

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO. 130 OF 2005**

1. M/s. Macmen foods,
a Partnership Firm having its
office at House No. 230,
Miranda Waddo, Sarzora,
Salcete, Goa.
2. Mr. Frank Mascarenhas,
businessman, Partner of
M/s. Macmen foods,
residing at Love-Neel Row House
No.2, opposite Swapna Lok Towers
Orlem-Malad-Marve Road,
Mumbai – 400 064
3. Mrs. Anita Mascarenhas
wife of Mr. Frank Mascarenhas,
Partner of M/s. Macmen Food,
residing at Love-Neel Row House
No.2, opposite Swapna Lok Towers
Orlem-Malad-Marve Road,
Mumbai – 400 064

... Appellants.**V/S**

1. M/s. Mohonsons Engineering Services
Private Limited, a constituted firm,
represented by its Director, Mr. Dilip
Mohan Pai Raiturkar and having its Office
at 'Pelican Building' 2nd Floor,
Opposite Lohia Maidan, Margao, Goa.
2. Mrs. Bella Menezes,
wife of Mr. Caetano Menezes,
Partner of M/s. Macmen Foods,
residing at House No.230,
Miranda Waddo, Sarzora,
Salcete, Goa.
3. Mr. Caetano Menezes,
Partner of M/s. Macmen Foods,
residing at House No. 230,
Miranda Waddo, Sarzora,
Salcete Goa.
[since deceased represented through L.Rs.]

- 3(a) Smt. Avila Menezes e Nazareth and
her husband
- 3(b) Shri. Vailankan Nazareth
Both r/o Santa Cruz, Ilhas, Goa.
- 3(c) Shri. Dalglish Menezes
23 years of age
- 3(d) Shri. Elaino Menezes
18 years of age
- 3(e) Shri. Eisen Menezes
18 years of age
All r/o Sarzora,
Miranda Vaddo, Chichinim,
Salcete, Goa.

... Respondents.

Mr. Vinod Korgaonkar, Advocate for the appellants.
Mr. Preetam Talaulikar, Advocate for the Respondents.

Coram :- M. S. SANKLECHA, J.

Date :- 24 April 2015

O R A L J U D G M E N T :

This second appeal challenges the order dated 26 April 2005 of the Additional District Judge, Margao (hereinafter referred to as 'First Appellate Court'), by which the order of the Civil Judge, Senior Division, Margao, (hereinafter referred to as 'trial Court') dated 30 January 2004 was confirmed and upheld. By the impugned order, the suit filed by the respondents (original plaintiff) seeking recovery of amounts due for work done was decreed by the trial Court and upheld in appeal.

2. This appeal has been filed by the appellants (original defendants).

The appeal was admitted on 29 March 2007 on the following substantial questions of Law :

That both the Trial Court and First Appellate Court passed the Judgment and Decree overlooking the provisions i.e. Sec. 102 of the Indian Evidence Act for the following reasons.

(a) That the learned Trial Court and the First Appellate Court disregarded and did not address themselves to the fact that there was no evidence on record adduced by the Plaintiffs to establish the fact that the Plaintiff as a fact has rendered services claimed to be assigned to him under three different letters of assignment dated 29.10.1997, 31.10.1997 and 31.10.1997 respectively.

(b) That the learned Trial Court and the First Appellate Court failed to consider and did not address themselves to the question as to whether the plaintiff had in fact established the quantum of damages actually suffered by the plaintiffs.

3. Mr. Korgaonkar, the learned counsel for the appellants at the very outset states that he does not press the question '(b)' relating to damages.

Consequently, no occasion to consider the same arises. Therefore, the challenge in the present appeal is restricted only to the substantial question of law framed as question '(a)'.

4. Briefly, the facts leading to this second appeal are as under :

(a) The respondent No.1 (original plaintiff) is a company engaged in consultancy services for the implementation of industrial projects. It is case of the respondent No.1 that it was approached by the appellants herein to assist them in setting up a Bakery Project within the State of Goa.

(b) Consequent to negotiations the respondent No.1 agreed to extend assistance to the appellants to set up its Bakery Project for consideration. The agreement arrived at between the parties was recorded in three communications viz. one dated 29 October 1997 and two dated 31 October 1997 by the appellants to respondent No.1. All the aforesaid three communications (one dated 29 October 1997 and two dated 31 October 1997) were duly accepted by the respondent No.1.

