

**IN THE HIGH COURT OF BOMBAY AT GOA.**

**SECOND APPEAL NO.88 OF 2019.**

Inacio Lourenco and anr.

... Appellants.

Versus

Laura M. O. Afonso Fernandes(Dec)  
and 6 ors.

... Respondents.

Mr. Nigel da Costa Frias, Advocates for the appellants.

Mr. V. Menezes, Advocate for the respondent nos.1 to 5.

**Coram:- DAMA SESHADRI NAIDU, J.**

**Date:- 6<sup>th</sup> December 2019.**

**P.C.**

The appellants in this Second Appeal are the defendants in the suit. That suit was filed by the owners of the suit property—to be precise, the Respondent 1 to 5. They filed Special Civil Suit No.79 of 2000, against the 6th respondent, who initially was the sole defendant. Later, the appellants, along with the 7th respondent, intervened. They came on record as the other defendants. Thus, before the trial Court, the respondents 1 to 5 were the plaintiffs; the appellants along with the 7<sup>th</sup> respondent and the 6<sup>th</sup> respondent-builder were the defendants.

2. Before the Trial Court, the plaintiffs contended that the 6th respondent was the builder that agreed to develop their property under a Development Agreement, dated 30.12.1995. But, later, he negated the terms of that agreement, so they cancelled the agreement. Only to have a

judicial imprimatur of that cancellation, they sought a declaration from the Court on the invalidity or the ineffectiveness of Development Agreement and its consequential cancellation, as well as injunction.

3. Blissfully, and unsurprisingly, the developer remained *ex parte*. Only the other defendants, that is the appellants before this Court and the 7<sup>th</sup> respondent, contested the suit.

4. In May 2009, the trial Court decreed the suit. Then the 7<sup>th</sup> respondent filed Regular Civil Appeal No.394 of 2010. In that, the appellants were shown as the respondents, but later they applied for transposition. Thus, they became the co-appellants. In March 2019, the learned District Judge-I, North Goa, Panaji, dismissed the Appeal. Then, faced with the concurrent findings, the appellants have come up with this Second Appeal. Of course, they did array their co-appellant in the first appeal as the 7<sup>th</sup> respondent here, though he himself did not chose to challenge the judgment in the first appeal.

5. To earn an admission of the Second Appeal, the appellants have presented a few substantial questions of law, and they read:

- i) Does the termination of power of attorney, dated 19.1.1996, affect the rights of the appellants arising out of the agreement dated 11.3.1996 in the face of Section 208 of the Indian Contract Act?
- ii) Are the findings of the First Appellate perverse because it has held that the agreement, dated 11.3.1996, is not a genuine document and is contrary to records?
- iii) Have the Trial Court and the First Appellate Court overlooked

Section 27 (2) (c) of the Specific Relief Act?

iv) Have the Courts below committed any material error in overlooking and in not considering the admissions made by the plaintiff's witness (PW2): that the Respondent No.6 has acted in terms of the agreement dated 30.12.1995 and the Power of Attorney, dated 19.1.1996, and has created rights in the property in favour of the Appellants and Respondent No.7?

v) Is the agreement, dated 11.3.1996 is valid and binding on Respondent No.1 to 5?

**Submissions:**

**Appellants:**

6. Shri Nigel Costa Frias, the learned counsel for the appellants, has advanced elaborate arguments. He has submitted that the development agreement, dated 30.12.1995 does, empower the developer to contract with any third party concerning the structure to be raised by him. Besides, the power of attorney, dated 19.1.1996, executed by the owners, also allows the developer to act as their agent: for example, to contract with third parties and to enter into the contract.

7. According Shri Costa Frias, viewed from either perspective the development agreement, dated 11.3.1996, squarely binds the owners. Thus, the owners unilaterally could not have development agreement. In the alternative, Shri Costa Frias has also argued that the developer has signed the development agreement not only in his independent capacity as a developer but also as the owner's agent. So, if at all the owners opted for cancellation of a composite document—that is, the development agreement cum power of attorney—that should have been only

prospectively, thus saving all the pre-cancellation transactions.

