

IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 33 OF 1998.

Shri Shankar Kudachi,  
son of Virupracash Kudachi,  
r/o House No.124, Mangor Hill,  
Vasco-da-Gana, Goa.

...

Appellant/  
Orig. Plaintiff.

VERSUS

1. M/s. Joel and Marlon  
Construction Civil Contractor,  
Alto de Britos,  
Baina, Vasco-da-Fama, Goa.

2. Shri Anthony Fernandes,  
Civil Contractor,  
Alto de Britos, Baina,  
Vasco-da-Gama, Goa.

...

Respondents.  
Orig. Defendants.

Mr. M.B. de Costa, Senior Advocate with Mr. J.A. Lobo,  
Advocate for the Appellant.

**CORAM: N.A. BRITTO, J.**

DATE OF RESERVING THE JUDGMENT: 22.03.2004.

DATE OF PRONOUNCING THE JUDGMENT: 31.03.2004.

J U D G M E N T:

The appellant herein was plaintiff in S.C.S. No.65/90 whose suit for declaration, injunction, recovery of money and other consequential reliefs has been dismissed by judgment/decreed dated 24.11.97 of the learned Civil Judge Senior Division, Vasco-da-Gama and the said plaintiff is now in appeal against the same before this Court.

2. The parties hereto shall be referred to in the

names as they appear in the cause title of the said Civil Suit.

3. The case of the plaintiff briefly stated was that the plaintiff entered into an agreement with the defendants on 16.4.87 for sale of a Flat on the first floor of their building "Maimar Apartment" admeasuring 71.63 sq. metres for Rs.1,40,000/- which was to be handed over to the plaintiff within a period of six months from the date of execution of the said agreement but the defendants on or about 19.4.88 handed over to the plaintiff Flat No.4 situated in the same building on the second floor and the defendants collected from the plaintiff a sum of Rs.1.75,000/- against receipts though the total cost of the flat to be sold to the plaintiff was Rs.1,40,000/-.

4. The case of the plaintiff was also that the defendants failed to abide by the terms and conditions of the said agreement and committed several breaches such as:-

(a) As per agreement dated 16.4.87 the defendants were to hand over the flat of 71.63 sq.m.for Rs.1,40,000/- on the first floor within a period of six months but the defendants failed to pay the same till

date.

(b) The defendants collected Rs.1,75,000/- and therefore the plaintiff was entitled for a refund of Rs.35,000/- from the defendants being the excess amount received by the defendants. The plaintiff stated that the plaintiff was entitled to obtain a flat on the first floor or in the alternative the defendants should give a further concession of Rs.10,000/- in the cost price and refund the same to the plaintiff;

(c) The plaintiff paid all the amounts due to the defendants but the defendants failed and neglected to execute the necessary sale deed in favour of the plaintiff inspite of consistent personal requests made by the plaintiff to the defendants;

(d) Flat No.4 presently occupied by the defendants is not as per the plan approved by the PDA and as agreed in the agreement and its external area is also less than what was agreed upon and the area of the verandah is more than what was shown in the original plan attached to the agreement;

(e) The defendants failed to provide separate water meter to the said flat allotted to the plaintiff

and the way leading to main water control room was recently blocked by doing illegal construction of wall by the defendants;

(f) The defendants failed to construct a parapet wall of 60 metres length and 1 metre height over the terrace shown in the approved plan and to do water proofing of the terrace in order to prevent water leaking through the terrace during the monsoon season since the flat gets flooded due to monsoon from the slab and the side of the walls;

(g) The defendants failed to provide parking area as shown in the approved plan/drawing in the rear side of the building by dismantling existing shed;

(h) The defendants failed to do the construction of the said flat as per the approved plan due to which the layout of the rooms constructed is different from the plan approved and attached with the agreement of sale. The defendants provided an additional balcony on the road side which is not shown in the approved plan and due to which there is a change in the super built-up area.

5. The case of the plaintiff further was that the

plaintiff being aggrieved by the aforesaid acts on the part of the defendants caused a legal notice to be served on the defendants with a direction to comply and fulfil all the conditions as agreed upon by the defendants in the agreement of sale, but the defendants did not even bother to reply to the said notice. The plaintiff therefore prayed for (a) a declaration that the plaintiff is the owner of the suit flat no.4 allotted to him, (b) for a judgment and decree of mandatory injunction directing the defendants to carry out the water proofing of the terrace, construction of the parapet wall over the terrace, providing parking area by dismantling the existing shed, night latch for the main door, demolishing the wall blocking the water meter and providing separate water meter, replacement of defective shutters and frames and internal and external plastering and painting of walls; (c) for a judgment and decree directing the defendants to refund Rs.35,000/- with interest at the rate of 18% and Rs.10,000/- by way of compensation; and (d) for judgment and decree directing the defendants to execute the Sale Deed of the said Flat No.4 occupied by the plaintiff in his favour or in the alternative for allotment of a Flat on the first floor of the building as agreed upon in the agreement dated 16.4.87.

