

IN THE HIGH COURT OF BOMBAY AT GOA**SECOND APPEAL NO.79 OF 2015****AND****CIVIL APPLICATION 194 OF 2015**

M/S CERA CONSTRUCTIONS
AND ANOTHER

..... Appellants.

V/s.

MS CLEOFFE AIDA LUCAS MONTEIRO
AND ANOTHER.

..... Respondents.

Mr. A. R. Kantak and Ms. R. Kantak, Advocates for the appellants.

Mr. J. A. Lobo, Advocate for the respondents.

CORAM :- F.M. REIS, J.

Date :- 13th July, 2017.

ORAL ORDER :-

Heard Mr. A.R. Kantak, learned Counsel appearing for the appellants and Mr. J.A. Lobo, learned Counsel appearing for the respondents.

2. The above appeal challenges the Judgments passed by the Courts below whereby the suit filed by the respondents came to be

decreed.

3. Briefly, it is the case of the appellants that the respondents filed the suit for specific performance of an agreement for sale, as well as for damages and permanent injunction, on the ground that the respondent No.1 and the appellant No.2 had constituted themselves into a partnership in the name and style “M/s. Cera Construction” by a Deed dated 16/7/1996, wherein the principal business of the partnership was to put up constructions and the real estate. Thereafter, by a Deed of Dissolution of Partnership dated 25/1/1999, the partnership firm stood dissolved, subject to the terms and conditions stated therein. It is further contended that as per clause (1) of the said Deed, the appellant No.2 was to conduct business of the said partnership firm. It is further contended that a Memorandum of Understanding was executed between the respondent No.1 and the appellant No.2 and, it was, inter alia, agreed that the respondent No.1 would be retiring as a partner of the said partnership firm and that the appellant No.2 would run the business as a Proprietor thereof. As far as the partnership assets were concerned, the respondent No. 1 was allotted a double bedroom flat, bearing flat No.B1, in Block B, having

a super built up area of 86 sq. metres, another flat B3, in block B having a super built up area of 92 sq. metres and a shop being Shop No.S-2, of Block A, having super built up area of 25 sq. metres. As per the said terms, the said premises were to be delivered on or before 31/12/1999 and, in case of delay in delivering the premises, the appellant No. 2 would have to pay damages calculated at the rate of Rs.1000/- per month of delay. It was further contended that delivery of such premises was subject to the payment of the amount as mentioned therein. It is also contended by the respondents that the MOU clearly indicated the manner in which the payments were to be effected. It is further contended by the appellants that it is the case of the respondents that the respondent No.2 desired that the entire consideration receivable by her would be gifted by her to her niece Miss Preciosa Francisca Vaz, and, therefore, the premises were to be delivered to her sister Mrs. Efezenia Vaz. It is also the case of the respondents in the plaint that Flat No.B-3 was agreed to be sold to one Mr. Antonio Lucas Monteiro and the consideration was Rs. 5,15,000/-, out of which an amount of Rs.1,60,000/- was received by the appellant No.2. Further it is also alleged and contended that an amount of Rs.1,30,000/- was agreed to be paid by the said Mr. Antonio Lucas Monteiro to the

appellants. In connection with such flat, a separate agreement dated 10.10.1997 was executed by the said Antonio Lucas Monteiro which clearly mentioned that the payments to be made to the appellants was before the possession of the premises was handed over in terms of the said agreement and in case of default, interest at the rate of 21% per annum was payable. As the appellants failed to hand over the suit premises, as stipulated in the Memorandum of Understanding dated 25/1/1999, the respondents called upon the appellants to complete the premises and hand over possession thereof to the respondents. Consequently, the suit came to be filed before the learned Civil Judge, Sr. Division at Panaji for specific performance, seeking a decree directing the appellants to hand over possession of the three premises to the respondents and for a temporary injunction.

