for renewal of the license and paid an amount of Rs.42,303/-(Rupees Forty Two Thousand Three Hundred and Three only) for the renewal of license and other charges, which the plaintiff has now claimed from the defendant no. 1 in the alternative prayer.

15. The plaint further shows that plaintiff received renewed license as well as No Objection Certificate for water and electricity connection on 14.11.2008. Accordingly, the plaintiff visited the site for the purpose of carrying out further construction, however defendant no.1 obstructed the plaintiff from doing so.

16. The plaint further shows that total construction cost which the plaintiff was required to make first and second floor was Rs.39,64,000/-(Rupees Thirty Nine Lakhs Sixty Four Thousand only) excluding the expenses. Accordingly, the profit which the plaintiff would have earned (30%) comes to Rs.11,88,000/-(Rupees Eleven Lakhs Eighty Eight Thousand Only).

17. Plaintiff also claimed certain amounts spent by him to different persons as pleaded by him in para number 25 (f) and finally showing the amount of Rs.20,81,656/- (Rupees Twenty Lakhs Eighty One Thousand Six Hundred and Fifty Six Only) which is claimed as compensation/damages from the defendants for not allowing further construction and earning profits out of it. Apart from it, the plaintiff is also claiming an amount of Rs.50,000/- (Rupees Fifty Thousand Only) for damages/compensation for delaying in obtaining licenses.

18. In the written statement, the defendants denied all the contentions raised in the plaint including the Agreement dated 02.10.2006. Specific defence raised is that the contents of such documents were not read over to the defendants and that they were misguided at the time of signing of documents. Thus, it makes clear that the defendants admit signing of such documents dated 02.10.2006 but deny the contents of it on the ground that such contents were not read over to them and they were misguided by the plaintiff.

19. During evidence, the plaintiff has produced registered Agreement for Sale dated 02.10.2006 along with other documents. Learned Trial Court observed that said document is a registered document. Thus it is clear that when the defendants admit signing of such document and took a subsequent defence that the contents were not explained to them, the burden shifts on the defendants to prove their specific defence. The Learned Trial Court in paragraph 30 of its Judgment admit that such Agreement is a registered document executed before the Sub-

Registrar and it was signed by all the defendants. Learned Trial Court also observed that though defendants took a specific plea regarding such document, no one stepped into the witness box and therefore failed to prove their defence regarding fraud played on them while executing such document.

20. The contents of the Agreement of Sale dated 02.10.2006 being a registered document and duly executed before the Sub-Registrar could be read in evidence.

21. This document dated 02.10.2006 and more specifically para nos. 1, 2 and 3 disclosed that the prospective vendor (defendants) agreed to convey and transfer by way of absolute sale and free of all encumbrances, the super built up FAR admeasuring approximately an area of 220sq.mts along with open terrace on first and second floor admeasuring approximately 22.50sq.mts and 41.07sq.mts. respectively together with two stilt parkings on the Northern side having an approximate area of 49.05sq.mts. along with undivided proportionate share in the land attributable to said FAR more particularly described in schedule-II for a total price of Rs.6,00,000/-(Rupees Six Lakhs only). Prospective purchaser/plaintiff has paid a sum of Rs.3,00,000/-(Rupees Three Lakhs Only) to the prospective vendors at the time of execution vide demand draft dated 29.09.2006 drawn on State Bank of India, Margao branch, in the name of prospective vendor no. 1 and the vendors admit/acknowledge to have received the said amount.

22. Clause 3 of the Agreement further show that balance sum of Rs.3,00,000/-(Rupees Three Lakhs Only) shall be paid by

the prospective purchaser to the prospective vendors within a period of 30 days or at the time of handing over renewed Construction License and SGPDA's permission. Clause 5 of the Agreement further provides that prospective vendors undertakes to renew at their own cost Construction Licenses and permissions from Margao Municipal Council and SGPDA which are required for undertaking construction of the premises of Flats on first and second floor as per the Schedule-II, within a period of 30 days from the date of execution of the Agreement.

23. It is well settled proposition of law that when the document is proved in evidence, the contents of it cannot be proved or disproved by the oral evidence as provided under Section 91 of the Evidence Act. It provides that when the terms of contract or any other disposition of property have been reduced to the form of document and in all cases in which any matter is required by Law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or any other disposition of the property, or of such matter except the document itself. Thus the contentions of the defendants that contents of the documents were not explained to them, has no substance at all when such documents were signed before the registering authority.

24. Similarly, General Irrevocable Power of Attorney was executed by the defendants in favour of the plaintiff on 03.10.2006 which was registered in the office of Sub-Registrar, Salcette on 04.10.2006. This document is also proved in evidence wherein it is clear that the defendants knowing fully

well that the document has been executed, gave Power of Attorney to the plaintiff.

25. Such Power of Attorney was revoked by the defendants on 03.01.2009 which is again proved by the Deed of Revocation of Power of Attorney produced on record.

