

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NOS. 45 & 59 OF 2016

SECOND APPEAL NO. 45 OF 2016

MR. CHARLES F. PAIS. Appellant

Versus

COSME COSTA AND ASSOCIATES, REP.
BY ITS PARTNER MR. CARMINHO COSTA. Respondent

Mr. F. E. Noronha, Advocate for the appellant.

Mr. V. Menezes, Advocate for the respondent.

AND

SECOND APPEAL NO. 59 OF 2016

COSME COSTA & ASSOCIATES ... Appellant
REP. BY ITS PARTNER MR. CARMINHO COSTA.

Versus

MR. CHARLES E PAIS ... Respondent

Mr. V. Menezes, Advocate for the appellant.

Mr. F. E. Noronha, Advocate for the respondent.

Coram:- F. M. REIS, J.

Date:- 26th August, 2016

ORAL ORDER :

Heard Mr. F. E. Noronha, learned counsel appearing for the appellant and Mr. V. Menezes, learned counsel appearing for the respondent.

2. Both the above appeals challenge the judgment and decree passed by the learned Lower Appellate Court in Regular Civil Appeal No. 428/2010 dated 23.12.2015.

3. The party shall be referred to in the manner they so appear in the cause title of the judgment of the Trial Judge.

4. Mr. F. E. Noronha, learned counsel appearing for the plaintiff has submitted that pursuant to an agreement, the respondent was appointed as a contractor to put up a construction at the instance of the plaintiff in the property surveyed under Chalta No.20-A of P.T. Sheet No.113 of City Survey of Mapusa. The learned counsel further points out that the terms and conditions of the services of the respondent were clearly stipulated in the letter addressed by the respondent dated

06.08.1992. The learned counsel further points out that in terms of the said agreement, the basic rates of the material which was agreed to be used for the subject construction were clearly specified and according to him, the terms also point out that the work carried out by the respondent had to be certified by the RCC drawings and the bills were to be checked by M/s. Paraz & Associates. The learned counsel further pointed out that the plaintiff has effected the payment on lumpsum based of the accounts though the certification was not done by the said engineer. The learned counsel further points out that ultimately the construction was completed in the year 1996 and according to him as there was dispute with regard to taking of possession of the subject building, the plaintiff had filed a suit for injunction with regard to such possession. The learned counsel further pointed out that the suit was filed in the year 1996 when the construction was completed within the time stipulated in the agreement and in the counter claim filed by the defendant, the defendant raised a claim of Rs.15,49,471.99. The learned counsel further pointed out that as the payment claimed by the defendant was not certified in terms of the said agreement by the said engineer, the plaintiff was not liable to pay such amount. The learned counsel has extensively taken me through the said contract to point out

that the condition precedent for effecting the payment was depending upon getting the certification from such engineer. The learned counsel further submits that the learned Trial Judge has erroneously allowed the counter claim filed by the defendant on the ground that as there was a delay in paying the mobilization amount of Rs.5 lakhs, the defendant was entitled for escalation of the amount as specified in the said agreement. The learned counsel further submits that the plaintiff preferred an appeal before the learned Lower Appellate Court which came to be disposed off by the impugned judgment whereby the learned Appellate Court has partly allowed the appeal preferred by the plaintiff and directed the payment of a sum of Rs.6,69,274.99 together with interest thereon at the rate of 6% per annum from the date of filing of the counter claim up to the actual payment. The learned counsel further pointed out that as there was no certification by the said engineer, the learned Lower Appellate Court was not justified to direct the payment of the said amount in favour of the defendant. The learned counsel has further pointed out that the learned Lower Appellate Court has relied upon a letter written by the plaintiff on their letter head with regard to the amount payable to the defendant though according to him such letter at Exhibit 87 by itself would not be an admission in terms of the

Evidence Act. The learned counsel further pointed out that the Courts below if at all had to construe the said letter as an admission, the amount mentioned therein as payable to the defendant is to the tune of Rs.15,49,472/- ought to have been accepted and not the sum of Rs.1,29,472/- as mentioned therein. The learned counsel further pointed out that the said counter claim itself could not have been decreed as according to him the son of the original defendant has deposed on behalf of the defendant. The learned counsel further pointed out that as the defendant has failed to establish their claim in the counter claim, the question of decreeing the counter claim is totally misconceived and deserves to be quashed and set aside. The learned counsel has laid great emphasis to the fact that as the bills have not been certified by the concerned engineer and as such, the question of directing the payment of such amount is untenable in law. The learned counsel points out that in terms of the agreement, a certification was required and consequently, the impugned judgment passed by the learned Lower Appellate Court deserves to be quashed and set aside.

5. On the other hand, Mr. V. Menezes, learned counsel appearing for the defendant has pointed out that the defendant has also

filed an appeal challenging the part of the refusal of the relief sought by the defendant in the counter claim. The learned counsel appearing for the defendant further points out that even though the defendant had a good case to claim further amount as against the plaintiff based on the counter claim filed by the defendant, nevertheless, in case this Court is inclined in not admitting the appeal preferred by the plaintiff, the defendant would restrict their Second Appeal only to the rate of interest as awarded by the learned Lower Appellate Court. Mr. Menezes, learned counsel has pointed out that in the terms of the agreement between the parties, it clearly specified that interest at the rate of 24% per annum was agreed between the parties for delay in the payment. The learned counsel further pointed out that as such the learned Lower Appellate Court has misconstrued the agreement to come to the conclusion that there was no contractual rate mentioned in the said agreement. The learned counsel as such points out that as a contractual rate was fixed in the agreement, the learned Lower Appellate Court was not justified to award interest at the rate of 6% per annum.