The stand taken by the appellants in the written statement is that in terms of the said Memorandum of Understanding, the delivery of the premises was depended on the timely payment of the amounts as agreed upon by the respondents. It is also contended that the appellants wrote to the respondents by letter, demanding an amount of Rs.2,50,000/- and also called upon the respondents to effect the payment of at least 50% of the amount and to take possession of the

Flat B3. It is also pointed out that on receipt of such amount, they would complete the work and hand over possession of the premises. A counter-claim was also filed by the appellants, *inter alia*, calling upon the respondents to pay a sum of Rs.1,00,000/-, with interest at the rate of 18% per annum. The averments in the counter-claim are also disputed by the respondents by filing a written statement.

The learned Trial Judge by Judgment and Decree dated 20/10/2011, after recording of evidence and hearing the parties, decreed the suit filed by the respondents and dismissed the counter-claim filed by the appellants. The learned Trial Judge, *inter alia*, directed the appellants to hand over the possession to the respondents of the three premises, namely Flats B1, B3 and the Shop S2 as per the Memorandum of Understanding, completed in all respects, upon payment of the sum of Rs.50,000/- to the appellants. The learned Trial Judge, while disposing of the said suit, framed eight issues. The learned Trial Judge, upon appreciating the evidence on record, came to the conclusion that the respondents were ready and willing to perform their part of the contract and pay the balance amount of Rs.50,000/- and consequently, was entitled for the relief of specific performance of the Memorandum of Understanding. The learned Judge further found

that the respondents have failed to establish that the appellants were in the process of leasing out the suit premises. The learned Judge further noted that the appellants have failed to hand over possession of the premises as mentioned in the Memorandum of Understanding and rejected the contention of the appellants that the Memorandum of Understanding came to be terminated. The learned Judge rejected the contention of the appellants that on account of the delay in effecting payments as agreed under the Memorandum of Understanding by the respondents, completion of the premises came to be delayed. The claim of the sum of Rs.1,00,000/- also came to be rejected.

Being aggrieved by the said Judgment and Decree passed by the learned Trial Judge, the appellants preferred an appeal, being Regular Civil Appeal No. 3/2012 before the Lower Appellate Court, which came to be rejected by Judgment and Decree dated 17/04/2015. While passing the said Judgment, the Lower Appellate Court framed six points for determination. Whilst examining as to whether the respondents have established their readiness and willingness to perform their part of the contract in terms of the Memorandum of Understanding, as well as whether the respondents are entitled for the specific performance, the learned Judge, upon reappreciating the

evidence on record came to the conclusion that the findings of the learned Trial Judge, on that count, cannot be faulted. The learned Judge also rejected the contention of the appellants that on account of the delay in effecting payments, agreed upon in terms of the Memorandum of Understanding, completion of the building came to be delayed. The claim for damages of Rs.1,00,000/-, as well as the dispute raised with regard to interest awarded by the learned Trial Judge, as raised by the appellants, also came to be rejected by the Lower Appellate Court. Being aggrieved by the Judgments passed by the Courts below, the appellants have preferred the present second appeal.

4. It would be relevant to note that after the matter was heard and posted for Judgment, an application was filed by the appellants under Order 41, Rule 27 of CPC, seeking leave to produce some documents. The learned Counsel for the respective parties were accordingly heard and during the course of hearing it was found that the documents sought to be introduced were already on record.

5. Mr. A. R. Kantak, learned Counsel appearing for the

appellants has vehemently argued that both the Courts below have rendered perverse findings of fact as, according to him, the plaintiff/respondent did not enter the witness box and her evidence was recorded by her power of attorney. The learned Counsel further submits that the person who had deposed as PW.1 had, in fact, deposed based on the delegation of power of attorney executed in favour of her mother. The learned Counsel further points out that the mother did not enter the witness box nor the plaintiff and, as such, according to him, as there was no evidence on record to prove the case of the respondents, both the Courts below have erroneously decreed the suit. The learned Counsel, in support of his submissions, has relied upon a Judgment of the Apex Court in **(2010) 10 SCC 512** in the case of ***Man Kaur (dead) by Lrs v/s Hartar Singh Sangha***. The learned Counsel further points out that as there was no admissible evidence on record, the Courts below have erroneously relied upon such evidence to decree the suit filed by the respondents. The learned Counsel further submits that in terms of the Memorandum of Understanding, admittedly, the respondents were liable to pay a specific amount as stated therein. It is further pointed out that in fact a sum of Rs.50,000/- had remained to be paid by the respondents in respect of Flat No.B3 and, as such,

