IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 189 OF 2009
WITH
CROSS OBJECTIONS NO. 15 OF 2009

FIRST APPEAL NO. 189 OF 2009

1. Shri Thota Sayyed,
   aged 43 years, businessman,
   & his wife,

2. Mrs. Shamshad Sayyed,
   aged 40 years, business
   Both r/o C/o Bismillah Fisheries,
   Near Zuari Acid Tank,
   Vasco-da-Gama, Goa. … Appellants

V e r s u s

1. Union of India,
   through the Secretary,
   Defence,
   Government of India,
   North Block,
   Central Secretariat,
   New Delhi.

2. The Flag Officer Commanding,
   Goa, INS Gomantak,
   Vasco-da-Gama, Goa. … Respondents

Mr. V. A. Lawande, Advocate for the appellants.

Mr. M. Amonkar, Central Government Standing Counsel for the respondents.

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(Ori. Respondents)

V e r s u s

1. Shri Thota Sayyed,
aged 43 years, businessman,
& his wife,

2. Smt. Shamshad Sayyed,
aged 40 years, business
Both residents of
C/o Bismillah Fisheries,
Near Zuari Acid Tank,
Vasco-da-Gama, Goa. … Respondents
(Ori. Appellants)

Mr. M. Amonkar, Central Government Standing Counsel for the Cross objectionist.

Mr. V. A. Lawande, Advocate for the respondents.

Coram:- F. M. REIS &
K. L. WADANE, JJ

Date :- 7th April, 2015

ORAL JUDGMENT (Per F. M. Reis, J)

The above appeal challenges the judgment and decree dated 28.04.2009 whereby the suit filed by the appellants was partly decreed and the respondents were directed to pay a sum of Rs.52,00,000/- to the appellants after deducting a sum of Rs.30,00,000/- which were already received by the appellants.

2. Briefly, the facts of the case are that in view of an air crash on a new residential bungalow constructed by the appellants, a Writ Petition was filed before this Court inter-alia claiming compensation for the damages sustained by the appellants. In the said proceedings, the learned Mamlatdar filed a report inter-alia assessing the damages sustained by the appellants on account of the air crash which destructed the new residential house as well as the fixtures and accessories therein at a sum of Rs.52,00,000/-. The appellants also filed their report inter-alia disclosing that the damages sustained by the appellants was a sum of Rs.82,00,000/-. This Court while disposing of the Writ Petition by order dated 30.08.2005 directed the respondents to deposit in this Court a sum of Rs.52,00,000/- and permitted the appellants to withdraw a sum of Rs.30,00,000/- and further permitted the appellants to file a suit to claim damages within two weeks. The Registry was accordingly directed to invest the said balance amount in fixed deposit. Accordingly, the record reveals that the appellants filed the suit for recovery of damages to the tune of

Rs.82,52,138/- besides interest at the rate of 16% per annum on the said amount. The respondents disputed the said claim put forward by the appellants inter-alia contending that the value of the house was much less than Rs.30,00,000/- and further that the amount received by the appellants was sufficient to meet the damages sustained. Another main contention raised by the respondents was that the suit itself was barred by limitation. The learned Judge by the impugned judgment and decree dated 28.04.2009 after framing the issues and recording of evidence directed the payment of Rs.52,00,000/- to the appellants after deducting the said sum of Rs.30,00,000/-. Being aggrieved by the said judgment, the appellants preferred the present appeal. After being served, the respondents filed their cross objections challenging the findings of the learned Judge on the point of limitation.

