

(2009) 07 BOM CK 0099
In the Bombay High Court
Case No : First Appeal No. 11 of 1999

Smt. Maria Leonora Hilda Da Conceicao Da Silva Correia	APPELLANT
Vs	
Shri Escolastico Mazarello, Mazarello Enterprises	RESPONDENT

Date of Decision : 08-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 33

Citation : (2009) 111 BOMLR 3684

Hon'ble Judges : N.A. Britto, J

Bench : Single Bench

Advocate : C.A. Coutinho, for the Appellant; V.A. Lawande, for the Respondent

Judgement

N.A. Britto, J.—This appeal is directed against Judgment/Decree dated 13-8-1998 of the learned Civil Judge, Senior Division at Margao, by which the learned Civil Judge has decreed in favour of the plaintiff a sum of Rs. 41,500/-with interest at the rate of 6%, as against the plaintiff's claim of Rs. 300,778/-with interest at the rate of 15%. Out of the said sum of Rs. 41,550/- decreed in favour of the plaintiff, a sum of Rs. 17,510/-was admitted by the defendant to be payable to the plaintiff, and a sum of Rs. 10,000/-was awarded to the plaintiff towards the inconvenience suffered by her due to untimely delivery of six shops and the flat agreed to be built by the defendant pursuant to an agreement between the plaintiff's husband and the defendant dated 5-3-1980. The defendant's counter claim was dismissed.

2. The parties hereto are being referred to, in the names, as they appear in the cause title of the suit.

3. The plaintiff had claimed the said sum of Rs. 3,00,778/-on account of breach of the said agreement dated 5-3-1980 committed by the defendant. In fact, the plaintiff had claimed a sum of Rs. 35,000/-as salvage value of the old house, Rs. 1,00,000/- for inconvenience caused to her due to non timely delivery of the flats and the shops, Rs. 1,12,800/-for loss caused to her on account of late delivery of

the shops and another sum of Rs. 47,978/-which she had spent to complete the works which had remained incomplete.

4. At the hearing of this appeal, by consent of learned Counsel, appearing on behalf of the parties, it was agreed that the claims made by the plaintiff could be considered under the aforesaid heads, and, therefore I proceed to consider first whether the plaintiff is entitled for any sum on account of the salvage value of the old house on account of which, according to Shri C.A. Coutinho, learned Counsel on behalf of the plaintiff, the plaintiff is entitled to receive at least a sum of Rs. 8000/- since a sum of Rs. 2000/- was only paid.

5. As per clause 3 of the agreement, permission was granted to the defendant to demolish the existing house, on behalf of the plaintiff, and it was further agreed that the defendant was to pay the sum received as sale proceeds of the materials of the existing house. Shri C.A. Coutinho, learned Counsel on behalf of the plaintiff has submitted that the plaintiff ought to have received at least Rs. 8000/- towards salvage value of the house, Rs. 2000/-having been paid to the plaintiff.

6. On the other hand, Shri V.A. Lawande, learned Counsel on behalf of the Respondent submits that the claim of the plaintiff is entirely dishonest.

7. There is no doubt that the relations between the plaintiff's husband and the defendant were very good, as stated by the plaintiff, and not denied by the defendant, and the defendant used to go to the plaintiff's house almost everyday and used to have drinks with her husband. As per the plaintiff, after the execution of the contract, the defendant demolished a portion of the house and took away its materials and soon thereafter the defendant demolished the remaining portion and took away the materials. According to the plaintiff its value was Rs. 30,000/-but the defendant did not pay anything for those materials. In cross-examination, she admitted that the old house was demolished on contract by one Salvacao Barreto and in case she was not mistaken, as per the contract he was supposed to give Rs. 10,000/-of the costs of the material but he paid only Rs. 2000/-. She further admitted that it was the defendant who had introduced the said Salvacao Barreto to them, but again conceded that the contract was between her husband and the said Salvacao Barreto. On the other hand, the defendant categorically stated that the old house was demolished by the plaintiff by giving a contract to the said Salu Barreto and the said Salu Barreto paid Rs. 10,000/-to the plaintiff and took away the material of the house. Again, he stated that it is the plaintiff's husband who had engaged the said contractor on a contract of Rs. 10,000/-for demolition of the house which included the taking away of the material of the said house. He denied the suggestion that it is he who had demolished the building and had to pay the costs of the material to the plaintiff's husband. Defendant's witness Pandarinath/DW3 stated that he knew the said Salu Barreto who had demolished the house and that he had personal knowledge of the fact that Rs. 10,000/-was paid by Salu Barreto to the plaintiff for the material of the old house. The plaintiff was asked if in case Salu Barreto was to give Rs. 10,000/-by way of the costs of