8. To elaborate, Shri Costa Frias has taken me through the judgments of the trial Court and the Appellate Court to contend that both the Courts have lost sight of the vital issues and, instead, decided on collateral issues. In the end, Shri Costa Frias has submitted that the interpretation of a documents is a substantial question of law. Here, the entire dispute, he maintains, turns on the true import of the development agreement-cum-power of attorney, as well as agreement, dated 11.3.1996. Therefore, he wants the Court to admit the matter.

**Respondents:**

9. On the other hand, Shri V. Menezes, the learned counsel for the respondent no.1 to 5, the plaintiff owners, has submitted that the development agreement clearly reveals that though the developer could contract with any prospective purchaser, but that should not affect the owners. In other words, the clause in the development agreement about the developer's contracting with third parties is "sans recourse" to the owners.

10. About the power of attorney, Shri Menezes argues that the development agreement authorizes the builder to contract with third parties only after his completing the construction. But, here, he contracted with the prospective purchasers, that is the appellants, even before he could lay a brick on the land.

11. At any rate, Shri Menezes submits that the agreement was supposed to be a tripartite one, but the owners never signed it. So it remains inchoate. Eventually, Shri Menezes has taken me through the first appellate Court's judgment and has stressed that the first appellate Court has considered all the issues and rendered reasonable findings, essentially, on the questions of fact. Besides, he also submits that even if one has to assume that the interpretation of a contract amounts to a substantial question of law, the contract here is unambiguous and stands correctly interpreted. Therefore, the appellants, according to Shri Menezes, have failed to raise before this Court any substantial question of law, under Section 100 of CPC, requiring admission and adjudication in this Second Appeal.

12. Heard Shri Nigel da Costa Frias, the learned counsel for the appellants; and Shri Valmiki Menezes, the learned counsel for the respondent nos.1 to 5.

**Discussion:**

13. Indeed, as both the counsel have contended that entire dispute relates to a couple of documents: the development agreement-cum-power of attorney and an agreement for sale. Initially on 30.12.1995, the owners contracted with the developer, and that resulted in the development agreement. The owners authorised him to develop their property by raising both commercial and residential structures. In the same

agreement, they have also incorporated a power of attorney. So the document, dated 30.12.1995, may be termed a composite agreement: a development agreement and a power of attorney, combined into one.

14. In the course of time, complaining that the developer had not adhered to the terms of the development agreement, the owners cancelled the development agreement, as well as the power of attorney. Eventually, in July 2000, the owners filed Special Civil Suit No.79/2000. In fact, they filed that suit only against the developer. In that suit, they sought a declaration that the development agreement is void and unenforceable, and that it should be cancelled. Besides, the owners wanted the trial Court to injunct the developer from interfering with the owners' possession. Later, the appellants—that is the prospective purchasers—and the 7<sup>th</sup> respondent, another contractee, applied to the trial Court to come on record as the other defendants. It was allowed. Thus, they have contested the matter, when the developer, the original defendant, remained *ex parte*.

15. As I have already noted, the trial Court has allowed the suit on 18.5.2009 in the owners' favour. The 7<sup>th</sup> respondent, then, appealed. In that appeal, initially, the appellants were shown as the respondents; later, they transposed themselves to be co-appellants. But they failed in the First Appeal. So this Second Appeal. As the 7<sup>th</sup> respondent, despite being the original appellant, did not carry the matter further, after his losing the First Appeal. So these appellants have showed him here as one of the

respondents.

16. We may examine the development agreement and the written statement filed by the appellants in this suit to determine the legality of the impugned judgment.

