

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 123 OF 2016

M/S. SHIVRAJ EARTHMOVERS PVT.
LTD., THR. ITS PROPRIETOR MR.
MADHAVRAO S. DESSAI.,

... Appellant

Versus

KINGFISHER INTERNATIONAL PVT. LTD,
REP BY ITS AUT. SIG. MR. VASUDEV
SHIVRAM RAIKAR.,

... Respondent

Mr. Ashwin D. Bhobe, and Ms. S. Bhobe, Advocates for the
appellant.

Coram:- F. M. REIS, J.

Date:- 17th February, 2017

P.C.:

Heard Mr. A. D. Bhobe, learned Counsel appearing for the appellant. The challenge in the above appeal is to the Judgments passed by the Courts below, whereby the suit filed by the respondent came to be decreed inter alia directing the appellant to pay a sum of Rs.5.00 lakhs with interest thereon at the rate of 18% p.a.

2. Mr. Bhobe, learned Counsel appearing for the appellant has submitted that though the appellants had received a sum of Rs.5,00,000/- as deposit for segregation of iron ore in the subject property, according to the appellants, in terms of the agreement, the appellants completed the work in the year 2006 and, in fact,

the respondents are liable to pay to the appellants a sum of Rs.12,81,609/-. The learned Counsel further submits that the respondents filed the suit on the ground that a sum of Rs.5,00,000/- was given as deposit to the appellant though no work was carried out in terms of the said agreement. It is further pointed out that in the year 2009, the respondent served a notice to the appellants to refund the said amount along with interest thereon. The learned Counsel further points out that the respondents, thereafter, filed the suit for recovery of the said amount wherein the appellants have filed a counter-claim, inter alia, contending that as the appellants had carried out the work in terms of the said agreement a sum of Rs.12,81,609/-, to be paid after a set off of Rs.5,00,000/- kept as a deposit and, as such, the respondents were liable to pay a sum of Rs.7,81,609/- to the appellants. The learned Counsel further points out that in support of the said claim of the appellants, documentary evidence was produced which was marked "X" for identification.

The learned Counsel further submits that an application for leading secondary evidence came to be rejected, which was assailed before the Appellate Court, which ultimately has been dismissed. The learned Counsel further points out that the appellants had also examined DW.2 one Maparai who had, in fact, acknowledged the receipt of vouchers. As such, according to him, as the documents were duly proved, the Courts below were not justified to decree the suit filed by the respondents. The

learned Counsel, as such, submits that there are substantial question of law, which arise in the present second appeal for consideration.

3. I have given my thoughtful consideration to the contentions raised by the learned Counsel appearing for the appellants and with the assistance of Mr. Bhobe, I have also gone through the records. The only aspect to be considered, in the circumstances of the case is, whether there is any substantial question of law which arises for consideration, in the present appeal. On perusal of the Judgment passed by the learned Trial Judge, I find that the learned Judge based on the documents and the cheque issued by the respondent in favour of the appellants, has come to the conclusion that the respondents had, in fact, paid a sum of Rs.5,00,000/- to the appellants as deposit towards the work to be carried out by the appellants as mentioned in the agreement. The only aspect, in such circumstances, to be examined is whether the appellant had established that they had carried out such work, the value of which is more than Rs.12.00 lakhs as claimed by the appellants in the counter claim. Both the Courts below on appreciation of the evidence on record have concurrently come to the conclusion that the appellants have failed to prove that any work was carried out based on the said agreement entered into between the appellant and the respondents. In fact, the Courts below disbelieved the evidence

of DW.2 Mapari and found that there is no material on record to establish that he was authorised or was representing the respondents herein. In fact, the findings of the learned Trial Judge also disclose that the respondents had a Power of Attorney-holder in Goa and admittedly, no such vouchers were ever submitted to such Power of Attorney-holder. Apart from that, there is no material on record to show that the appellants had released any ore from the subject property. In such circumstances, considering the concurrent finding arrived at by the Courts below to the effect that the appellants have not carried out any work in terms of the said agreement, I find that there is no substantial question of law which would arise in the present appeal for consideration as there is no perversity disclosed in such findings.

4. As far as the contention of the appellants that the Courts below have erroneously rejected the prayer for secondary evidence, I find that there is nothing on record to show the existence of the original document and consequently, the Courts below were justified in holding that the appellants have failed to make out a case in terms of Section 65 of the Evidence Act for leading secondary evidence. Consequently, I find no infirmity in the Judgments passed by the Courts below which would call for interference of this Court in the present appeal under Section 100 C.P.C. The substantial question of law proposed by the

appellants are essentially the questions of facts, which cannot be reappreciated by this Court in the present second appeal. The appeal stands accordingly rejected.

F. M. REIS, J.

ssm.