3. Mr. V. A. Lawande, learned counsel appearing for the appellants has pointed out that a brand new residential house which was constructed by the appellants after lot of expenses had crumbled on account of air crash of the air craft of the respondents. The learned counsel further pointed out that once it is established that the air crash has caused damages to the appellants, the respondents are liable to pay to the appellants all

the damages and expenses incurred by the appellants on account of such accident. The learned counsel further pointed out that the house was already ready for occupation and that all the fixtures and fittings were already put in the new house. The learned counsel further pointed out that the appellants have filed a Writ Petition before this Court bearing Writ Petition No. 311 of 2005 claiming compensation on account of damages sustained by the appellants due to the air crash. The learned counsel further submits that this Court has directed the Mamlatdar to assess the value of the bungalow as well as the fixtures and fittings therein. The learned counsel further submits that the compensation was assessed by the Mamlatdar for a sum of Rs.52,00,000/- by report dated 19.05.2004. The learned counsel has thereafter taken us through the observations in the judgment disposing of the above Writ Petition by judgment dated 13.09.2005 to point out that a sum of Rs.52,00,000/- was ordered to be deposited in this Court on the basis of such report which included the value of the bungalow as well as the fixtures and accessories therein. The learned counsel further pointed out that even during the course of the said petition, the Assistant Engineer of P.W.D. had filed a report with regard to the value of the bungalow and compound wall which had in fact assessed such bungalow at a sum of Rs.29,66,366/- besides a sum of Rs.44,600/- towards the compound wall. The learned counsel further pointed out that the appellants have also produced a valuation report of an engineer who had valued the bungalow and accessories therein at a sum of Rs.82,00,000/- including non pecuniary damages. Thereafter, the learned counsel has taken us through the impugned judgment to point out that the learned Judge has accepted the valuation based on the report of the Mamlatdar for a sum of Rs.52,00,000/- without examining the material on record which suggests that the appellants are entitled for compensation of Rs.82,00,000/-. The learned counsel thereafter has taken us through the evidence of PW1 to point out that the witness has clearly stated the amount which he has spent for the construction of a bungalow besides non pecuniary damages suffered by the appellants. The learned counsel further submits that such non pecuniary damages cannot be assessed by any particular sum and as such, the learned Judge was not justified to fix the compensation only at a sum of Rs.52,00,000/-. The learned counsel further submits that the learned Judge has erroneously refused to grant interest on the said amount and as such the appellants are also entitled for interest on the amount fixed by this Court. The learned counsel further submits that though by an interim order dated 21.01.2006 passed by the learned District Judge, there was an order directing the balance amount of Rs.22,00,000/- be continued to be deposited in

Government treasury nevertheless, the respondents without any right or notice to the appellants have arbitrarily withdrawn the amount deposited in this Court. The learned counsel as such submits that the appeal be allowed and the judgment of the learned Trial Judge be modified and the amount payable by the respondents be fixed at a sum of Rs.82,00,000/- with interest thereon.

4. On the other hand, Mr. M. Amonkar, learned Central Government Standing Counsel appearing for the respondents has pointed out that there is no material on record produced by the appellants to justify any increase in the compensation fixed by the learned Trial Judge. The learned counsel further pointed out that the respondents have filed cross objections challenging the decree passed by the learned Judge on the ground that the suit filed by the appellants was barred by law of limitation. The learned counsel further pointed out that admittedly the air crash occurred on 01.10.2002 and the suit was filed on 08.11.2005 which is hopelessly barred by limitation. The learned counsel further pointed out that as the suit is not filed within time prescribed, the question of awarding any compensation to the appellants would not arise. The learned counsel as such submits that the impugned judgment passed by the learned District Court be quashed and set

aside.

5. We have duly considered the submissions of the learned counsel and with their assistance we have gone through the records. On the basis thereof, the following points for determination arise for our determination in the present appeal :

POINTS FOR DETERMINATION

1. Whether the suit filed by the appellants is barred by limitation ?
2. Whether the appellants are entitled for enhancement of compensation to the tune of Rs.82,00,000/- together with interest thereon ?