6. The defendants contested the suit stating that the plaint disclosed alleged breaches of contractual obligations and as such relief of mandatory injunction was not available under the provisions of the law relating to specific reliefs. The defendants stated that the defendants had agreed to sell a flat on the second floor and a cyclostyled standard form of agreement was signed by the plaintiff and the defendants and the said cyclostyled standard form pertained to agreement for sale of flat on the first floor but the consensus between the plaintiff and the defendants was for sale of the flat on the second floor. The defendants stated that the very fact that the plaintiff accepted possession of the flat on the second floor indicated the said consensus. The defendants further stated that the act of accepting the flat on the second floor on the part of the plaintiff had legal effect of ratifying the breach of the agreement, if any, on the part of the defendants. The defendants stated that the defendants had agreed to sell to the plaintiff an approximate area of 71.63 sq.m. for the price of Rs.1,40,000/- and obviously the plaintiff was bound to pay for additional area over and above the agreed amount. The defendants stated that the time was not the essence of the contract and extension was permissible in terms of clause (3) of the

agreement and the defendants delivered the flat to the plaintiff as soon as it was ready. The defendants stated that the plaintiff had an option of cancelling the agreement in case of delay and having not exercised the said option the plaintiff was precluded from making any grievance as regards the delay of delivery of the flat.

7. The defendants stated that the plaintiff did not make payment under mistake nor the defendants robbed the plaintiff of his money but as the work of construction progressed, the plaintiff came with requests one after another and at the request of the plaintiff necessary changes and modifications were introduced in the flat, resulting into additional expenses which the plaintiff agreed to pay and this was in consonance with a note in clause 4 of the agreement. The defendants stated that the plaintiff made payment of Rs.35,000/- on account of and in connection with the extra work, modifications and increased in the area of the flat, but the final bill was not drawn when delivery was given to the plaintiff and subsequently final bill was prepared and sent to the plaintiff but the plaintiff has yet not paid the amount of the bill. The defendants stated that the defendants had agreed to sell the flat admeasuring 71.63 sq. metres and the

plaintiff had agreed to pay for increase in area if any and moreover the defendants carried out several modifications and changes in the flat at the request of the plaintiff and the plaintiff agreed to pay towards proportionate increases in cost. The defendants stated that the plaintiff paid Rs.35,000/- on account of, in connection with extra work and modifications and promised to pay the balance after drawing of the final bill and when the defendants produced the final bill towards increase in area, modification in the sum of Rs.106325/- the plaintiff kept the bill outstanding. The defendants denied that they were liable to refund Rs.35,000/- or any amount at all. The defendants denied that the plaintiff was entitled for the flat on the first floor or that he was entitled for any compensation of Rs.10,000/-. The defendants stated that the plaintiff had still to pay to the defendants Rs.1,06,325/-. The defendants stated that the alterations made in the said flat were made at the request of the plaintiff and the plaintiff had agreed to pay the cost of extra works. The defendants denied that they were bound to provide a separate meter and that the plaintiff was yet to pay the said sum of Rs.1,06.325/- for the payment of which an ultimatum was given on 23.1.91 and therefore the plaintiff filed a suit for recovery of the said amount.



8. The defendants further stated that the plaintiff and many other purchasers have not paid the dues of the defendants in connection with the flats sold and therefore the work of common and joint facility is held up and that the plaintiff alone has no locus standi to demand execution of the said works of joint and common facility when the plaintiff has agreed to pay only proportionate cost thereof. The defendants denied that there were any water leakages and that the plaintiff had no right to make any grievance after having accepted the possession of the suit flat without protest. The defendants stated that they were not liable to provide any night latch and in the alternative pleaded that the plaintiff having accepted the suit flat, could not make such a belated grievance. The defendants stated that the change in the layout of the suit flat was effected at the request of the plaintiff and it is he who requested the defendants to provide additional parking and several other things for which the plaintiff agreed to pay for the extra items and that the defendants had no fancy to make such aesthetic alterations that cost them substantially and that it is dishonest on the part of the plaintiff to describe the said alterations as violations of design with the sole intention of evading and to avoid extra

payment of cost. The so called report of the Engineer is a convenient and evil design to claim from the defendants the sum of Rs.1,06,325/-. The defendants stated that the plaintiff was not entitled to any relief.