material, her statement that the total value of the material of the old house was Rs. 30,000/- would not be correct; and she answered the question by stating that she did not know anything and everything was done by her husband. If the contract was between the plaintiff's husband and the said Salvacao Barreto, as admitted by the plaintiff, there is no question of the defendant having to pay to the plaintiff any amount due thereon. That the contract was between the plaintiff's husband and Salvacao Barreto is further confirmed by the defendant as well as by the defendant's witness. The plaintiff would therefore not be entitled to any sum towards salvage value of the old house.

8. Next, I will consider, plaintiff's claim for Rs. 1,12,800/-. As per clauses 1-A and B of the agreement, the defendant was to construct in the property of the plaintiff, free of cost, six shops on the ground floor facing the public road with masonry as per detailed specifications and a four bedroom flat over and above the said six shops, facing the public road, again as per specifications, and as per clause 4 of the agreement, the defendant was to deliver to the plaintiff/her husband, the said six shops and the flat within nine months from the date of the agreement subject to availability of cement and steel.

9. As against the claim of Rs. 47,978/- for incomplete works, the plaintiff has been awarded a sum of Rs. 31,550/-. For Rs. 30,000/- claimed by the plaintiff, the defendant accepted the sum of Rs. 12,000/- which has been granted to the plaintiff. Likewise, for the sum of Rs. 7,510/- claimed by the plaintiff towards mosaic tiles, the same was admitted by the defendant and it was awarded to the plaintiff. As regards glazed tiles it was clearly suggested to the plaintiff that the defendant was supposed to fix standard white glaze tiles and as she wanted coloured tiles she had to pay more and the defendant paid a sum of Rs. 5000/- and odd to Virgincar and she answered the suggestion that she did not know about it. The defendant categorically stated that the plaintiff wanted special coloured tiles, and therefore he had to pay an amount of Rs. 5,075/- which was the price of white glazed tiles. As regards the sum of Rs. 1,750/- claimed by her towards expenditure of fixing veranda grills, comode, etc. it was suggested to the plaintiff that her husband had told the defendant to alter the plan and the plaintiff answered that the defendant never constructed any grills for the veranda and they put those grills because the defendant alleged that he had no money. There is no mention of any grills in the agreement, and if the plaintiff wanted grills for veranda she had to pay for them. It was again suggested to her that as per the plan the defendant was supposed to fit steel grills and that she answered that the defendant never showed the plan to her. Shri Coutinho, has submitted that the sum of Rs. 13,804/- ought to have been awarded to the plaintiff towards the aluminum fittings. The learned trial Court has disallowed the said claim observing that there was nothing in the contract between the parties to provide aluminum sliding doors, complete with 5.5 mm thick plain sheet of glass including the accessories. The plaintiff had admitted that as per the contract the broad door leading from the hall was not having aluminum frames and the defendant had agreed to use teak wood frames. She also admitted that teak

wood frames fixed to the door were removed by them and they were replaced by aluminum frames and the wooden frames were still kept in the veranda. It is therefore obvious that it is the plaintiff who had to pay for the changes made by her and which were not part of the agreement. It is true that the plaintiff's architect had done estimate of the doors to the extent of Rs. 35,000/-, water proofing of Rs. 30,000/-, kitchen platform for Rs. 5000/-, etc. but it is evidently the plaintiff who had completed the said work, and therefore it was incumbent upon her to prove before the Court what was the amount she spent on labour. The evidence of the plaintiff is sketchy and shaky on that aspect, and, therefore no further amount can be assessed in favour of the plaintiff, more than awarded to her by the learned trial Court.