6. With regard to the first point for determination, it is not in dispute that the aircraft crashed on 01.10.2002. The record also reveals that the appellants have filed a Writ Petition before this Court bearing Writ Petition No. 311 of 2005 which came to be filed somewhere on 28.07.2005 and registered on 05.08.2005. The Writ Petition was finally disposed of on 13.09.2005. Immediately, thereafter on 08.11.2005 the appellants filed the civil suit. On perusal of the said judgment, this Court while disposing of the above Writ Petition granted leave to the appellants to get the compensation adjudicated in appropriate proceedings. Taking note of the fact that such leave was granted by this Court, the suit filed

by the appellants is not barred by limitation. The Apex Court in the judgment reported in ***(2009) 1 SCC 786*** in the case of ***Shakti Tubes Limited V/s Sate of Bihar and others,*** has observed that the period taken in filing a Writ Petition which has been disposed of on the ground that the relief cannot be granted in such petition as it requires further investigation, such period can be deducted in terms of Section 14 of the Limitation Act, 1963. After deducting such period it is not disputed that the suit is within the period of limitation.

7. In any event, the claim put forward by the appellants is on account of a tortious act and negligence by the respondents under the provisions of the Law of Torts. It is well settled by the learned Single Judge of this Court in the judgment passed in Civil Revision Application Nos. 18 and 19 of 2009 decided on 04.09.2012 at para 8 thus :

> "**8**. .... Before going into the said provisions of law, it would be convenient to point out that this Court in the Judgment reported in 1993(2) BCR 296 in the case of Dr. Sharad Vaidya vs, Shri Paulo Joel Vales (since deceased) through legal representatives & Ors., has held at para 9 and 10, thus :

"9. Shri Kolwakar, learned Counsel appearing on behalf of respondents Nos. 1 and 2, vehemently disputed the contention of Shri Kholkar that the liability sought to be enforced against the petitioner is a contractual one. He has submitted that the suit was filed by the then original plaintiffs against the petitioner and respondent No. 3 on account of a tortious act and negligence committed by the petitioner while treating the late Santana Vales. He has further urged that the Law of Torts was not codified in India and therefore we should fall back to the provisions of the Portuguese Civil Code which in its Article 2361 provides that one who violates or causes breach of third party's rights incurs an obligation to compensate the victim for all the damages caused to him on account of his own action. It was also argued by the learned Counsel that Article 2361 is included in Part IV of the Portuguese Civil Code which Chapter has not been repealed by the Goa, Daman and Diu (Laws) Regulations, 1962 dated 28th November, 1962 (hereinafter called the Regulation). According to him the said Regulation has saved all the existing laws in force in the Teritory of Goa, Daman and Diu at the time of Liberation except those which had been expressly repealed. Hence Article 72 of the Schedule to the Limitation Act could not be invoked because the concerned Portuguese Law being still in force and not having been expressly repealed the question of the cause of action having arisen more than 3 years prior to the filing of the suit had no relevancy in this case.

10. There appears to be a very valid point in these submissions of Shri Kolwalkar. Section 4(1) of the Regulation expressly prescribes that any law in force in Goa, Daman and Diu or any area thereof corresponding to any Act referred to in section 3 or any part thereof shall stand repealed as from the coming into force of such Act or part in Goa, Daman and Diu or such area, as the case may be. There is no dispute that the Law of Torts has not been codified in India and therefore Article 2361 of the Portuguese Civil Code which deals with tortious liability is to be

held as still in force once there is nothing to show that Part IV of the Portuguese Civil Code has been repealed consequent upon the extension to the Territory of Goa, Daman and Diu or any other enactment dealing with the liability arising out of a tortious act. It is true that Article 72 of the Schedule to the Limitation Act in its Part VII refers to suits relating to torts and provides for a period of limitation of one year for suits claiming compensation for doing or for omitting to do an act alleged to be in pursuance of any enactment in force for the time being in the territories to which this Act extends. However from the very wording of Article 72 it is clear that such provisions is not to be applied in case of the liability sought to be enforced by the original plaintiffs against the petitioner is not based on the branch of any act of commission or omission in respect of an enactment in force in the territory to which the Limitation Act extends. Here it is just a liability which is contemplated in Article 2361 inserted in Part IV of the Portuguese Civil Code which is to be deemed as still very

> much alive so far the same has not been repealed by any corresponding Act or enactment dealing with tortuous liability."