according to him, as there was such delay in making such payment, the appellants were unable to complete the subject premises to be built for the respondents. The learned Counsel further points out that despite of a notice served on the respondents to pay the said amount of Rs.50,000/-, there was a default committed in payment of such amount, which delayed the delivery of possession of the subject premises to the respondents. It is further pointed out that in terms of the said agreement, in case of any default, the interest charged in excess of a sum of Rs.20,000/-, the appellants were also entitled to terminate the agreement. The learned Counsel further submitted that in such circumstances, as there was admittedly delay in payment of such amount, the appellants terminated the Memorandum of Understanding executed between the parties. The learned Counsel has, thereafter, extensively taken me through the impugned Judgments passed by the Courts below to point out that the Courts below have erroneously appreciated the material on record and have misconstrued the Memorandum of Understanding and the Agreement to erroneously decree the suit filed by the respondents. The learned Counsel has further pointed out that as far as the agreement in respect of Flat No.B3 is concerned, there was a separate agreement signed between

the appellants and said Mr. Antonio Lucas Monteiro which was independent of the transaction between the appellants and the respondent in connection with the premises to be allotted in terms of the dissolution of the partnership between the appellant No.2 and the respondent No.1. The learned Counsel points out that as said Antonio Lucas Monteiro is not a party to the suit, the respondents filing a suit to claim possession of Flat No. B3 is totally unjustified. It is further pointed out that there is no agreement between the appellants and the respondents in respect of the Flat No.B3 and, as such, to that extent the Courts below were not justified to pass the impugned Judgments and direct delivery of such premises. It is further pointed out that the Courts below have failed to consider that the appellants were in default in performing their part of the bargain and, as such, according to him, the Courts below have erroneously come to the conclusion that the respondents were ready and willing to perform their part of the contract. The learned Counsel, as such, points out that there are substantial questions of law which arise in the present appeal for consideration. The learned Counsel further points out that the suit filed by the respondents was not on behalf of the minor child who was the beneficiary of the premises to be allotted in terms of the

dissolution of the partnership.

6. On the other hand, Mr. J. A. Lobo, learned Counsel appearing for the respondents, has supported the impugned Judgments. The learned Counsel points out that both the Courts below have concurrently found that the respondents were ready and willing to perform their part of the contract and, as such, according to him, the Courts below have rightly decreed the suit filed by the respondents herein. The learned Counsel further submits that the premises itself were incomplete and, as such, according to him, though the respondents were always ready and willing to pay the sum of Rs.50,000/-, the appellants defaulted in completing the building in terms of the Memorandum of Understanding which led to the dispute, and ultimately forced the respondents to file the suit for specific performance. The learned Counsel further points out that a plain reading of the agreement signed by the said Antonio Lucas Monteiro, who is the brother of the respondent No.2, would clearly show that the appellants had agreed to sell such flat to said Mr. Antonio Lucas Monteiro or his assignees or representatives. The learned Counsel further points out that the Memorandum of Understanding which has

been signed between the appellants and the respondents clearly shows that the subject matter of such MOU also included the Flat No.B3 which was agreed to be purchased by the said Antonio Lucas Monteiro. The appellants themselves had accepted to assign all such right of the purchaser of the flat in favour of the respondents herein. The learned Counsel further submits that in any event, the question of terminating the Memorandum of Understanding is totally misconceived and misplaced as, according to him, there is no justifiable reason which could entitle the appellants to terminate the said agreement. The learned Counsel further submits that PW.1 who is the husband of the plaintiff No.2 was well conversant with the facts of the case and, in fact, taken part in the discussion in connection with the subject dispute and, as such, there is no infirmity committed by the Courts below while accepting such evidence of PW.1. The learned Counsel further submits that the respondents also filed an application before the learned Trial Judge to deposit the said amount of Rs.50,000/-. The learned Counsel further points out that the appellants have unnecessarily delayed the delivery of the premises as disclosed in the said Memorandum of Understanding and have deprived the respondents of the just entitlement of the premises agreed to be

delivered to the respondents way back in the year 1999. The learned Counsel has, thereafter, taken me through the findings of the learned Judge to contend that the findings rendered therein are in accordance with the material on record and, as such, no interference is called for in the Judgments passed by the Courts below in the present second appeal under Section 100 of the Code of Civil Procedure.

