

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 113 OF 2015

1. Shri Agnelo Joazinho
Rosario Leonel Lacerda,
s/o. Antonia Lacerda, of
major age, landlord and his wife
2. Smt. Maria De Fatima Artimizia
Da Costa Lacerda,
housewife, of major age,
both residing at H. No. 201,
River Sal Estate,
Benaolim, Salcete, Goa. Appellants

V e r s u s

M/s. Afmar Constructions,
represented by its Proprietor
Shri Mariano Sequeira, son of
late Paulo Sequeira, of major
age, businessman, residing at
H. No. 12, Maina, Curtorim,
Salcete, Goa. Respondents

Mr. Nitin Sardessai, Senior Advocate with Mr. Deep Shirodkar, Advocate for the Appellants.

Mr. C. A. Coutinho, Advocate for the Respondent.

Coram :- F. M. REIS, J

Date : 29th July, 2016

ORAL JUDGMENT

Heard Mr. Nitin Sardessai, learned Senior Counsel appearing for the Appellants and Mr. C. A. Coutinho, learned Counsel appearing for the Respondent.

2. Admit, on the following substantial question of law :

(i) Whether the learned Appellate Court committed illegality in failing to deal with the specific challenge raised by the Appellants to the Orders dated 23.08.2012, 20.10.2012 and 23.11.2012 passed by the learned Trial Court, pursuant to the liberty granted illegality by this Honourable Court in Writ Petition nos. 702/2012, 796/2012 and 819/2012 ?

(ii) Whether the Judgments of the Courts below stand vitiated ?

(iii) Whether the Order dated 20.10.2012 also stands vitiated considering the Order dated 19.10.2012 passed by the learned Judge granting permission to the Appellants to engage a new Lawyer within a period of one week.

3. Heard forthwith with the consent of the learned Counsel. Learned Counsel appearing for the Respondent, waives service.

4. The brief facts of the case are that the Respondent filed a suit for specific performance, inter alia, claiming that some flats which were subject matter of the consideration in an Agreement executed between the Appellants and the Respondent were ready for delivery and further claiming damages from the Appellants herein. The Appellants filed their written statements disputing such claim and also preferred a Counter Claim, inter alia, alleging that the subject flats agreed to be delivered to the Appellants were not in conformity with the Agreement and further claiming a specific sum of damages for the delay in delivery of the flat.

The suit was thereafter posted for evidence and it appears that the Appellants' evidence was in progress. An application came to be filed at the instance of the Appellants, inter alia, contending that some documents produced by the Respondents cannot be taken on record. The application came to be disposed of by an Order dated 23.08.2012 dismissing such application filed by the Appellants. The said Order was challenged before this Court and a notice was issued to the Respondents in the Writ Petition filed by the Appellants. In the meanwhile, when the matter was taken up for cross examination of Pw.1, an adjournment was sought by the Appellants, inter alia, on the ground that the Advocate appearing for the Appellants had gone abroad. This application was filed on 19.10.2012, which came to be allowed, inter alia, directing the Appellants to engage a new Lawyer within a period of one week. But, however, on the next date i.e. 20.10.2012, the evidence of the Appellants was closed. Subsequently, on 23.11.2012, the Appellants sought an adjournment to lead his evidence as Orders passed by the learned Trial Judge were being assailed before this Court. But, however, the evidence of the Appellants was closed and ultimately a Judgment came to be passed on 13.12.2012. In the meanwhile, as the Writ Petitions became infructuous, as the suit itself was disposed of, the Writ Petitions were disposed of, inter alia, reserving liberty to the Appellants to challenge such interim Orders in the Appeal intended to be filed by the Appellants before the Appellate Court. Accordingly, the Appellants filed an Appeal before the learned District Judge, inter alia, raising objections to the correctness of the said three Orders. The learned Judge, by the impugned Judgment without examining the correctness or otherwise of the Orders which were challenged, proceeded to dismiss the Appeal essentially on the ground that the

evidence of Pw.1 remained unchallenged forgetting that the Orders closing the evidence were also assailed before the Appellate Court.

5. Being aggrieved by the Judgments passed by the Courts below, the Appellants have preferred the present Appeal.

6. Shri Nitin Sardesai, learned Senior Advocate appearing for the Appellants has pointed out that the said three Orders which were challenged before the Appellate Court have not at all been examined by the Lower Appellate Court and on this count alone, the impugned Judgment stands vitiated. The learned Senior Advocate further pointed out that there is no reference at all in the Judgment passed by the Lower Appellate Court with regard to the challenge to such Orders and, consequently, grave injustice has occasioned to the Appellants to the challenge to the impugned judgment passed by the learned Trial Judge. Learned Senior Advocate further pointed out that the Order dated 20.10.2012 is patently unjustified as on perusal of the Order dated 19.10.2012, one week's time was given to the Appellants to engage a new lawyer but, surprisingly, thereafter, on 20.10.2012, the impugned Order was passed closing the evidence of the Appellants. Learned Senior Advocate further pointed out that even an adjournment sought as the matter was pending before this Court was refused by the learned Judge and no evidence was permitted to be led by the Appellants in support of the Counter Claim filed by the Appellants. Learned Senior Advocate further pointed out that grave injustice has occasioned to the Appellants in closing the evidence of the Appellants and, consequently, the impugned Judgments passed by the Courts

below stands vitiated which calls for interference of this Court in the present Appeal.

