

Amrut

IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO.109 OF 2017

M/s Sagar Builders & Real Estate Developers Appellant
Versus
Mrs. Antoneta Filipina Caldeira Clemente Respondents

Mr. J. Supekar, Advocate for the Appellant.

Coram : N.M. Jamdar, J.

Date : 5 December 2017.

ORAL ORDER

The Appellant has challenged the judgments and orders passed by the learned Senior Civil Judge, Ponda and the learned District Judge, Panaji Goa, directing the Appellant to pay an amount of Rs.1,19,250/- for deficit area of flat with interest stipulated therein and to carry out repairs as sought for by the Respondent-Plaintiff, in default to pay Rs.1,00,000/- to the Respondent-Plaintiff.

2. The Respondent-Plaintiff filed a suit bearing Regular Civil Suit No.84/2015/A (Special Civil Suit No.34/2008/A (old)) for mandatory relief. The Respondent-Plaintiff was owner and in

possession of the property situated at Santacruz, within the jurisdiction of Ponda Municipal Council. Parties had entered into an agreement for sale and development with the Appellant-Defendant on 21 March 2004. According to the Respondent-Plaintiff the Appellant-Defendant, after development of her property, agreed to give her a two bed room flat admeasuring 76.62 square metres on the first floor, with certain other rights in the property. According to the Respondent-Plaintiff, inspite of the agreement, the Appellant-Defendant gave her a flat on the ground floor admeasuring 60.72 square metres. It was further her case that the said flat was defective and repairs had to be carried out. The Appellant-Defendant resisted the suit and disputed the area of the flat and also denied his liability to pay any additional compensation.

3. The learned Civil Judge accepted the case of the Respondent-Plaintiff that under the agreement she was entitled to the flat of 76.62 square metres and for the deficit area of 15.90 square metres she had to be paid compensation at the rate of 7500/- per square metre. The learned Civil Judge also accepted the case of the Respondent-Plaintiff that there were defects in the flat which would require Rs.1,00,000/- to rectify. Accordingly, by judgment and order dated 30 June 2016, the learned Civil Judge decreed the suit. Appeal bearing Regular Civil Appeal No.78 of 2016 was filed by the

Appellant-Defendant in the District Court, Ponda. The Appellant-Defendant preferred an application for leading additional evidence seeking to rely upon a declaration sought to be executed by the Respondent-Plaintiff relinquishing the flat on the first floor and instead accepting the flat on the ground floor. The learned District Judge, by judgment and order dated 22 March 2017, dismissed the appeal however, the judgment of the Trial Court to the extent of payment of Rs.50,000/- to the Respondent-Plaintiff was modified. Thereafter the present Second Appeal is filed.

4. The learned counsel for the Appellant submitted that the First Appeal was not argued on merits by the Appellant in the District Court and what was argued only on the application for additional evidence. The submission cannot be accepted. Perusal of the decision of the learned District Judge would show that the learned District Judge has given the judgment running to almost fifty pages. Issues on merits were framed and arguments of the Appellant have been recorded therein. Further more, if the Appellant was aggrieved by the fact that he was not given an opportunity to argue the appeal and arguments were not reflected the Appellant could have approached the learned District Judge by filing review or such other appropriate proceedings. On such oral arguments advanced by the learned counsel for the Appellant, it cannot be presumed that the Appellant

was only heard on the application for additional evidence.

5. As far as the merits of the Second Appeal is concerned, the learned counsel appearing for the Appellant advanced two submissions. Firstly, that the learned District Judge was in error in dismissing the application for additional evidence, which ought to have been allowed. This submission has no merit. The suit was instituted by the Respondent-Plaintiff on 23 July 2008 and the decision thereupon was given on 30 June 2016, that is, after eight years. The learned District Judge has correctly noted that the Appellant is a professional developer and not illiterate person. It is not that an additional evidence can be produced as a matter of right at any time, but must stand scrutiny of the Court as regards the diligence of the party. Admittedly, the agreement refers to the flat admeasuring 76.62 square metres on the first floor. When the entire suit is based on an agreement between the parties, by any subsequent agreement if it is modified then such document would be a complete answer to the suit. Any party would produce the same at the first instance. The argument that the document was given to the Advocate who did not produce the same is rightly not believed by the Appellate Court. It is impossible to believe that the Appellant, a developer, will not even consider producing such complete answer to the suit for eight long years. The learned District Judge has considered the

application in detail and found that the stand of the Appellant was contradictory. Therefore, the judicial discretion used by the learned District Judge in not allowing the application, cannot be stated as perverse.

6. The learned counsel for the Appellant then submitted that the direction to the Appellant to carry out repairs is contrary to the terms of the agreement which mandates that the responsibility of the Appellant in respect of carrying out any repairs would cease after one year of the execution of the agreement. The learned Civil Judge had considered the evidence on record and had come to the conclusion that there were various defects in the flat which ought to have been rectified by the Appellant. In the first appeal, the Appellant advanced a sole argument that after a period of two to three years there is possibility of wear and tear which has been dealt with by the learned District Judge, The learned District Judge, in absence of any expert evidence, did not accept this argument. That there was a mandatory cut-off of one year in the agreement was not an argument made before the learned District Court. The only argument, is as seen from the judgment, was of wear and tear. Whether the repairs which had to be carried out were because of normal wear or tear or not, is purely a question of fact which both the Courts have held against the Appellant.

7. In these circumstances, no substantial question of law arises for consideration. The Second Appeal is accordingly dismissed.

N.M. Jamdar, J.