9. In the trial of the suit the plaintiff examined his attorney and one Engineer by name Shri Sardessai. The suit as well as the present appeal have proceed ex parte against the respondents.

10. At the hearing of this appeal arguments have been advanced on behalf of the plaintiff by learned Senior Counsel Shri D'Costa. It is necessary to take a note of some of the relevant clauses of the agreement between the parties, a copy of which had been produced by the plaintiff at Exh.PW1/B. They read as follows :-

(1) The Party of the first part shall complete the construction of the aforesaid building 'Maimar Apartments' consisting of the above flat within a period of six months.

(2) The Party of the Second Part agrees and undertakes to sign all the necessary documents required for the purpose of formation and/or registration of

Housing Society that will be formed by the flat holders of the aforesaid building "Maimar Apartments", and be bounded by its Bye-Laws, Rules and Regulations. Signing and execution of the aforesaid documents by the Party of the Second Part shall be a condition for precedent for occupation of the said flat by the party of the Second Part.

(6) The Party of the Second Part hereby agrees and undertakes to join alongwith the other flat owners to form a Co-operative Housing Society or such other society or Association or a Body for the purpose of Administration, a maintenance and management of the Building and the affairs connected therewith and to form and abide by such Rules, bye-laws agreement etc. and such directions as may be issued, formed, framed by such society or Body. It is clearly understood that the Building alongwith the said plot of land of the said Building referred in the Second Schedule hereinunder mentioned and as a whole, shall belong to all Purchasers, although each Purchaser shall be the owner of his flat and shall be available to the Purchasers subject to the right of the others.

(9) The Party of the Second Part shall before the occupation of the flat keep and maintain with the party

of the First Part, the following deposits viz.  
Rs.501/- towards the share money and other expenses  
incidental to the formation of the Housing Society.  
...

(13) That the Party of the Second Part will join  
and form the Co-operative Housing Society and the Party  
of the Second Part agrees and binds itself to join the  
aforesaid Housing Society.

(14) On possession of the flat the Party of the  
Second Part shall have no claim whatsoever against the  
Party of the First Part as to any item of work etc. or  
otherwise except the defect liability in construction  
for which the party of the First Part shall be liable  
for the period of one year.

(16) In case owing to unforeseen circumstances  
the building is not completed within the aforesaid  
period of time or within its extension by six months  
the Party of the Second Part is at liberty to exercise  
their option to cancel this Agreement and claim the  
refund of the money paid to the party of the First Part  
with interest 12%.

(18) In case any disputes arise about the

interpretation of the clauses and conditions and about the performance or non-performance of these presents the Matter shall be referred to arbitration under Indian Arbitration Act, 1940.

11. Though the defendants did not lead any evidence in rebuttal to the evidence led by the plaintiff, the case of the plaintiff appears to be far from convincing and only because the defendants did not lead any evidence does not mean to say that the plaintiff should be believed in all what he has stated before the court through his attorney. The plaintiff has complained that the flat was not completed within a period of six months but the plaintiff has not explained as to why he did not choose to opt to cancel the agreement and claim the refund with interest as stipulated by clause (16) of the agreement. Admittedly, the plaintiff accepted from the defendants a flat on the second floor admeasuring 91.35 sq.m. for Rs.1,40,000/- instead of a flat on the first floor admeasuring 71.63 sq.m. and remained silent from 19.4.88 to 6.1.90 almost for a period of two years without any murmur or demur and this conduct of the plaintiff itself suggests that there was a subsequent agreement between the parties by which the plaintiff accepted a bigger flat on the second floor instead of a smaller flat on the first

floor for the same amount. It is the submission of learned Senior Counsel Shri D'Costa that it is the contention of the plaintiff that a part of the bigger area of the present flat is illegal and defective. Here again one does not know as to why the plaintiff inspite of knowing that a portion of the flat was illegal and defective chose to accept the same and remain quiet for a considerable period of time. Moreover, the plaintiff has led no evidence, which is acceptable, to suggest that any portion of the flat now occupied by the plaintiff is illegal. The plaintiff has himself stated that the internal area is less than the area mentioned in the PDA plan and the balcony area is unnecessarily more than what was in the approved plan. However, P.W.2 Shri Sardessai in his report has stated that an additional balcony is provided on the road side (south) which is not shown in the approved plan. It is obvious that the statements made by the plaintiff and the plaintiff's witness Shri Sardessai are not consistent. The plaintiff has also not produced the approved plan by the PDA and/or the plan of the flat now occupied by him so that the court was in a position to know as to what was approved and what was not. In any event, it must be observed that the plaintiff having accepted the flat which the defendants say was constructed as per the requirements of the

plaintiff, the plaintiff cannot turn round and say now that the flat of which he took possession was both illegal and defective and therefore he should be compensated.