**Power of attorney dated 19.1.1996.**

17. It began with clause 19 of the development agreement; it says “the developer shall be deemed to have authority to enter into or sign any such agreement independently with the prospective purchaser of the flats/shops/offices/garages. The vendors herein shall not be responsible for any default/breach or deficiency in service by the purchaser vis-à-vis the purchaser of the flats or built up area.”

18. Here as I notice, the purchaser can “independently” enter into any agreement with a prospective purchaser of the flat, shop, and so on. The expression “independent” clarifies that the developer does not act as the owners’ agent. Besides, the owners have also restricted their liability: “the vendors herein shall not be responsible for any default/breach or deficiency . . . [to] the purchaser of the flats.”

19. Here, both the Courts have concurrently held that the owners have established justifiable grounds for their cancelling the Development Agreement. For whatever reason, the developer could not keep his promise with the appellants, as is clear from clause 19 of the Power of Attorney, the owners cannot be held liable. The developer’s deficiencies in

service or negation of contract should not be affecting the owners.

20. Now we will examine other terms of the Power of Attorney, dated 19.1.1996. A part of that reads thus:

To agree to sell/let out the said buildings or any part thereof irrespective of the said property to such person in on term and conditions as the said attorney may in their absolute description think fit and proper without in any way affecting the area agreed to be allotted to the owner'

21. In the first blush, this clause leads us to believe that the developer could exercise under this Power of Attorney his right to contract with third parties. Granted, the developer has that power, but it has a couple of contingencies. What the developer could agree to sell or let out is the "buildings or any part thereof". And that agreement to sell or letting out should not "in any way affect[] the area agreed to be allotted to the owner." In other words, the developer could contract with a third party, but that contract must concern the building or a part of it. That contracting should not affect the area agreed to be allotted to the owners. So what the developer can contract over is his own share of the building or buildings. And this contracting is not as the owners' agent, nor can it affect their rights in any way.

### **The Agreement between the Developer and the Appellants:**

22. Let us examine the agreement, dated 11.03.1996. It is apparently a tripartite agreement. The owners were described as vendors, the developers as a second party, and the appellants as the prospective

purchasers or other part. That said, it was signed by only the developer and the appellants. Most significantly, the developer signed the agreement on his own behalf; he did not represent the owners, though they were shown as parties to the agreement.

23. Thus, so long as the developer has not acted as the owner's agent, his act, if any, under the Power of Attorney could not bind the owners. In fact for want of owner's signature the very agreement the appellants have relied on has become an inchoate agreement, with no rights flowing from it, at least, vis-à-vis the owners.

**Counter Claim:**

24. Now I shall turn to the written statement. In the written statement, the appellants as the defendants also raised a counter claim. As is well established, a counter claim is a suit within a suit, with an independent cause of action. The appellants have pleaded that they have parted with Rs.45,00,000/- under the agreement. Later, the owners and the developer have colluded and cancelled the development agreement and the power of attorney. It was only to defraud the appellants. Curious as it may seem, the appellants have not claimed any compensation from the owner, nor have they held them vicariously liable for the acts of developer allegedly as their agent. In fact, they have limited the relief to one lakh rupees from the plaintiff-owners as the damages.

25. I may note here that the appellants have reiterated in the written

statement, as seen from paragraph 26, that the appellants have reserved their right under Order 2 Rule 2 (3) of CPC to sue the developer. Of course, so far, they have not exercised that right. In paragraphs 16 and 17 of the written statement, the appellants have also agreed that the developer has signed the agreement with them in his individual capacity but undertaken to secure the owner's signature at the time of his conveying the property under a sale deed. In one word, the appellants' written statement belies whatever they have pleaded or argued before this Court in the Second Appeal.

**Conclusion:**

26. To conclude, I may hold that the findings concern contractual violation and they are concurrent. I see no question of law, much less a substantial question of law presenting itself in this Second Appeal, for the Court to consider.

27. As a result, I hold that the Second Appeal is merit less. So I dismiss it.

No order as to costs.

**DAMA SESHADRI NAIDU, J.**