8. Taking note of the said observations of this Court and as the provisions of the Portuguese Civil Code dealing with Torts have not been repealed by any corresponding provisions after the coming into force of Goa, Daman and Diu Administration Act, we find that the period of limitation prescribed under the Civil Code is still in force. Considering the period as prescribed in the Portuguese Civil Code which is a period of 20 years for recovery of damages on account of Torts, the contention of Mr. Amonkar, learned counsel appearing for the respondents that the suit filed by the appellants is barred by limitation cannot be accepted. The first point for determination is answered accordingly.

9. With regard to the second point for determination, we shall examine the evidence on record adduced by the parties with regard to their respective stands.

10. On perusal of the evidence of the appellants, we find that the appellants had purchased the plot with a view of putting up a bungalow therein and all the permissions required from the

statutory authorities were duly obtained in the year 2001 and for the compound wall in the year 2002. It is further stated in the affidavit that the bungalow was constructed by the appellants after spending more than Rs.60,00,000/- and the Occupancy Certificate was issued on 26.09.2002. But, unfortunately, when all preparations were completed to occupy a new bungalow, the aircraft crashed on the bungalow on 01.10.2002 which completely destroyed the bungalow and resulted in the death of six workers who were the carpenters on the spot besides nine being seriously injured. The destruction of the bungalow had to be attributed to the respondents only. It is further stated that immediately the complaints were lodged to that effect with the Commanding Officer in charge of Collateral Damages and Compensation Cell. The affidavit further discloses that a loan of Rs.7,70,000/- was obtained from Vijaya Bank, Vasco Branch, and that at the relevant time, the cost of land was Rs.15,00,000/-. He has further stated that the Mamlatdar of Mormugao had submitted a loss Assessment Report on 19.05.2004 certifying that the total loss suffered by the appellants is Rs.52,00,000/-. He has also stated that the Military Engineering Services had submitted a loss Assessment Report for an amount of Rs. 51,13,192.20 wherein the value of the items of the furniture and fixtures have also been disclosed. A report of Mr. Rajanikant Sardessai, who is a Government approved valuer was also produced by the appellants showing the value and pictures of such bungalow at Rs.71,03,700/-. There is also a fourth valuation report of the Assistant Engineer, Works Division IV, Public Works Department, showing the value of the civil structures to be a sum of Rs.29,66,366/-. It is the claim of the appellants in the affidavit that the Civil Contractor had submitted a bill of Rs.55,35,538.54 which has already been paid to the said contractor. The appellants have also claimed further sum of Rs. 15,00,000/- as compensation payable to the appellants in the affidavit and a further sum of Rs.20,00,000/- as the construction took nearly eighteen months and the air crash caused severe loss to the appellants. The appellants also produced all the relevant sale deeds as well as the permissions obtained with regard to the subject bungalow. He has also produced the correspondences with regard to the subject bungalow with different authorities. The appellant was duly cross examined by the respondents. He has stated that the bungalow was duly completed in all respects before the air crash and that the inauguration was fixed on 09.10.2002. He has further stated that he has carried out the structural changes without changing the basic structure. He has denied the suggestion that he had not made cash payments to the concerned contractor. He has stated that the value of the structure of his bungalow was Rs.18,00,000/- minus the furnitures, fixtures and the internal appliances and works. He has stated that he has spent Rs.25,00,000/- for furniture and fixtures including the doors, window frames, grills etc. He has stated that he has spent money from his business to construct a bungalow. He has denied the suggestion that the report produced by him was obtained from the Mamlatdar is not showing the correct picture. He has also denied the suggestion that the receipts of Dourado and others were manipulated. He has also denied the suggestion that the valuation given by P.W.D. of Rs.29,66,366/- is not correct. The report of the registered valuer Mr. Sardessai dated 21.10.2004 shows the total value of the property including the bungalow to be a sum of Rs.71,03.700/-.

