

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE T.R.RAMACHANDRAN NAIR

&

THE HONOURABLE SMT. JUSTICE P.V.ASHA

FRIDAY, THE 22ND DAY OF MAY 2015/1ST JYAISHTA, 1937

AS.No. 1041 of 1998 (A)

AGAINST THE ORDER/JUDGMENT IN OS 1097/1992 of I ADDL.SUB
COURT, THRISSUR DATED 18-03-1998

APPELLANT/PLAINTIFF:

MANUEL SONS HOUSING DEVELOPMENT (P) LTD.,
M.O.ROAD, THRISSUR.

BY ADVS.SRI.T.M.CHANDRAN
SRI.JOSHI VARGHESE
SRI.S.SUJITH
SRI.T.A.UNNIKRISHNAN

RESPONDENTS:

* 1. RAMANDA RAO, HOUSE PLOT NO.3, PUSHPA VIHAR,
NADATHARA, THRISSUR TALUK [DIED]

2. MRS. BASANT.R.RAO, HOUSE PLOT NO.3,
PUSHPA VIHAR, NADATHARA, THRISSUR TALUK.

ADDITIONAL RESPONDENTS

* ADDL.R3. MR. R. KRISHNANANDA PAI,
S/O.LATE SRI.RAMANANDA RAO, PLOT NO.3,
PUSHPA VIHAR HOUSING COLONY,
N.H.47, BYE-PASS ROAD, NADATHARA, TRICHUR.

* ADDL.R4. MRS.ANURADHA, D/O.LATE SRI.RAMANANDA RAO,
PLOT NO.3, PUSHPA VIHAR HOUSING COLONY,
N.H.47, BYE-PASS ROAD, NADATHARA, TRICHUR

LEGAL HEIRS OF DECEASED 1ST RESPONDENT ARE IMPEADED AS
ADDITIONAL RESPONDENTS 3 AND 4 AS PER ORDER DATED 20.3.2015 IN
IA NO.3156 OF 2009

BY ADV. SRI.P.VIJAYA BHANU

THIS APPEAL SUIT HAVING BEEN FINALLY HEARD ON
01.04.2015, THE COURT ON 22.05.2015 DELIVERED THE FOLLOWING:

RKC

T.R.RAMACHANDRAN NAIR & P.V ASHA, JJ.

A.S No.1041 of 1998

Dated this the 22nd day of May, 2015

JUDGMENT

Asha, J.

Plaintiff in a suit for money is the appellant. This appeal is against the decree passed by the court below allowing the counter claim filed by the defendants for a sum of Rs.50,000/-.

2. The plaintiff is a construction company. Ext.A1 agreement was entered into with the defendants on 07.02.1989 for construction of a house in plot No.3 at a cost of Rs.3,35,000/-. The terms of construction were provided in the agreement Ext.A1 as detailed in the schedule thereto. It was mentioned therein that appropriate alterations can be effected on mutual agreement. In the plaint, the case of the plaintiff was that the defendants did not pay the entire amount due to them even after repeated requests. It was their case that the possession of the house was handed over to the defendants in June, 1991; demand notice was issued to the defendants along with a statement of balance of account on 26.08.1991. According to which, a sum of Rs.30,831.92 was due to the plaintiff. It was stated in the plaint

that even though defendants had initially admitted the balance amount due, later they have started demanding alterations, corrections etc. in the construction. According to the plaintiff, the defendants acknowledged the dues and on mutual agreement, the balance was reduced to a sum of Rs.29,294.16, after making certain adjustments. It was thereafter that the defendants started seeking alterations in the construction and started accusing the mode of construction. Accordingly after a series of correspondence between the plaintiff and the defendants, the defendants in their letter dated 27.02.1992 stated that the balance amount due from them was only a sum of Rs.16,377.79 and that can be paid only after corrections were done to the mosaic flooring of the ground floor, Aluminium railing work, supply of decorative entrance door, replacement of broken tiles in bathroom, corrective measures against stagnation of rain water at entrance door, fixing of marble sill in the bathroom etc, were carried out. In these circumstances, the plaintiff caused a lawyer notice to be sent to the defendants demanding payment of a sum of Rs.29,294.16 along with interest @ 12% per annum. The suit was thereafter filed for a decree for payment of a sum of Rs.39,842.16 along with interest @ 12%.