7. I have given my thoughtful consideration to the rival submissions and I have also gone through the records. The undisputed facts of the case, as culled out from the material on records, would disclose that there was a subsisting partnership between the appellant No.2 and the respondent No.1 which led to the dissolution of such partnership. The business of such partnership was of real estate and putting up constructions. In terms of the agreement for dissolution at Exhibit 48, the appellants were liable to deliver one Flat B1 and one shop being Shop No.S2 to the respondents herein. Admittedly, towards such delivery, the respondents were not liable to pay any amount to the appellants. In such circumstances, I fail to understand the contention of the learned Counsel appearing for the appellants on what basis the appellants are entitled to delay the delivery of the said

flat B1 and the shop S2 to the respondents herein. Such delay on untenable and unjustifiable reasons cannot be accepted and consequently, the contention of the learned Counsel appearing for the appellants that the respondents are not entitled to such premises deserves to be rejected.

9. As far as the contention of Mr. Kantak, learned Counsel appearing for the appellants that the evidence of PW.1 should not have been considered by the Courts below, I find that it is not in dispute that PW.1 is the husband of respondent No.2. The fact that he was involved in the transactions between the respondent No.1 and the appellants are not in dispute. There is no ground on that count raised by the appellants even in the appeal memo before the Lower Appellate Court. In such circumstances, taking note of the observations of the Apex Court which clearly states that evidence recorded from the personal knowledge of the Power of Attorney can be considered by the Court while examining a dispute between the parties, I find that the contention that the evidence of PW.1 had to be discarded, cannot be accepted.

10. Apart from that, the claim of the appellants is basically on documentary evidence. The agreement for dissolution at Exhibit 48 and the Memorandum of Understanding at Exhibit 47 are admitted documents. Authenticity of such documents and the contents thereof have not been disputed by the appellants herein. A plain reading of the agreement for dissolution, as well as the Memorandum of Understanding would reveal that the appellants had to deliver the Flat B1 and the shop S2, which cannot be defaulted. In such circumstances, the findings of the learned Judge, on that count, cannot be faulted. The contention that the findings of the learned Judge are perverse also cannot be accepted as, in fact, the findings on that aspect are based on minute examination of the material on record and the oral and the documentary evidence adduced by the parties. The concurrent findings of both the Courts below on that count, also cannot be faulted. Consequently, the substantial questions of law proposed by the learned Counsel for the appellants, on such aspect, do not at all arise in the present second appeal.

11. The only aspect which remains to be considered is with regard to the agreement executed between the appellants and the said

Mr. Antonio Lucas Monteiro who is, admittedly, the brother of the respondent No.1. The said agreement is at Exhibit 57 which is dated 10/10/1997. The Memorandum of Understanding, admittedly, is subsequent to the said agreement. On perusal of the MOU, it is seen that the appellants had agreed to deliver the subject Flat No.B2 which was subject matter of the said agreement, to the respondents herein. In such circumstances, it is not open to the appellants to now contend that the Flat had to be delivered to said Mr. Antonio Lucas Monteiro and not the respondents herein. The suit is basically for the specific performance of the MOU. The MOU clearly shows that the said flat had to be delivered to the respondents. There is no justification on the part of the appellants to refuse such terms in the MOU and deprive the respondents of Flat No.B3 which was agreed to be delivered to the respondents, subject to the payment of the amount. The fact that substantial payments have come from the respondents is not in dispute. In such circumstances, it is not open to the appellants, after receiving the benefit of the amounts received from the respondents, to now contend that such flat cannot be delivered to the respondents. Even on perusal of said agreement, it is seen that the appellants had agreed to deliver the flat either to the purchaser said Shri Antonio Lucas

Monteiro or his assignees. The very fact that the MOU, as such, indicates that the flat had to be delivered to the respondents would itself show that the appellants have accepted the respondent as one of the beneficiaries, having assigned the right to purchase such flat. The Courts below have appreciated the material on record to concurrently come to the conclusion that the appellants are liable to deliver flat No.B3. As such, I find no perversity in the said findings which would call for interference of this Court under Section 100 of the Code of Civil Procedure.