11. The next witness examined was Mr. Krishnamoorthy Bhat, who has stated that he had started the work of construction in the first fortnight of July 2001 of the concerned bungalow which was designed by Mr. Abel Dourado who was an Architect. He has also stated that the total built up area of the said bungalow was 325 square metres. He has also identified the quotation at Exhibit C-61. He has denied in the cross examination that they had made various false averments in the said report. He has further stated that he cannot say how much amount was paid by cheque or how much by cash. He could not also confirm the

receipt of the payment/s thereof in terms of the quotation in the cross examination. He has stated in the cross examination that the final bill has not been settled and that he was paid Rs.5,50,000/- on 01.06.2002 and the sum of Rs.30,00,000/- was paid when the work was completed but, however, he has stated that he does not remember after the receipt of Rs.5,50,000/- what was the balance amount due to him.

12. The respondents also examined a witness. He has stated that when the appellants had applied for a loan they had shown the cost of the constructions at Rs.11,97,145/-. He has also stated that the appellants had claimed a sum of Rs.82,52,138/- after deducting a sum of Rs.30,00,000/- directed to be paid by the High Court though notice dated 23.05.2005 demanded a sum of Rs.75,00,000/-. He has disputed the correctness of the Loss Assessment Report of the Mamlatdar. He has further stated that the final decision could not be taken in view of the conflicting statements of the appellants. He has also disputed the valuation reports done by the Engineers. He has also stated that the respondents are not shying away from their liability to pay the compensation as stated by this Court. He has disputed that any amounts are to be paid to the appellants. He has stated in cross examination that he disputes the correctness of the

valuation of the Mamlatdar at exhibit 37 dated 19.05.2004.

13. To a specific question whether the respondents had ever disagreed with the records of loss submitted by the appellants he has stated that they did not contest the loss claimed by the appellants though it was highly excessive. He has also stated that it is true that the Mamlatdar had given the loss assessment of Rs.52,00,000/-. He has also stated that the Mamlatdar in his report has mentioned the loss suffered by the appellants as Rs.22,00,000/- for actual bungalow besides Rs.25,00,000/- towards articles, furnitures and fixtures in the bungalow and Rs.5,00,000/- towards the compound wall. To a question as to why the respondents dispute the payment of Rs.5,00,000/- towards the compound wall, he has stated that he is not aware about the existence of such compound wall. To a specific question with regard to the correctness of the Mamlatdar report, the witness has stated that they disputed only because there was no supporting evidence. In the further cross examination, the said witness has admitted that as per his records, his office had recommended the payment of Rs.52,00,000/- to the higher authorities to be paid to the appellants and that this was based on the documents such as PWD reports and the Mamlatdar's Valuation Report. He has also stated that he cannot say whether

the Mamlatdar is correct or not. He has also stated that the recommendation made by them had not been rejected by the higher authorities.

14. On going through the said evidence on record, we find that though it is the case of the appellants that they are entitled to a sum of Rs.82,00,000/- besides a sum of Rs. 30,00,000/- received by the appellants pursuant to the direction by this Court, but however there is no material to support such claim. The Engineer examined by the appellants was not in a position to state whether the amount mentioned in the quotation has in fact been paid by the appellants. The said witness has also stated that the final bill has not yet been prepared. In such circumstances, the contention of Mr. Lawande, learned counsel appearing for the appellants, that the appellants are entitled to a further sum of Rs.82,00,000/- on account of damages sustained cannot be accepted as the appellants have failed to discharge the burden to establish such claim.