3. The defendants had filed a written statement admitting the execution of the agreement Ext.A1, but disputing the manner of construction by the plaintiff. It was alleged that the plaintiff did not construct the house properly in accordance with the agreement and that they were forced to take possession of the building under the bonafide belief that the construction was completed properly and in view of the fact that they had already tendered invitation for their house warming ceremony. It was also stated that the plaintiff did not complete the construction within the period prescribed in the agreement, according to which the time stipulated was only one year. It was further stated that they had provided sufficient materials for construction, but the plaintiff failed to do the work properly using substandard materials. It was further stated that the car porch which was to have a width of 3 metres was found to have only 2.7 metres on account of which rain water falling on the walls on the northern side, had been splashing on the car. It was further stated that tiles for bathroom, provided by the defendants, were not laid properly, on account of which water was entering in the bedroom. It was alleged that the plaintiff did not undertake the corrective measures even after repeated

demands. Similarly their request to fix a decorative door on the entrance was also not heeded to by the plaintiff and the door which was already fixed, on complaints by the defendants, was taken but not replaced or refixed. The defendants therefore raised the counter claim for passing a decree for a sum of Rs.50,000/- towards the damages caused to them/getting the defects repaired.

4. The court below considered the following issues :

(1) maintainability of the suit,

(2) whether the plaintiff acted in accordance with the terms and conditions of the agreement,

(3) the entitlement of the plaintiff to realize the amount from the defendants as prayed for,

4) defects if any in the construction of the house,

(5) reliefs and costs and

(6) entitlement of defendants for counter claim.

5. On behalf of the plaintiff, PW1 was examined. Exts.A1 to A13 were marked. On behalf of the defendants, the 2nd defendant was examined as DW1. Exts.B1 to B5 and C1 were marked.

6. As the agreement for construction as well as the

construction was not disputed and at the same time there were serious disputes regarding the mode of construction, violation of agreement etc., the court below found that the suit was maintainable.

7. Regarding the construction of the house in terms of the conditions stipulated in the agreement, the court below found that the plaintiff failed to comply with the conditions and the house was handed over without carrying out the construction in terms of the agreement entered into. Finally it was found that the defendants were entitled to a decree in terms of the counter claim for a sum of Rs.50,000/- towards the repair charges of mosaic floorings, Aluminium work, replacement of broken tiles in bathroom, providing new decorative door, for redrawing of pipe line, for stopping of leakage and other expenses, as claimed by the defendants in the counter claim.

8. In this appeal, the appellant has raised the grievance in allowing the counter claim as such, mainly on the ground that there was absolutely no material to arrive at a sum of Rs.50,000/- by way of compensation towards the alleged faults in construction of the house. At the same time it is pointed out that the defendants had already admitted the dues towards them for

a sum of Rs.30,831.92, which was pointed out in the statement dated 26.08.1991. It was also pointed out that the sum of Rs.30,831.92 was subsequently reduced on mutual agreement between the plaintiff and defendants to Rs.29,294.16, which was acknowledged by the defendants as early as on 3.9.1991 and promised payment at the earliest. According to the appellant it was in February, 1992 that the defendants started seeking alterations and further demands while admitting payment of dues of only a sum of Rs.16,377.79. According to the appellant, the defendants did never have a case or claim as against the plaintiff till the written statement was filed raising the counter claim for a sum of Rs.50,000/-. It was also pointed out that a commission was taken out with the help of an expert commissioner and report Ext.C1 was before the court below, which does not justify the decree for a sum of Rs.50,000/- towards damages to defendants. According to the appellant, there was absolutely no material before the court below to decree the counter claim, on the other hand, the report of the Commissioner, which was available before the court below would specify the fact that the defects were not material. It was also pointed out that the total amount assessed by the Expert

Commissioner for curing all the defects was found to be a sum of Rs.3,070/-, as against which the court below awarded a sum of Rs.50,000/-. It was also pointed out that the minor defects pointed out in the report of the Commissioner as well as the Expert Commissioner were because of the use of the house for about six years and which was quite probably on account of the improper user of the house or irregular maintenance of the house, which was evident from the report Ext.C1 itself. The appellant therefore prayed for dismissing the counter claim of the defendants and for decreeing the decree prayed for by the plaintiff for a sum of Rs.29,294.16 along with interest as claimed in the plaint and along with interest for the period thereafter from the date of decree.