7. On the other hand, Shri C. A. Coutinho, learned Counsel appearing for the Respondents, has pointed out that the Appellants have given up their challenge to the said three Orders as, according to him, no arguments were advanced in that connection. Learned Counsel further pointed out that the learned Trial Judge was justified to refuse any adjournment to the Appellants as there was specific direction that no adjournment would be granted to the Appellants with that regard. Learned Counsel further pointed out that as such the substantial questions of law framed in the present Appeal deserves to be answered in favour of the Respondent herein.

8. I have duly considered the submissions of the learned Counsel appearing for the respective parties. I have also gone through the records. The records indisputably disclose that there was a challenge in the grounds of Appeal to the said three Orders dated 23.08.2012, 20.10.2012 and 23.11.2012 whilst preferring the Appeal before the Lower Appellate Court. Apart from that, when the Writ Petition preferred before this Court came to be disposed of, there was an express liberty reserved in favour of the Appellants to challenge such Orders before the Appellate Court. Apart from that, as rightly pointed out by Shri Nitin Sardesai, learned Senior Advocate appearing for the Appellants, in the written arguments filed before the Lower Appellate Court there were specific grounds taken with regard to the illegality and infirmity in the said Orders passed by the learned Trial Judge. On

perusal of the Judgment passed by the Lower Appellate Court, I find that there is no reference to such challenge whilst disposing of the Appeal preferred by the Appellants. The challenge to such Orders would be very material for the ultimate decisions of the Lower Appellate Court essentially as the learned Judge has accepted the case put forward by the Respondent as the evidence remained unchallenged. In such circumstances, I find that the very fact that the learned Judge has failed to consider the challenge to the said three Orders has itself vitiated the Judgment passed by the Lower Appellate Court which calls for interference of this Court in the present Second Appeal.

9. In normal circumstances, the matter had to be remanded to the learned Lower Appellate Court for a fresh decision. But, however, in the peculiar facts and circumstances of this case, I find that there was a challenge in the Writ Petition when the suit was ultimately disposed of by the impugned Judgment and Decree dated 13.12.2012. Apart from that, on perusal of the impugned Order dated 20.10.2012, I find that on the previous day, there was liberty granted to the Appellants to engage a lawyer within a period of one week. But, however, on the following date, the learned judge went to the extent of closing the evidence of the Appellants on 20.10.2012. This patent error committed by the learned Trial Judge would itself justify the interference of this Court in the present Second Appeal without remanding the matter to the Lower Appellate Court which would delay the further proceedings in the suit.

9. In the facts and circumstances of the case, I find that the matter

deserves to be remanded by the learned Trial Judge for deciding the suit as well as the Counter Claim filed by the Appellants and the Respondent respectively afresh after hearing the parties in accordance with law. Considering the conduct of the Appellants, I find that successive adjournment sought by the Appellants are not justified. This Court as well as the Apex Court has taken serious view in the tendency of the litigants obtaining adjournments which cannot be permitted in an expeditious disposal of the suits and the litigations between the parties. In such circumstances, I find that in the facts and circumstances of the case and considering the past conduct of the Appellants, some compensatory costs are to be awarded in favour of the Respondent. The costs are accordingly fixed at Rs.50,000/- to be paid as condition precedent by the Appellants to the Respondent. The substantial questions of law are answered accordingly.

10. In view of the above, I pass the following :

ORDER

- (i) The impugned Judgment dated 26.06.2015 passed by the Lower Appellate Court in Regular Civil Appeal no. 17/2013 as well as the Judgment and Decree dated 13.12.2012 passed by the learned Trial Judge in Special Civil Suit no. 11/1999/III are quashed and set aside.
- (ii) The impugned Orders dated 23.08.2012,

20.10.2012 and 23.11.2012 passed by the learned Trial Judge, are also quashed and set aside.

- (iii) The learned Trial Judge shall proceed to decide the suit afresh after giving an opportunity to the Appellants to proceed with the cross examination of Pw.1 and leading further evidence by the respective claimants in the Suit and Counter Claim in accordance with law.
- (iv) Needless to say, the Respondents are also entitled to lead further evidence if so advised.
- (v) The parties are directed to appear before the Trial Court on 17.10.2016 at 10.00 a.m.

F .M. REIS, J.

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