10. Admittedly, the shops and the flats were not completed during the period stipulated in the agreement. There is no dispute that after the demolition of the old house, one part of the house had remained with the tenant one Mrs. Menezes who on 24-10-1980 had obtained an injunction which was ultimately vacated and communicated to the defendant by letter dated 10-7-1981. The plaintiff took possession of the flat in April, 1983. According to Shri Coutinho, the plaintiff ought to have been awarded at least Rs. 800/-per shop for the period of delay since that is the amount the plaintiff would have earned in case the shops were let out to the prospective tenants in case the building was completed in time.

11. On the other hand, Shri V.A. Lawande, learned Counsel on behalf of defendant, has submitted that time was not the essence of the contract inasmuch as it was also not contemplated that the plaintiff would let out the shops on rent. Learned Counsel further submits that in case the shops and the flat was not delivered in time it was for the plaintiff to have revoked the agreement. He further submits that the plaintiff did not plead that there was delay which was partly attributable to the injunction obtained by one of the tenants. Learned Counsel further submits that the findings given by the learned trial Court on this aspect are correct and no other view is possible.

12. As far as the construction of the six shops on the ground floor is concerned there was no problem between the plaintiff and the defendant except that the defendant could not have constructed them between 24-10-1980 and 10-7-1981 on account of the injunction obtained by one of the tenants of the plaintiff. There is no dispute that during that period the defendant was already doing the work of construction of the building which he was entitled to construct in terms of the said agreement. The learned trial Court observed, and in my view rightly that from June, 1981(should be July, 1981) the defendant started construction, and therefore it was his duty to complete the said construction work of the six shops and one flat within a period of nine months as agreed in the agreement. The learned trial Court also observed that in the year 1982 there were exchange of notices between the plaintiff and the defendant in respect of failure to construct. The learned trial Court also observed, and in my view rightly that the defendant had delayed the construction beyond the period of nine months even after

excluding the period of stay and the construction was not completed even till November, 1982. The change of plan as regards the flat, as rightly submitted on behalf of the plaintiff, had nothing to do with the completion of the six shops which were on the ground floor. This issue appears to have been mixed up by the learned trial Court with the issue of completion of the six shops. The learned trial Court observed that there is no delay on the part of the defendant in completing the building for the plaintiff, and that in my view is an erroneous conclusion. A faint attempt appears to have been made by the defendant to explain late completion of shops by stating that there was no proper supply of cement at the relevant time, a fact which was not pleaded nor convincingly proved. The plaintiff had stated that the shops were meant to be given on lease to third parties and they had already entered into agreements with respective tenants. She had further stated that as the shops were to be completed within six months (in fact nine months) she would be able to recover the rent from those tenants after those six months. She further stated that all the work left out to be done in the shops was done by her. She had also stated that the lease contracts were entered into with the prospective tenants when the building was under construction and the rent agreed was Rs. 600/-per month. She had further admitted that the lease contract with one Mrs. Jerry Fernandes was executed in the year 1981, and the agreed rent was Rs. 600/-. True, plaintiff's witness Jack Ferrao stated that he had taken possession of the shop in the year 1981 and was paying Rs. 800/-as rent, Rs. 200/-being deducted from the deposit and Rs. 600/-being paid in cash. Learned Counsel on behalf of the plaintiff has submitted that the plaintiff ought to have been awarded compensation at the rate of Rs. 800/-per month for six shops which works out to Rs. 1,24,800/-. I am not inclined to accept the said submission, as well as, the other submissions made on behalf of the defendant. This is a case where the plaintiff has filed the suit for compensation for the amount which she would have earned by giving the shops on rent in case the defendant had given to the plaintiff timely delivery of the shops, and as such she cannot be denied of the same on a spacious principle that time was not the essence of the contract which is a principle governing specific performance of agreements and not for claim for compensation on account of breach of an agreement. The defendant was well aware that the plaintiff's house had tenants and the plaintiff was building six shops only for the purpose of giving them on rent and in case there was delay the plaintiff would suffer loss therefrom. Revoking the agreement would have only led to further delay in execution of the construction of the shops and would have brought about further loss to the plaintiff. The time taken for construction can be calculated to be 35 months out of which about 10 months the defendant was not able to continue with the plaintiffs construction for want of stay obtained by one of the tenants of the plaintiff, namely the said Mrs. Menezes, and that time has got to be excluded. Likewise, time of another nine months is also required to be excluded as that was the time required by the defendant to complete the construction of the six shops and the flat meant for the plaintiff. During the period of injunction, the defendant continued the work of his own building, which he was entitled to