(c) The letter dated 29 October 1997 addressed by the appellants to the respondent No.1 recorded that the respondent No.1 was to assist the appellant in securing a plot of approximately 2000 sq. mts. in Goa, Daman and Diu Industrial Development Corporation(hereinafter referred to as 'G.D.D.I.D.C.') Industrial Estate at Concolim. Besides,

rendering assistance to the appellant in obtaining Small Scale Industry (hereinafter referred to as 'S.S.I.') registration and N.O.C. from the Pollution Control Board. For the aforesaid services the appellants had agreed to pay the respondent No.1 an amount of Rs.25,000/- in the aggregate. An amount of Rs.12,500/- was to be paid along with the order and the balance of Rs.12,500/- on securing the plot at G.D.D.I.D.C.

(d) The first letter dated 31 October, 1997, recorded that the appellant was to avail of various services of the respondent No.1 in respect of its Bakery Project. The services to be availed were in respect of the appointment of Architects, Civil Contractors, preparing basic plan of the project, specifying the plot and machinery, applying for completing various formalities with various authorities such as Sales Tax Authority, Food and Drugs Authority, Health Department etc. In consideration of the aforesaid services the appellants agreed to pay Rs.15,000/- per month to respondent No.1 commencing from Nov. 1997.

(e) The second letter dated 31 October 1997, recorded the respondent No.1 was to prepare a project report within three weeks. In consideration of the same the respondent No.1 was to be paid by the appellants Rs.20,000/- in the aggregate. (Rs.10,000/- with the order and balance on furnishing of report).

(f) The appellants paid the respondent No.1 a sum of Rs.12,500/- (in term of letter dated 29 October 1997) and Rs.10,000/-

(in term of second letter dated 31 October 1997) in advance to the respondents on execution of the two letters. However, the respondent No.1 was not paid the balance amounts payable by the aforementioned three communications dated 29 October 1997, 31 October 1997 and 31 October 1997. This according to the respondent No.1 was inspite of having rendered services to the appellant in terms of the aforementioned three letters.

(g) Consequently, the respondent No.1 filed a suit before the Civil Judge, Senior Division at Margao being Suit No.50/1998. The suit was filed inter alia seeking to recover a sum of Rs.52,500/- along with interest at the rate of 18% thereon. The basis of the above claim was the failure of the appellants to honour its obligations and pay the amount due to the respondent No.1 under the contracts/communications dated 29 October 1997 and two communications dated 31 October 1997 for services availed. In the plaint, the respondents do indicate that the sum of Rs.22,500/- had been paid by the respondents before the respondents embarked upon the assignment. The respondents in the plaint had claimed the balance payable giving a break-up as under :

a)	Against securing of Plot from GIDC	Rs.12,500/-
b)	Against submission of Project Report	Rs.10,000/-
c)	Installments for Nov 1997 & Dec 1997 for Project Implementation services @ Rs.15,000/- per month	Rs.30,000/-
Total payment Due		Rs.52,500/-

(h) The appellants filed their written statement contending that no amounts were payable to the respondent No.1. This is on the ground that no services had in fact been rendered by the respondent No.1 to the appellants. In particular, it was pointed out in the written statement by the appellants that the respondent No.1 did not keep its promise of securing a plot of 2000 sq. mts. in G.D.D.I.D.C. Thus, the question of rendering any further service in the absence of an allotment of a plot to set up a Bakery unit would not arise. Therefore, it was contended that the appellants were not entitled to Rs.52,500/- as claimed or any part thereof. Besides, the appellants also filed a counter-claim seeking refund of Rs.22,500/- paid by the appellants to the respondent No.1 in advance, as no services were rendered. Moreover, further amount of Rs.50,000/- as damages was also claimed by the appellants from the respondent No.1.

(i) Both the respondents as well as appellants led evidence before the trial Court in support of their respective contentions. The respondent No.1 led evidence to indicate that an area of 1000 sq. mts. was allotted to the appellants by G.D.D.I.D.C. This allotment was made on the basis of the application made by the appellants under their signature seeking a plot admeasuring 1200 sq. mts. from G.D.D.I.D.C. and the appellants were allotted 1000 sq. mts. Moreover, evidence was led by respondent No.1 of having obtained provisional S.S.I.