6. I have considered the submissions of the learned counsel and I have also gone through the records. Both the Courts below upon

appreciating the evidence on record have come to the conclusion that the plaintiff has not paid the amount in terms of the agreement which the defendant are entitled to claim from the plaintiff based on the claim put forward in the counter claim. The fact that the bills were not finalized by the plaintiff before taking possession of the subject premises/building is not at all disputed. It is also undisputed that the building was completed by the defendant within the time specified in the agreement. The records also reveal that in fact though the mobilization amount was to be paid immediately, nevertheless, the plaintiff paid such amount only two years after the execution of the agreement.

7. In the backdrop of the aforesaid undisputed facts, I shall now proceed to examine whether any interference is called for in the impugned judgment passed by the learned Lower Appellate Court. The learned Lower Appellate Court while coming to the conclusion that the defendant are entitled for the said sum of Rs.6,69,274.99 as decreed has relied upon a letter at Exhibit 87. The contents whereof have been admitted by the plaintiff himself. The said letter was in fact written by PW1 who has admitted the contents of such letter. On perusal of the

said letter/note prepared by the plaintiff on his letter head, it clearly stipulates that a sum of Rs.15,49,472/- was payable by the plaintiff to the defendant. The plaintiff claimed to be entitled for a deduction of Rs.14,20,000/- as reflected therein. The Courts below have accepted the said sum of Rs.15,49,472/- as an admission on the part of the plaintiff as the amount due to the defendant and proceeded to examine the veracity of the deductions claimed by the plaintiff. On perusal of such deductions, the Court has come to the conclusion that the plaintiff was entitled for deduction of an amount of Rs.8,30,697/- which has been accepted. This amount has been fixed on the basis of examining the other material on record and accordingly found that the plaintiff was liable to pay such amount to the defendant towards the construction put up by the defendant. The contention of the learned counsel appearing for the defendant that there is perversity in the findings of the Courts below in relying upon such document cannot be accepted. The document has been read in the context of the other material on record and appreciating the oral evidence adduced by the plaintiff and the defendant. In such circumstances, this Court in the present Second Appeal under Section 100 of Civil Procedure Code cannot reappreciate the evidence based on such document. The Lower Court has also considered the agreement

between the parties wherein the rates have been clearly specified to come to the conclusion that a sum of Rs.6,69,274.99 was payable by the plaintiff to the defendant. Considering that the plaintiff do not dispute that the final bill was not prepared before the delivery of possession by the defendant of the subject building to the plaintiff, it is late in the day for the plaintiff to now contend that he is not liable to pay such amount merely because there is no certification from the engineer. Admittedly, the plaintiff did not examine such engineer to dispute the correctness of the bill submitted by the defendant in connection with the subject construction. It is also not disputed that the plaintiff has been paying the amount to the defendant despite of knowing that there was no certification by such engineer. This acquiescence on the part of the plaintiff itself would disentitle the plaintiff to now make an issue that he is not liable for payment merely because there was no certification on record. Even on plain reading of the said agreement, I do not find anything specific therein that the condition precedent for making the payments would be after obtaining a certification from the engineer. No doubt, the certification is required to consider whether in fact the work was completed or not done by the defendant. But however, the plaintiff do not dispute that the work was in fact carried out by the defendant in

terms of the said agreement. In such circumstances, I find that there are no substantial questions of law which arise in the present appeal for consideration on that count. The substantial questions of law proposed by the plaintiff would entail reappreciating the evidence on record which exercise cannot be carried out in the present Second Appeal under Section 100 of the Civil Procedure Code as there is no perversity in the findings therein and such findings have been arrived at by correctly reading the material on record.

8. With regard to the Second Appeal preferred by the defendant, considering the view I have taken while examining the appeal preferred by the plaintiff, I find that as pointed out Mr. Menezes, learned counsel appearing for the defendant that such appeal is restricted only to the rate of interest awarded by the learned Lower Appellate Court, the rate of interest as specified in the agreement is at the rate of 24% per annum for the delayed payment. The amounts would be payable only after the bills were in fact submitted by the defendant. It is contended by the learned counsel appearing for the defendant that the bills were received by the plaintiff on 06.11.1996. The records however reveal that in fact the suit was filed by the plaintiff on 08.11.1996. In such circumstances, the lis between the parties in respect of the subject

building was already under adjudication before the learned Trial Court. In such circumstances, the contention that there was any delayed payment when the matter was already seized by the Civil Court cannot be accepted. In such circumstances, the interest, if any, would have to be awarded in terms of Section 34 of the Civil Procedure Code. The learned Appellate Court on examining the material on record and considering all the aspects of the case has exercised its discretion to award interest at the rate of 6% per annum. Though Mr. Menezes, learned counsel appearing for the defendant may be justified to contend that the interest could have to be higher considering the contractual rate of interest as specified in the agreement, nevertheless, considering that the Appellate Court has exercised its discretion under Section 34 of the Civil Procedure Code, merely because the discretion could have been exercised in different manner it would not by itself called upon this Court to admit the appeal on a substantial question of law on that ground. There is no substantial question of law which can arise for considering in the present Second Appeal preferred by the defendant as admittedly, the liability to pay the amount did not arise before the filing of the suit in the facts and circumstances of the case.

9. In view of the above, I find that no substantial questions of

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law arise in both the above appeals and consequently, both the appeals stand rejected.

F. M. REIS, J.

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