15. On going through the Judgment in the Writ Petition, it is noted therein that there was no dispute as far as the valuation/loss assessment report done by the Mamlatdar wherein the damages were assessed at Rs.52,00,000/-. In fact the records

reveal that DW1 also admitted that the payment of Rs.52,00,000/- was in fact accepted by the authorities and recommended for payment to the higher authorities. The witness has also pointed out that such recommendations have not been rejected. It is further admitted that the Mamlatdar had valued the structural construction of the bungalow at Rs.22,00,000/- and the furniture and fixture, etc., at Rs.25,00,000/-. The crash of an aircraft on a newly constructed bungalow which was ready for occupation is a traumatic experience suffered by the appellants. The appellants must have also suffered non-pecuniary damages on account of such tragic situation for no fault of theirs. In fact, the respondents have not disputed their liability to pay such compensation and damages to the appellants. Considering the said aspect and taking note of the fact that the report of the Mamlatdar has not been seriously disputed by the respondents, we find that the appellants are entitled for a sum of Rs.52,00,000/- as assessed by the Mamlatdar in the report. The built up area of the bungalow was 325 square metres and assuming the rate of construction is taken at Rs.15,000/- per square metre, the amount would work out to about Rs.49,00,000/-, besides the value of the furnitures etc. We would also like to record that though whilst disposing of the Writ Petition, the appellants were paid a sum of Rs.30,00,000/- and further amount of Rs.22,00,000/- was ordered to be kept in deposit in this Court. An Order was passed by the learned District Judge on 21.01.2006 that the sum of Rs.22,00,000/- was ordered to be kept in fixed deposit. But, however, in breach of the said directions, it appears that the respondents have withdrawn the said sum of Rs.22,00,000/- which conduct deserves to be deprecated when the suit was also filed and an interim Order was passed by the learned District Judge.

16. In view of the above and on the basis of the report of the learned Mamlatdar and for the reasons stated herein above, we find that the appellants are entitled for the total sum of Rs. 52,00,000/- after deducting a sum of Rs.30,00,000/- paid to the appellants. The claim of the appellants to pay a sum of Rs.82,00,000/- has not been established and accordingly, the claim is restricted to the amount referred to in the Mamlatdar's report. The report of the Engineer that a sum of Rs.82,00,000/- is payable, cannot be accepted as the Engineer was not in a position to compute the amount of fixtures nor produce any report or material with that regard. The appellants have also not produced the receipts of payment of the amount in terms of the said report and, consequently, we find that the question of accepting the said claim of the appellants to that extent would not at all be justified. Taking note of the above, we find that the

appellants are entitled to a sum of Rs.52,00,000/- after deducting a sum of Rs.30,00000/- paid by the respondents to the appellants.

17. The only aspect to be examined as to whether the learned Judge was justified to refuse an interest on the said balance amount. It is to be noted that in case the balance amount had to be continued in fixed deposit in terms of the directions of the learned District Judge, the interest would have accrued on such amount in fixed deposit before this Court. But, however, as pointed out herein above, the respondents withdrew the amount of Rs.22,00,000/- deposited in this Court and, as such, the amount could not be invested in the Nationalised Bank. The respondents are itself responsible and, as such, the respondents would be liable to pay interest on the balance sum of Rs.22,00,000/- payable to the appellants. The interest is fixed at the rate of 9% per annum on the balance sum of Rs.22,00,000/- payable by the respondents to the appellants from the date of the filing of the suit until actual payment. To that extent, the impugned Judgment passed by the learned Judge deserves to be modified. The second point for determination is answered accordingly.

18. In view of the above, we pass the following :

<u>O R D E R</u>

(i) The appeal is partly allowed.

(ii) The impugned judgment and decree dated 28.04.2009 passed by the learned Ad-Hoc District Judge – 1, FTC-I, South Goa, Margao stands modified and the respondents are directed to pay to the appellants a sum of Rs.52,00,000/- after deducting of Rs.30,00,000/- received by the appellants together with interest thereon at the rate of 9% per annum from the date of the filing of the suit until the actual payment.

(iii) The appeal and cross objections stand disposed of accordingly.

K. L. WADANE, J **F. M. REIS, J**

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