Registration. Besides, evidence was led to indicate that in terms of the letters dated 31 October 1997 the respondent No.1 had commenced rendering services to the appellants and in support thereof filed evidence of the various applications kept ready by them for further submission to various authorities on allotment of plot by G.D.D.I.D.C. The respondent No.1 had also made a detailed application to the Corporation Bank for a loan and submitted the project report on November 1997 to the appellant. It was the respondent No.1, who pointed out that it received a communication dated 10 December 1997 addressed by the appellants to it seeking to terminate the agreement as on 31 December 1997.

(j) On the other hand, the appellants led evidence that as the obligation cast upon the respondent No.1 by the three communications dated 29 October 1997 and 31 October 1997 had not been acted upon the appellants are not entitled to Rs.52,000/- or any part thereof. Besides sought a refund of Rs.22,500/- on account of the failure of the respondent No.1 to carry out its obligation. In fact, in its evidence the appellants do admit receipt of Sales Tax Forms which had been signed by them on 8 December 1997.

(k) On consideration and appreciation of the evidence led by the appellants and the respondent No.1, the trial Court by its order dated 30 January 2004 concluded that the respondent No.1 had rendered various services to the appellants as required under letter dated 29

October 1997 and two letters dated 31 October 1997. The grievance of the appellants that it was an obligation of the respondent No.1 to ensure allotment of 2000 sq. mts. of plot was negated by the trial Court by pointing out that the appellants themselves had signed an application dated 1 November 1999 for allotment a plot to G.D.D.I.D.C. seeking an allotment of only 1200 sq. mts. Moreover, the trial Court records that there was no lodging of protest on allotment of 1000 sq. mts. by the G.D.D.I.D.C. The trial Court by its order dated 30 July 2004 decreed the suit in favour of the respondent No.1 while dismissing the counter-claim filed by the appellants. However, the interest payable on Rs.52,500/- was restricted to only 6% from the date of filing of the suit till actual payments.

(I) Being aggrieved by the order dated 30 July 2004 of the trial Court the appellants filed an appeal to the First Additional District Judge, South Goa at Margao. By an order dated 26 April 2005 the First Appellate Court upheld the order of the trial Court. In particular the Appellate Court held that there was no time limit provided for obtaining / securing allotment of plot from G.D.D.I.D.C. The Appellate Court also records the facts that the appellants themselves had under their signature sought an allotment of only 1,200 sq. mts. in their application to G.D.D.I.D.C. The various application which were prepared by the respondent No.1 to be submitted to the authorities no

sooner the plot was allotted was also considered by the Appellate authority to indicate that services has been rendered by the respondent No.1 . Besides, the Appellate Authority records that the fact of the project report in terms of the second letter dated 31 October 1997 has been submitted to the appellants, is on record. Evidence by the receipt of the project report signed by the partner of the appellants is also a record. Taking these facts into account the First Appellate Court by order dated 26 April 2005 upheld the order of the trial Court dated 30 July 2004.

5. In support of this second appeal Mr. Korgaonkar, the learned counsel for the appellants submits that there is no evidence adduced by the respondent No.1 for the Courts below to decree / allow the suit in favour of the respondent No.1. It is submitted that in the absence of the evidence relevant to issue not being led by the respondent No.1, its case must fail as provided under Section 102 of the Indian Evidence Act. In particular, it was emphasized that the order of the trial Court as well as First Appellate Court referred to various applications prepared by the respondent No.1 to various authorities, however, none of these applications were in fact filed with the authorities. It is also submitted that the obligation to render services under the two letters dated 31 October 1997 would only arise after a plot has been allotted by the G.D.D.I.D.C. Thus, the mere preparation of the applications to be

submitted to the various authorities would not entitle the respondent No.1 to any payment on account of alleged services rendered in the month of November and December 1997. It is also further submitted that as the respondent No.1 had failed to secure a plot of 2000 sq. mts from G.D.D.I.D.C. it was not entitled any amount either under the letter dated 29 October 1997 or the two letters dated 31 October 1997. In view of the above, it is submitted that appeal be allowed.

