

IN THE HIGH COURT OF BOMBAY AT GOA
CIVIL APPLICATION (REVIEW) NO.09 of 2018

1. Ms/ CERA CONSTRUCTIONS,
A Proprietary concern of
 2. Mr. Liborio Bapista De Souza,
(since deceased) represented by LR's
 - a) Mrs. Jane @ Genoveva D'Souza,
Major, widow, aged about 79 years,
w/o Mr. Liborio B. De Souza.
 - b) Mr. Robert D'Souza,
Major, married, Indian National,
s/o Mr. Liborio B. De Souza,
 - c) Mrs. Anita D'Souza,
major, married,
w/o Mr. Robert D'Souza,
All having address at 'Villa Filomena',
Carras Vado, Parra, Bardez, Goa.
- Applicants.

V e r s u s

1. Ms. Cleoffe Aida Lucas Monteiro,
Major, represented herein by her Attorney
Mrs. Yvette Andrade Monteiro, r/o F-2,
Gharse Towers, M.G. Road, Panaji, Go.
2. Mrs. Efezenia Vaz,
Major, w/o Cecil, Indian National,
r/o C5, 3rd floor, General Pool,
Quarters Altinho, Panaji, Goa.
3. Mr. Reginaldo D'Souza,
Major, aged about 53 years,
s/o Mr. Liborio B. De Souza.
4. Mrs. Ena D'Souza,

Major, Indian National,
w/o Mr. Reginaldo D'Souza,
both r/o Carras Vaddo,
Parra, Bardez, Goa.

..... Respondents.

Shri A. R. Kantak, Advocate with Adv. Ms. R. Kantak for the Applicants.

Shri J. A. Lobo, Advocate for the Respondents.

CORAM: C. V. BHADANG, J.
DATE: 10th July, 2018.

Oral Order:

This is an application for review of the order dated 13/7/2017 passed by this Court (F.M. Reis, J) in Second Appeal no.79 of 2015. By the impugned order, the Second Appeal filed by the applicants has been rejected.

2. The brief facts necessary for disposal of the review application may be stated thus:

That the respondents/plaintiffs filed Special Civil Suit No.80/2004/B against the plaintiffs/defendants for specific performance of a Memorandum of Understanding (MOU) dated 25/1/1999. The case made out in the plaint was that the plaintiff no.1 and the defendant no.2 had constituted a partnership by Deed of a Partnership deed dated 16/7/1996 under the name and style of M/s Cera Constructions. As per Clause 14 of the Partnership Deed the profits and losses of the partnership business were to be shared

equally by the plaintiff no.1 and the defendant no.2. Subsequently by a Deed of Dissolution dated 25/1/1999 the partnership stood dissolved subject to certain conditions. On the same day, a Memorandum of Understanding (MOU) came to be executed between the plaintiff no.1 and the defendant no.2. It was inter alia agreed that the plaintiff no.1 would retire as a partner of M/s. Cera Constructions and the defendant no.2 would run the business of M/s Cera Constructions as a a proprietary concern.

3. According to the plaintiffs the defendants failed to hand over the possession of three premises, namely Flats no. B-1 and B-3 and the shop S-2 to the plaintiffs which led the plaintiffs to file the suit.

4. The applicants resisted the suit and raised a counter claim for a declaration that the agreement dated 10/10/1997 entered into by the defendant no.1 with Mr. Antonio L. Monteiro stands terminated and that the plaintiffs are not entitled to seek the possession of flats no.B-3 at Sera Residency, Parra.

5. On behalf of the respondents one Cecil Vaz was examined as PW.1. There was no evidence led on behalf of the applicants. The learned trial court by a judgment and decree dated 20/10/2011 decreed the suit while dismissing

the counter claim. As a result the applicants have been directed to hand over the possession of three premises namely the flats B-1 and B-3 and the shop S-2 as per the MOU upon the respondents paying an amount of Rs.50,000/- to the applicants. In appeal, the learned District Judge by judgment and order dated 17/4/2015 in Regular Civil Appeal no.3/2012 has confirmed the said decree passed by the trial court. That is how the applicants had approached this Court in Second Appeal no.79/2015 which has been rejected by this Court by the order under review.