12. The contention of Mr. Kantak, learned Counsel appearing for the appellants that the appellants were justified in delaying the delivery of the premises as the sum of Rs.50,000/- was not paid, has been concurrently rejected by the Courts below. The learned Counsel for the appellants points out that in terms of the said agreement, the appellants are entitled for interest at the rate of 21% on the said sum of Rs.50,000/- admittedly payable by the respondents to the appellants. No doubt, such interest was agreed to be paid in terms of the MOU, but the fact remains that as the premises were to be delivered to the appellants way back in the year 1999, the appellants have defaulted to

deliver such premises even the two premises which were the subject matter of the dissolution agreement. In such circumstances, awarding any interest to the appellants, on such amount, at this stage would not at all be justified when both the Courts below concurrently found that the respondents were ready and willing to preform their part of the contract. These concurrent findings of fact, which are based on material on record, cannot be re-appreciated by this Court in the present second appeal. Apart from that, there is no clause in the agreement which would justify such action on the part of the appellants.

13. The Apex Court in the Judgment reported in (2006) 2 SCC 496, in the case of *H.P. Pyarejan vs. Dasappa (Dead) by LRs., and ors.*, has observed at paras 14,15 and 16, thus :

“**14.** Section 16(c) of the Act mandates the plaintiff to aver in the plaint and establish as the fact by evidence aliunde that he has always been ready and willing to perform his part of the contract. The principles were recently elaborated in *Aniglase Yohannan v. Ramlatha*, (2005) 7 SCC 534.

15. As rightly contended by learned counsel for the appellant no question was even formulated regarding

the correctness or otherwise of the findings of facts recorded by the trial court. The High Court has also not discussed as to in what way the requirement of Section 16(c) regarding the proof of readiness and willingness of the plaintiff to perform his part of the contract was fulfilled.

16. In our opinion, therefore, the judgment of the High Court suffers from serious infirmities. It suffers from the vice of exercise of jurisdiction which did not vest in the High Court under the law. Under Section 100 of the Code (as amended in 1976) the jurisdiction of the High Court to interfere with the judgments of the courts below is confined to hearing on substantial questions of law. Interference with finding of fact by the High Court is not warranted if it involves reappreciation of evidence (see *Panchugopal Barua v. Umesh Chandra Goswami*, (1997) 4 SCC 713 and *Kshitish Chandra Purkait v. Santosh Kumar Purkait*, (1997) 5 SCC 438. The High Court has not even discussed any evidence. No basic finding of fact recorded by the courts below has been reversed much less any reason assigned for taking a view contrary to that taken by the courts below. The finding on the question of readiness and willingness to perform the contract which is a mixed question of law and fact has been upset. It is statutorily provided by Section 16(1) (c) of the Act that to succeed in a suit for specific

performance of a contract the plaintiff shall aver and prove that he has performed and has always been ready and willing to perform the essential terms of the contract which were to be performed by him other than the terms the performance of which has been prevented or waived by the defendant.”

14. In the present case, the Courts below have concurrently found that the respondents were ready and willing to perform their part of the contract and, as such, were entitled for the reliefs granted in the impugned Judgments. In the present second appeal, this Court cannot reappreciate the evidence as I find that there is no perversity in the finding to that effect. As such, I find that there is no case made out for interference in the impugned Judgments passed by the Courts below. There are no substantial questions of law which arise in the present appeal for consideration. The appeal stands, accordingly, rejected.

In view of disposal of the second appeal, the civil application is rendered infructuous. Disposed of accordingly.

F.M. REIS, J.

ssm.