9. We heard the learned counsel appearing for the appellant as well as the respondents.

10. Ext.A1 is the agreement executed between the plaintiff and the defendants on 7.2.89 for construction of the house at a cost of Rs.3,35,000/-. A perusal of Ext.A1 will show that the parties had agreed for the construction of the house as provided in schedule B to the agreement. The schedule B provides for the specifications for house type I and II. According

to clause (1) thereof, the building is to have a base with cement concrete of 10 c.m thickness, foundation in cement mortar, basement with R.R. Masonry and filling basement with excavated earth. Clause © provides for flush doors for all rooms except for bathrooms and windows of steel with glass shutters and iron security bars. Plastering is with cement mortar 12 mm thick – smooth finishing; flooring with mosaic mixture – grey colour with black and white chips, size 0-3 laid in panels with glass joints; toilets with glazed tiles of 15X15 c.m etc.; kitchen with a built in platform with R.C.C slab with cuddappah stone slab. It further provides for plumbing, electrification of rooms, painting, compound wall, gate etc. It is provided in clause (B) that the construction shall be strictly in accordance with the plan and subject to such modification as are mutually agreed. Clause 3(C) provides that materials and workmanship shall be in accordance with specifications detailed in schedule B and that workmanship shall be on good quality and good standard. Clause 3(D) provides that the owner shall supply all materials required for the construction like cement, steel, bricks, electrical goods etc. and empowers the agent to purchase the above materials in the name of the owner with the fund provided by the owner. As per

Clause 3(F), the agent shall on completion of the work and on receipt of all payments made to the agent as stipulated, deliver to the owner the constructions in good order and condition. As per Clause II, the consideration of the construction of the residential unit was Rs.3,35,000/- stating that payment of the first instalment of Rs.50,250/- was at the time of execution of the agreement, the next 15%, ie.Rs.50,250/-was on completion of the work upto basement level and the next instalment of Rs.1,00,500/- when it reaches the lintel level and the next instalment of Rs.83,750/- when the roof level is laid and the next sum of Rs.50,250/- on completion of the building except flooring, plastering, painting etc. Clause VII provides that the agent shall be entitled to retain possession of the property including structures thereon and shall not be bound to deliver possession of the schedule premises and structures thereon until the entire amount due to the agent from the owner is paid and fully settled. Clause IX provides that in the event of construction not being completed within the stipulated period of 12 months as agreed to by reason of any default on the part of the owner in effecting payment or by any other reason on the part of the owner, the agent shall be entitled to escalation based on the increase in the

cost of cement, steel, bricks etc. According to clause X, additional cost shall be paid by the owner, in the event of any deviation in the plan and consequential increase or change in the work. The execution of the agreement Ext.A1 is admitted by all parties. Subsequently on 21.8.89 the defendants suggested several modifications and additions, on account of which, the cost of construction was rescheduled, as per letter dated 21.08.89 on mutual agreement . Ext.A12 is the letter from the first defendant addressed to the Executive Director of the plaintiff detailing his requirements and requesting to incorporate the same in the construction of the house, where he has sought several modifications on almost all the items of construction, that is from items 1 to 12. Ext.B4 series are communications from the plaintiff on the request made by the defendants. Ext.B4(b) relates to alterations sought for the terrace for which additional cost is demanded. Ext.B4(d) is a letter dated 21.08.89 addressed to the first defendant, according to which it was stated that the total cost of construction was arrived at on a sum of Rs.3,75,457/- on final acceptance of all revisions. A detailed expenditure sheet was also appended along with it while rescheduling the quantum of the instalment payment