6. I have heard Shri Kantak, the learned counsel for the applicants and Shri Lobo, the learned counsel for the respondents. With the assistance of the learned counsel for the parties I have gone through the record.

7. Shri Kantak, the learned counsel for the applicants has made multiple submissions. It is submitted that there is an error apparent on the face of the record of the order passed by this Court while rejecting the second appeal, which would require the present application to be allowed. He submitted that the plaintiff had executed a Power of Attorney in favour of the her mother and the Power of Attorney holder had further delegated the powers to PW.1 which is not permissible. It is submitted that the agreement dated 10/10/1997 stood terminated and the plaintiff were not entitled to seek the possession of

the flat no. B-3. It is submitted that there is no specific finding recorded by any of the Courts below or this Court on the aspect of termination of the agreement. He submits that this Court has failed to address itself on the substantial question so involved in the second appeal and which has resulted into the rejection of the second appeal. It is submitted that this Court has also not properly appreciated that in the event of delay there was interest payable on the amount. He, therefore submits that the application be allowed.

8. On the contrary Shri Lobo, the learned counsel for the respondents has pointed out Clause 6 of the MOU in order to show that the applicants (who were the party of the First Part) had agreed that the possession of the two flats and the shop was to be delivered to the respondents (parties of the Second Part) by 31/12/1999. It is pointed out that the applicants have not even handed over the possession of the flat no. B-1 and the shop no. S-2 (as agreed in para 2 of the MOU), which is in clear breach of the MOU. He submits that the Power of Attorney dated 11/3/2002 executed by the plaintiff in favour of her mother clearly authorizes the Power of Attorney holder to further delegate the authority to any person of confidence. It is submitted that accordingly the mother of the plaintiff had executed a Special Power of Attorney in favour of PW.1 on 24/7/2012. It is also submitted that the plaint was verified by PW.1 as Power of Attorney holder of the plaintiff.

9. In reply, Shri Kantak, the learned counsel for the applicants submitted that PW.1 has not in so many words stated in his evidence that he is disposing as a Power of Attorney holder of the plaintiffs and thus his evidence is of no avail in the absence of any such statement.

10. I have carefully considered the circumstances and the submissions made and I do not find that any case for review is made out. It is now well settled that under the garb of review a party cannot seek reconsideration of the entire matter which has been dealt with and decided by this court. The question essentially is whether there is any error apparent on the face of the record of the order passed by this Court.

Clauses 2, 3 and 6 of the MOU reads thus :

2. That towards the share of the partnership assets, the parties of the FIRST PART and the SECOND PART have agreed that the party of the SECOND PART is to be allotted free of any consideration the following:

a) Double Bedroom Flat denoted as Flat B-1 having a Super Built up area of 86 square metres in the Block "B" under construction in the project of M/s. CERA CONSTRUCTION at Parra Bardez, Goa, this Flat having the same specifications as agreed upon in the Agreement entered into with Mr. Antonio Lucas in

respect of the Flat No.B-3 in the same project.

b) Shop denoted as Shop S-2 having a Super Built up area 25 square metres in the Block “A” under construction in the Project of M/s. CERA CONSTRUCTIONS at Parra, Bardez, Goa, the shop structure being already complete with the flooring to be of Grey mosaic tiles and having 2 light points, 1 external light point, 2 fan points, one 15 amps, power plug and two 5 amps plug points. The door of the shutter is to be a Rolling shutter.