under the agreement. He could have certainly resumed the work of the plaintiff soon thereafter and completed the same i.e. in nine months. There has been a delay of about 16 months attributable to the defendant in handing over the possession of the shops for which compensation payable at the rate of Rs. 600/ for six shops works out to Rs. 57,600/-, which in my opinion, the plaintiff was certainly entitled to.

13. Lastly, as against the claim of Rs. 1,00,000/-for loss of comforts and inconvenience, the learned trial Court has awarded to the plaintiff a sum of Rs. 10,000/-and Shri Coutinho, learned Counsel appearing on behalf of the plaintiff has submitted that the amount awarded is less and ought to be increased. Damages such as this cannot be assessed with certainty or precision or with mathematical accuracy, and in a suit for damages, the damages must be proved by the plaintiff and not only that the plaintiff must satisfy the Court both as to the fact of damage and as to the amount he or she is entitled to claim. The plaintiff started with a statement stating that she used to pay about Rs. 1000/-to her daughter for all the expenses incurred by her for her maintenance; not that the plaintiff would not be required to spend anything in case she had moved to her new flat. It is difficult to accept that she would be required to bear all the expenses for the whole family including her daughter and her family, as stated by her. The plaintiff then ended by stating that Rs. 1000/-she paid to her daughter was to help her to pay the installments of the price of the flat purchased by her. Considering the nature of evidence led by the plaintiff, this is not a case where any enhancement is required to be made towards loss of comfort and inconvenience caused to the plaintiff on account of delay completion of the flat Rs. 10,000/- ought to be adequate.

14. Shri Lawande, learned Counsel on behalf of the defendant has sought to revive his counterclaim which has been dismissed, by placing reliance on the provisions of Order 41 Rule 33, C.P.C. and submitting that the said relief could be granted to the defendant notwithstanding that the defendant has not filed an appeal, and in that regard Shri Lawande has placed reliance on a decision of the Apex Court in the case of K. Muthuswami Gounder Vs. N. Palaniappa Gounder, . On the other hand, Shri Coutinho, learned Counsel on behalf of the plaintiff has submitted that this is not a case to exercise the power under Order 41 Rule 33, C.P.C. in favour of the defendant, the defendant having not filed any appeal against the Judgment of rejection of his counterclaim. Shri Coutinho has placed reliance on another decision of the Apex Court in Banarsi and Others Vs. Ram Phal, . Shri Lawande has rejoined and submitted that in fact there was no objection on the part of the plaintiff in not transferring the land by executing a proper sale deed, and, therefore on the basis of that admission the learned trial Court ought to have decreed the counterclaim filed by the defendant. Learned Counsel submits that in fact, the defendant had pleaded that by the agreement dated 5-3-1980 the plaintiff's husband had undertaken to transfer to him all the land lying at the back of the building to be constructed by the defendant, and the deed of transfer was to be executed by the plaintiff after possession of the

building was given to them which possession was given in March, 1993, and the plaintiff had obtained the Occupancy Certificate on 4-4-1993. The defendant had also claimed a sum of Rs. 6,190/-towards additional expenditure.