accordingly. This letter is with reference to the letter issued by defendants on 16.8.89 wherein alterations were sought. Ext.B2 is the letter dated 19.10.89 addressed to the defendants, informing him that the car porch can be constructed at the back portion marked II in the sketch or front marked I therein, as the plaintiff understood that the defendants were not pleased with the position of the car porch with a width of 2.7 metres. It was stated therein that 2.7 metres width alone could be given in the present position since it lies on the boundary. The position of the proposed car porch with 3 metres width on the front portion or back portion marked as I and II were also attached along with letter dated 19.10.1989 marked as Ext.B2. In reply to Ext.B2, the first defendant by Ext.A7 letter dated 7.11.1989 informed as follows:

“With reference to the above letter with suggestions on alternate positions for the car porch, I have decided to agree with the 2.7 m X 5 m car porch which is to be positioned before the ground floor sit out (that is the original car porch). The two proposed positions are not acceptable to me. However, I must add that due to some miscalculations from your side, I am getting only a 2.7 m car porch. I am unhappy over it. But I know

there is no other way out. The two alternatives suggested by you will totally spoil the show of the house. So please don't make any changes."

It was also stated therein that the next instalment of money will reach the plaintiff soon and official intimation from the plaintiff was yet to reach the defendants. The defendants had thereafter by Ext.A9 letter dated 24.01.1990 suggested further alterations to be incorporated, which included closing of loft over the store room and instead of that providing opening to the loft from the kitchen side; providing of shelves in the store room; providing of entrance steps to the veranda which should be faced towards east; he does not want wash basin at the entrance of the ground floor bed room; not to make any provision for wash basin in the dining/drawing room for the time being; increase the height of the shoe loft by another 4 inches; to provide the windows and doors with frames; fabricate windows except entrance, outlet at work area and outlet at the first floor veranda using termite proof teak wood. In clause 7 of Ext.A9 it was also demanded that "for the three main outlets namely the entrance door, outlet at work area and outlet in the top floor veranda, the frames and doors are to be made using seasoned termite proof teak wood.

The entrance door is to be artistic also.” It was further stated that the point (5) regarding wash basin in dining/drawing room) and point (7) shall be discussed in detail during his next visit sometime in February, 1990. In Ext.A10 letter of the 1st defendant, he had sought further alterations, after making a visit to the site on 20.04.1990. He argued for providing 3 shelves in the store room; a step down below the stair case; it was stated that the sanitaryware such as wash basin, hardware like tops and floor tiles and glazed tiles for bath rooms will be supplied by them. Certain further requirements were also sought in that letter. By Ext.B4© letter dated 14th March, 1991, the plaintiff had informed the defendants that an additional expenditure for a sum of Rs.6,062/- will be required for the requirements in his letter dated 11.3.1991. From the testimony of DW1, it is seen that the house was handed over in May, 1991 and they started residence thereupon. From Ext.B4 letter of the plaintiff issued on 26.8.91, the total expenditure on the house as per statement No.1 was stated as Rs.4,34,216.73 and after deduction as per statement No.2 of Rs.14,784.81 and remittances and refund made to the tune of Rs.3,88,600/-, the balance amount due to the plaintiff was stated as Rs.30,831.92. The defendant was

requested to remit the balance amount of Rs.30,831.92. A detailed statement regarding the expenditure was enclosed as statement No.1 to 4. In Ext.A11 letter dated 3.9.91, in reply to Ext.B4(a) dated 26.8.91, the first defendant informed that he was making arrangements for payment of Rs.30,831.92 at the earliest and he will be visiting Thrissur during the last week of September. It was further requested to complete all pending works so that he can settle his accounts. It was also assured that his son will be visiting the plaintiff and their engineers at the site so that they will not have any difficulty in completing the pending work inside the house. Thereafter it is seen that after discussions with the plaintiff and the defendants the balance amount was arrived at as Rs.29,294.16 allowing deduction of Rs.1,537.76. As the payment was not received, the plaintiff has issued Ext.A4 registered notice to the defendants demanding payment of a sum of Rs.29,294.16. This is followed by another notice dated 5.2.1992 demanding payment of the amount at the earliest. In this notice the plaintiff stated that the delay in construction had occurred on account of the alterations suggested by him time and again, with reference to the correspondence between them from time to time. It was stated that several