26. The learned counsel Shri Usgaonkar strongly contended that when the Power of Attorney was revoked and the license was canceled at the instance of defendants, the plaintiff was unable to carry out any construction. He submits that unless the license is operating and the defendants permit the plaintiff to enter the premises and also obtain necessary other permissions with the help of Power of Attorney, the plaintiff would not have been able to carry out any construction. He submits that the entry of the plaintiff in the said property without any authority would have been considered as trespass. He submits that granting of injunction in favour of plaintiff is meaningless as the defendants revoked the Power of Attorney and the Construction License has been withdrawn. He submits that though the agreement is not cancelled, the plaintiff has been restrained from performing his part by cancelling the license and revoking the Power of Attorney. Thus he submits that the relief claimed by way of alternative prayers ought to have been allowed.

27. The contentions raised by Mr. Usgaonkar are having force. Granting injunction restraining the defendants would not serve the purpose as by that time Construction License was cancelled at the behest of defendants by Margao Municipal Council. Even the Power of Attorney was revoked. The consequences of such acts on the part of defendants would

practically prevent the plaintiff from carrying out any construction in absence of license and the Power of Attorney. This aspect has been completely lost sight of by the Trial Court.

28. The reasonings for rejecting the claim of the plaintiff towards compensation/damages are found to be perverse. Admittedly, the Agreement itself proved that the plaintiff paid Rs.3,00,000/- (Rupees Three Lakhs only) by a demand draft while executing the Agreement. Thereafter remaining amount of Rs.3,00,000/- (Rupees Three Lakhs only) was also paid by the plaintiff to the defendants for which the receipt at exhibit 98 is placed on record. Thus the plaintiff paid an amount of Rs.6,00,000/- (Rupees Six Lakhs only) to the defendants as per the said Agreement. Admittedly, there is no material to show that apart from this six lakhs rupees the plaintiff paid Rs.1,15,000/- (Rupees One Lakh Fifteen Thousand Only) in cash. In the plaint, the plaintiff has disclosed various charges which he paid/spent on different counts. However, such aspect has been disputed by the Trial Court on flimsy grounds. The plaintiff claimed an amount of Rs.3150/- towards cost of stamp paper, Rs.150/- towards registration charges which need not require any evidence as the stamp papers for the Agreement and the registration charges are admittedly in the name of plaintiff.

29. Plaintiff then claimed that he paid an amount of Rs.20,000/- (Rupees Twenty Thousand Only) to the architect Mr. Prakash Kamat. Receipt issued by architect Mr. Prakash Kamat is placed on record which is dated 17.11.2006 and that too in the name of plaintiff. Therefore, there was no question of

disbelieving the plaintiff for paying such amount to architect for drawing the plan. Another amount of Rs.8000/- (Rupees Eight Thousand Only) was paid to engineer Abhay Khaunte. In this respect the plaintiff examined Vasudev Khaunte as PW-2 through whom receipt of Rs.8000/- is produced and proved. The cross-examination is on irrelevant aspects. The fact of payment of Rs.8000 by the plaintiff is established.

30. The remaining amount of Rs. 4000/- towards water tanker, Rs.14,000/- for supply of sand, Rs.15,600/- towards supply of metal, Rs.400/- for purchase of nails, Rs.14,400/- towards purchase of laterite stones, Rs.11,650/- for purchase of cement, Rs.8303/- towards purchase of steel, Rs. 11,200/- paid to the labourers and Rs.10,500/- to Sub-Contractor are also established by the plaintiff through his evidence and witnesses. The learned Trial Court rejected such evidence on extraneous grounds. The observation that there is no material to show that such construction material was used for the present site is clearly unwarranted. It is not the case of defendant that the plaintiff was having other sites wherein the construction was going on simultaneously. These are the expenses which a normal contractor is required to carry out for the purpose of preparation of construction site.

31. Lastly the amount which plaintiff paid for renewal of Construction License of Rs.42,303/-(Rupees Forty Two Thousand and Three Hundred and Three only) is also denied and again on flimsy grounds. The plaintiffs claim that defendant no. 1 was supposed to renew the license, however he failed to do so which forced the plaintiff to approach the Margao Municipal

Council. It is the contention of the plaintiff that he paid the renewal charges of Rs.42,303/-(Rupees Forty Two Thousand and Three Hundred and Three only) and accordingly the license was renewed. The plaintiff produced receipt issued by the Margao Municipal Council. However, the learned Trial Court rejected such claim on the precise ground that name of defendant no. 1 appears in the receipt which shows that the amount was paid by defendant no. 1.

32. Possession of the receipt with the plaintiff is one of the circumstance which the learned Trial Court completely ignored. Secondly the amount was required to be paid in the name of defendant no. 1 for the simple reason that the license exist in the name of defendant no. 1. When the amount/fees are paid for renewal of the construction license, a receipt is issued in the name of the licence holder only.

33. During cross-examination of the plaintiff as well as in the written statement, a stranged defence is raised that the plaintiff managed to collect payment receipts from the Margao Municipal Council. First of all such defence is of no substance. The receipt is issued immediately on making a payment and to the person who makes the payment. Secondly, when such renewal was made by effecting payment/fees the plaintiff was empowered to do so on behalf of defendant no. 1 on the strength of Irrevocable Power of Attorney.