15. The Apex Court in the case of K. Muthuswami Gounder v. N. Palaniappa (supra) has stated that Order 41, Rule 33, enables the appellate Court to pass any decree or order which ought to have been made and to make such further order or other decree or order as the case may require in favour of all or any of the parties even though (i) the appeal is as to part only of the decree; and (ii) such party or parties may not have filed an appeal. The necessary condition for exercising the power under the rule is that the parties to the proceeding are before the Court and the question raised properly arises out of one of the judgments of the lower Court and in that event, the appellate Court could consider any objection to any part of the order or decree of the Court and set it right. No hard and fast rule can be laid down as to the circumstances under which the power can be exercised under Order 41, Rule 33, C.P.C. and each case must depend upon its own facts. The rule enables the appellate Court to pass any order/decreed which ought to have been passed. The general principle is that the decree is binding on the parties to it until it is set aside in appropriate proceedings. Ordinarily, the appellate Court must not vary or reverse a decree/order in favour of a party who has not preferred any appeal and this rule holds good notwithstanding Order 41, Rule 33, C.P.C. However, in exceptional cases, the Rule enables the appellate Court to pass such decree or order as ought to have been passed even if such decree would be in favour of parties who have not filed any appeal. The power though discretionary should not be declined to be exercised merely on the ground that the party has not filed any appeal. In Banarasi and Ors. v. Ram Phal AIR 2003 SC 1983, the Apex Court stated that a plaintiff who files a suit for specific performance claiming compensation in lieu of or in addition to the relief of specific performance or any other relief including the refund of any money has a right to file an appeal against the original decree, if the relief of specific performance is refused and other relief is granted. The plaintiff would be a person aggrieved by the decree in spite of one of the alternative reliefs having been allowed to him because what has been allowed to him is the smaller relief and the larger relief has been denied to him. A defendant against whom a suit for specific performance has been decreed may file an appeal seeking relief of specific performance being denied to the plaintiff and instead a decree of smaller relief such as that of compensation or refund of money or any other relief being granted to the plaintiff for the former is larger relief and the latter is smaller relief. The defendant would be the person aggrieved to that extent. It follows as a necessary corollary that in an appeal filed by the defendant laying challenge to the relief of compensation or refund of money or any other relief while decree for specific performance was denied to the plaintiff, the plaintiff as a Respondent cannot seek the relief of specific performance of contract or modification of the impugned decree except by filing an appeal of his own or by taking cross-objection and therefore in the absence of

cross appeal preferred or cross-objection taken by the plaintiff-respondent the first appellate Court did not have jurisdiction to modify the decree by decreeing plaintiff's suit for specific relief.

16. The trial Court considered the evidence produced and felt that there was no iota of evidence produced by the defendant, to support his counter claim for directing the plaintiff to transfer the remaining portion in his favour. The learned trial Court noted that the examination in chief of the defendant ran in four pages but there was not a single word stated by him regarding the execution of the Deed of Conveyance in respect of the remaining portion although, he stated that a sum of Rs. 6,190/-was to be recovered by him. The learned trial Court also stated that evidence was required to be produced by the defendant specifically when there was a counterclaim for specific performance of the agreement notwithstanding the fact that the agreement was admitted by both the parties and as such the counterclaim could not be granted. Whatever might have been the stand taken by the plaintiff to the said counterclaim once there was no order on admission implied or otherwise by the defendant, the defendant at the trial was bound to substantiate his averments which the defendant did not do. Not only that inspite of his counterclaim having been rejected by the learned trial Court, the defendant did not file any cross-objections, or cross appeal. There is nothing exceptional in the case of the defendant for this Court to exercise the powers under Order 41, Rule 33 and pass a decree as regards the counterclaim raised by him, in the absence of cross appeal or cross-objection as held by the Apex Court in *Banarsi and Ors. v. Ram Phal* (supra).

17. In the light of the above, in my opinion, the appeal deserves to succeed partly and Judgment of the trial Court, modified. Consequently, the claim of the plaintiff is hereby enhanced to Rs. 99,100/-which shall be payable to the plaintiff, by the defendant with pending and future interest at the rate of 6%, until payment, with costs.