6. As against the above, Mr. P. Talaulikar, the learned counsel for the respondents contends that substantial evidence in support of its case was led by the respondent No.1. This evidence was a subject matter of consideration both by the trial Court as well as the First Appellate Court. It is on the appreciation of the evidence, which was placed before the Courts below that they came to the conclusion that the respondent No.1 had rendered services to the appellants and were entitled to an amount of Rs.52,500/- along with interest thereon at 6% p.a. Thus the appeal be dismissed with costs.

7. It is a settled position that in a second appeal, it is not open to the Court to interfere with findings of fact based on consideration of the evidence by the lower Courts. It is only when the findings are based on no evidence or are perverse could it become a subject matter of inquiry in second appeal.

8. In this case the trial Court decreed the suit in favour of the respondent No.1 after considering various evidences led by the appellants in support of its case. It is not a case when no evidence was led by the respondent No.1 in support of its case. The evidence has been considered and appreciated. It is not a case where Section 102 of Evidence Act could be invoked as sought to be done by the appellants. The Courts below have considered the evidence led by the parties and on that basis concluded that the respondent No.1 had in terms of communication dated 29 October 1997 and two communications dated 31 October 1997 rendered services to the appellants.

9. The appellants have made a grievance that the respondents are not entitled to Rs.52,500/- or any part thereof in view G.D.D.I.D.C. not allotting them 2000 sq. mts. of land. This was negated by the Courts below on appreciating the fact that the obligations under the letter dated 29 October 1997 was only to render assistance to the appellants to secure approximately 2000 sq. mts. of plot at G.D.D.I.D.C. Industrial Estate. There was no assurance therein of securing the plot of 2000 sq. mts. or that the payment was dependent upon securing a plot of the same size. The payment was to be made for securing a plot which has been done. In any case both Courts below have recorded the fact that the appellants themselves had made an application for allotment of plot to

G.D.D.I.D.C. on 1 November 1997 under its signature seeking only 1,200 sq. mts. of plot at G.D.D.I.D.C. plot. Moreover, the lower Courts on the basis of the evidence has held that the purported attempt of termination on account of an allotment of plot by a specific time was not valid as there was no time limit to have the plot allotted. As the letter dated 29 October 1997 did not provide that in the absence of the plot being secured before 31 December 1997 the contract would come to end, it is not open to the appellants to wash its hands of the obligation to pay for the services rendered. So far as the rendering of services under the first letter dated 31 October 1997 is concerned the Courts below have observed on the basis of the evidence produced before them that the respondent No.1 had kept in readiness various applications to be filed before various authorities. In fact, the appellants themselves had signed some such applications to be presented to the Tax Authorities. It is on the basis of this evidence produced before the Courts below that it had come to the conclusion that respondent No.1 had rendered services under the first letter dated 31 October 1997. The submission on behalf of the appellants that the first letter dated 31 October 1997 would come into force only after the industrial plot has been allotted to G.D.D.I.D.C and not before that does not hold merit. This in view of the fact that the first letter dated 31 October 1997 provided that the appellants would pay the respondent No.1 Rs.15,000/- per month beginning with November

1997. Thus, the money was to be paid, to them, for the work to be done independent of when the plot of land was allotted to the appellant by G.D.D.I.D.C. So far as the third letter dated 31 October 1997 is concerned the Appellate Court clearly renders a finding of fact that the appellants have in fact received the project report on 29 November 1997 as is evidenced by the signature of the partner of the appellants acknowledging the receipt of the project report. Therefore, the amount of Rs.10,000/- which was payable on furnishing the project report is also payable by the appellants to the respondent No.1.

10. The Courts below have an appreciation of evidence have rendered a concurrent finding of fact that the respondent No.1 has rendered services in terms of the three letters dated 29 October 1997, 31 October 1997 and 31 October 1997. This finding of fact on the basis of evidence has not been shown to be in a manner perverse or arbitrary. Thus, the substantial question '(a)' as proposed by the appellants is to be answered in the negative i.e. in favour of the respondent No.1 and against the appellants.

11. Accordingly, appeal is dismissed. No order as to costs.

M. S. SANKLECHA, J.