12. As far as prayer (a) of the plaint is concerned, there has never been a cloud of title raised by the defendants regarding the said flat no.4 which was handed over to the plaintiff on 19.4.1988 and therefore there is no question of the plaintiff succeeding with prayer (a) of the plaint. Although the learned Civil Judge S.D. has dismissed the suit filed by the plaintiff, at the same time the learned C.J.S.D. has ordered that the defendants shall sign an agreement for sale of the flat on ownership basis in favour of the plaintiff. It is the submission of the learned Senior Counsel Shri D'Costa that what the defendants should be directed is to execute not an agreement for sale, but a Sale Deed in favour of the plaintiff. In my opinion, the learned Civil Judge S.D. having dismissed the suit of the plaintiff with costs, there was no reason for the learned Civil Judge S.D. to have ordered the execution of any agreement for sale or for that matter the Sale Deed itself. As already seen from the terms of the agreement, there was no provision by which upon completion and handing over deliver of the flat to the

plaintiff another sale deed was to be executed by the defendants in favour of the plaintiff or for that matter in favour of the other purchasers of the flats. The terms of the agreement was that what was contemplated by the parties was formation of a co-operative housing society or an Association or a Body for the purpose of administration, maintenance and management of the building in terms of clause (6) of the Agreement. It was certainly not the case of the plaintiff that he required the defendants to form such a Housing Society or Association and therefore in my opinion there was no question of the learned Civil Judge S.D. directing the defendants to execute an agreement of sale in favour of the plaintiff and for the same reason there is now no question of the defendants being directed to execute a Sale Deed in favour of the plaintiff.

13. As already stated the plaintiff received the possession of Flat No.4 on the second floor on 19.4.88 and till the sending of the legal notice on 6.1.90 remained satisfied with the same. Moreover, the plaintiff has led no evidence to show whether clause (9) of the agreement has been complied by him.

14. Regarding prayer (b) of the plaint, learned Senior Counsel Shri D'Costa has submitted that it will



be a better option in case the prayer is granted in terms of money as estimated by Shri Sardessai. However, it is seen from clause (11) of the agreement that it was the duty of the plaintiff to carry out all internal repairs of the flat. Clause (14) stipulated that the liability of the defendants was restricted to a period of one year only and apparently the demand for repairs has been made after the expiry of the said period of one year and therefore on the face of the said agreement the plaintiff would not be entitled for the relief or prayer (b) of the plaint. As regards prayer (c), the plaintiff accepted the possession of the flat on 19.4.88. The receipts produced by the plaintiff show that a sum of Rs.35,000/- was paid subsequently after the date the possession was taken. The plaintiff has not explained the reason why he paid the said amount after he was already handed over the possession of the flat and although the defendants have led no evidence, it certainly appears probable that the said sum was paid by the plaintiff towards the extra repairs which the defendants say were carried out at the request of the plaintiff. Otherwise it was incumbent upon the plaintiff to have given some cogent and acceptable explanation as to why he paid the said amount of Rs.35,000/- after the delivery of the flat to the plaintiff since it otherwise appears improbable

that the defendants would have handed over the possession of the flat unless the amount due towards the flat was paid to the defendants. Learned Senior Counsel Shri D'Costa submits that the said receipts do not reflect that they were issued towards the payment of extra works. It was the duty of the plaintiff to have explained the said payment after the delivery of possession of the flat.

15. There is no question of the plaintiff receiving any difference of Rs.10,000/- by way of refund because the plaintiff himself accepted a bigger flat on the second floor probably for the same price as agreed upon for a flat on the first floor. I have already stated that in terms of the agreement, the plaintiff was not entitled to prayer (d) of the plaint.

16. In conclusion, it may be observed that the plaintiff's case appears to be far from convincing. The plaintiff's story had to be more convincing in case the plaintiff desired to obtain discretionary reliefs. In my opinion the suit was rightly dismissed by the learned Civil Judge, S.D.

17. I find there is no merit in this appeal and the same is also hereby dismissed with costs.

N.A. BRITTO, J.

sl.