3. That a Double Bed room flat denoted as Flat B-3 having a Super Built up area of 92 square metres in the Block “B” under construction in the project M/S. CERA CONSTRUCTIONS at Parra, Bardez, Goa, was agreed to be sold to Mr. Antonio Lucas, the brother of the Party of the SECOND PART at a consideration of Rs.5,15,000/- (Rupees Five lakhs fifteen thousand only) out of which an amount of Rs.1,60,000/- (Rupees One lakh sixty thousand only) has been received by M/S. CERA CONSTRUCITONS. It has now been agreed that the party of the SECOND PART is to adjust the amounts receivable by M/S. CERA CONSTRUCTIONS. It has now been agreed that the Party of the SECOND PART is to adjust the amounts receivable by M/s. Cera Constructions. It has now been agreed that he Party of the SECOND PART is to adjust the amounts receivable

by M/s Cera Constructions from the amounts payable by Mr. Antonio Lucas Monteiro on account of which instead of Rs.3,55,000/- (Rupees Three lakhs fifty five thousand only) payable by Mr. Antonio Lucas Monteiro, an amount of Rs.1,30,000/- (Rupees One lakh thirty thousand only) shall be payable by Mr. Antonio Lucas Monteiro and that on the receipt of the said Rs.1,30,000/- (Rupees One lakh thirty thousand only) the entire consideration payable in respect of the Flat B-3 by Mr. Anonio Lucas Monteiro shall be deemed to have been paid and he shall be entitled to be delivered the possession of the said Flat B-3.

6. That the party of the FIRST PARTY has agreed that the possession of the Flat Nos. B-1 and B-3 as also the Shop No. S-2 shall be delivered by the party of the FIRST PART unto the party of the SECOND PART by 31/12/1999.

It can thus clearly be seen that towards the share of the respondents (as parties of the second part) they were to be allowed free of any consideration flat no. B-1 and the shop S-2. The present dispute pertains to the flat no. B-3 which is covered by Clause 3 of the MOU. As per Clause 6 the applicants (as parties of the first part) had agreed that the possession of the two flats and the shop is to be delivered to the respondents by 31/12/1999. It is an admitted position that the flat B-1 and shop S-2 which are covered by clause 6 have

not been handed over to the respondents as yet. Shri Kantak, the learned counsel for the applicants has submitted at the initial stage of the suit itself, the applicants had shown willingness to hand over the same subject to the dispute about flat no. B-3 being sorted out. In any event it appears that it was a conditional proposal. The applicant did not lead any evidence to show that the agreement was in fact terminated. There was a specific issue framed by the trial court vide issue no.5 as to whether the applicants prove that the agreement dated 10/10/1997 stands terminated on account of breach of the specific clause of the agreement which has been answered in the negative and the same has been confirmed in appeal.

11. In so far as the question of interest at the rate of 21% on the amount of Rs.50,000/- is concerned, this Court has acknowledged that admittedly the same was payable by the respondents to the applicants. However this Court has found that the premises were to be delivered to the respondents way back in the year 1999 in which the applicants have defaulted and even the two premises which are subject matter of Clause 2 were not delivered. This Court has therefore found that awarding any interest to the applicant on the said amount at this stage would not be justified. Both the courts below had concurrently found that the respondents, were ready and willing to perform their part of the contract and these concurrent finding of fact which are based

on the material on record, cannot be interfered with on re-appreciation in a second appeal.

12. In so far as the question of further delegation of the powers by the mother of the plaintiff is concerned, the Power of Attorney executed by the plaintiff vide Clause 19 indeed shows that there was an express power granted to the mother to delegate it further to any person of confidence and subsequently the Power of Attorney is executed in favour of PW.1. Merely because PW.1 had not stated that he is deposing as a Power of Attorney holder would not be sufficient to vitiate the findings so recorded. The plaint was verified by PW.1 himself. The applicants did not lead any oral evidence to substantiate their case of the termination of the agreement. Considering the overall circumstances, I do not find that the order under review demonstrates any error apparent on the face of the record. Consequently the application is hereby dismissed with no order as to costs.

C. V. BHADANG, J.

Ap/