34. The Appellant filed an application under Order XLI Rule 27 of the Code of Civil Procedure for production of additional documents i.e. bank statements precisely to prove the aspect

that such amount was infact paid by the plaintiff to Margao Municipal Council by Two different cheques.

35. A perusal of the general receipt issued by the Margao Municipal Council clearly discloses the cheque numbers and the bank from which such cheques were issued. The first receipt no. 07408 dated 17.10.2008 is in connection with an amount of Rs.1892/- (Rupees One Thousand Eight Hundred and Ninety Two only) paid by cheque no. 033934 dated 17.10.2008 drawn on Bank of India.

36. Second receipt from Margao Municipal Council bearing no. 07407 refers to an amount of Rs.39,821/- (Rupees Thirty Nine Thousand Eight Hundred and Twenty One Only) paid by cheque no. 033935 dated 17.10.2008 drawn on Bank of India.

37. These cheques clearly reflect in the statement of account produced by the Plaintiff/Appellant along with the application for production of additional documents. The account number, the name of the plaintiff and other details show that an amount of Rs.39,821/- (Rupees Thirty Nine Thousand Eight Hundred and Twenty One Only) vide cheque no. 033935 dated 22.10.2008 was debited in the plaintiff's account and credited in Margao Municipal Council's account. Similarly, on the same date vide cheque no. 033934 an amount of Rs.1892/- (Rupees One Thousand Eight Hundred and Ninety Two only) is found debited in the plaintiff's account and credited to account of Margao Municipal Council. Though the statement of account of the plaintiff produced along with the application is in fact not necessary since the receipts issued by Margao Municipal Council and produced from the possession of the plaintiff would

show that the plaintiff spent such an amount for and on behalf of defendant no. 1, the application for production of additional document in the interest of justice needs to be allowed. Accordingly, the statement of account showing the above two entries about payment made by the plaintiff to Margao Municipal Council are admitted. These entries needs to be considered along with the receipts produced by the plaintiff towards the proof of payment of Rs.42,303/-(Rupees Forty Two Thousand Three Hundred and three only). Thus the answer to issue number one framed by the Trial Court ought to have been in affirmative. Accordingly, the findings of the learned Trial Court with regards to such aspect needs interference.

38. Learned Counsel Shri Usgaonkar relied on section 73 of The Indian Contract Act 1872 which deals with compensation for loss or damage caused by breach of contract. It provides that when a contract is broken the party who suffers by such breach is entitled to receive from the party who has broken the contract, a compensation for any loss or damage caused to him which naturally arose from the usual course of things from such breach. Such provisions squarely apply to the facts and circumstances of the matter in hand. In the case of **ONGC (supra)**, the Apex Court observed in paragraph no. 68 is as under:

...(68) From the aforesaid discussions, it can be held that:

- i. Terms of the contract are required to be taken into consideration before arriving at the conclusion

whether the party claiming damages is entitled to the same.

ii. If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed that breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

iii. Section 74 is to be read along with the Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree. The court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract.

iv. In some contract, it would be impossible for the court to assess the compensation arising from breach and if the compensation contemplated is not by way of penalty or unreasonable, the court can award the same if it is genuine pre-estimate by the parties as the measure of reasonable compensation.

39. In the case of **Vidyadhar(supra)** the Apex Court observed in paragraph 17 that where the party to the suit does not appear in the witness box and states its own case on oath,

does not offer himself to be cross examined by the other side, the presumption would arise that the case set out by such party is not correct. Applying such proposition to the matter in hand, it is clear that the plaintiff must succeed in connection with alternate prayer instead of the prayer granted by the Trial Court. The alternative prayer (aa) and (b) are subsequently proved by the plaintiff. As far as prayer clause (c) is concerned plaintiff failed to prove actual damages. However, he is entitled to the loss of profit amounting to Rs.11,88,000/- (Rupees Eleven Lakhs Eighty Eight Thousand Only) and other expenses as found mentioned in paragraph no. 25(f) totaling to Rs.20,81,656/- (Rupees Twenty Lakhs Eighty One Six Hundred Five Six Only). In addition the plaintiff is entitled to recover the amount paid by him towards renewal of Construction Licence amounting to Rs.42,303/- (Rupees Forty Two Thousand Three Hundred and Three Only). Apart from this the plaintiff is also entitled to interest on the above said amount from the date of filing of the suit till realisation, at the rate of 15% per annum since the transaction was commercial in nature. The appeal needs to be allowed in the above terms thereby modifying the Order passed by the Trial Court. Accordingly, Point no. 1 and 2 are answered in affirmative.

ORDER

The appeal is partly allowed. The impugned Judgment which disallowed the compensation/damages claimed by the plaintiff is hereby quashed and set aside. The defendants are liable to pay an amount of Rs. 21,23,959/- (Rupees Twenty Lakhs Twenty Three Thousand Nine Hundred and Fifty Nine Only) to the plaintiff with interest at the rate of

15% per annum from date of filing of the suit till realisation.

Decree to be drawn accordingly.

BHARAT P. DESHPANDE, J.