adjustments were made as claimed by the defendants. It was stated that additional cost for extra items was incurred to the tune of Rs.19,897/- towards the door, wooden units, ventilation, grills and other items. It was also stated that a sum of Rs.13,693/- was incurred towards expenditure for certain other items. It was also stated that car porch was constructed as per instructions in the letter dated 7.11.89 of the defendants. They further stated that the plan for the house was approved by the authorities of the Panchayat on 27.4.89 and considerable time was taken on account of the suggestions of the defendants time and again and for the time taken for the visits at the instance of the respondents and the supply of materials by them. It was further stated that the plaintiff had handed over the house in June, 1991 since the house remained locked, they were unable to proceed with the work thereafter and it was only due to the non cooperation of the defendants and due to the failure on their part to contact them that the delay occurred in completing the work.

11. From the depositions of the second defendant – wife of the first defendant, it is seen that the house was handed over in May, 1991 and they started residing there and at that time the mosaic work was not completed and Aluminium work was

completed. Receipt of Ext.B4(a) letter dated 26.08.1991 demanding a sum of Rs.30,831.92 towards final settlement, is admitted by DW1, at the same time, she stated that they had sent a reply on 28.12.1991 demanding reduction and it was adjusted to Rs.29,294.16 (Ext.A4). It was also agreed that the cost of additional work was agreed to be paid as per the agreement. According to PW1 they did not demand too much modifications but only sought additional facilities. It was suggested that Ext.A11 letter dated 3.9.1991 was issued since there were no faults in construction; but the same was denied by DW1. She admitted that they had intimated their consent for payment of a sum of Rs.16,377/- as per Ext.A13 letter; while demanding completion of pending work. According to her, the defects were pointed out to the plaintiff after a period of two months of the handing over of the house. In the chief examination, she stated that further amount was required for carrying out the repair of the house, as claimed in the counter claim. In the cross examination she stated that "quotation was received from the person who is to carry out repair works; the amount required was intimated only orally". It was admitted that no notice was issued demanding any amount for the repair works to the

plaintiff except the statement to that effect in the counter claim.

12. The plaintiff had examined PW1. Even though he deposed in terms of the claim made in the plaint, he was totally unaware of the factual situation. Ext.C1 is the consolidated report which contains separate reports of Advocate Commissioner and that of Expert Commissioner. As per this report, the Expert Commissioner found that the total amount required for carrying out the repairs for the defects found in the house will come to only Rs.3,070/-. The Expert Commissioner is a Senior Grade Lecturer in the Department of Civil Engineering, Government Engineering College, Thrissur. According to him, the defects noticed at the time of the inspection on 10.11.1995 are not at all serious. He had furnished the preventive measures which can be taken to avoid:-

(1) splashing of water from the sunshade in the Veranda by lowering down the pipe at the cost of Rs.250/-

(2) he has furnished the reasons for the fading appearance of the mosaic floor to be either by improper mixture of each item in mosaic mix by inexperienced labourers or by the use of the floor immediately after the completion of polishing before getting it set or by time lag or by dampness. He also

cautioned that the mosaic floor should be re-polished every 5 years and it should be kept cleaned and swept every time; otherwise it will look dirty. He stated that the colour of the mosaic will be in accordance with the colour which is used along with white cement. The charges for repolishing was stated as Rs.1,000/-.

(3) He did not find any defect in the work of laying glazing tiles in bathroom; he found that the floor can be maintained by appropriate sweeping regularly.

(4) He did not find any possibility of leakage of water to bedroom and stated that by providing down step near the door of the bathroom at the expense of a sum of Rs.300/- the possibility of slippage of water can be prevented.

(5) He further found that by providing a down tap pipe, the car shed can be protected from splashing of water from the terrace. He further found that the door provided is made of hardwood which can be replaced by the door of the specification.

(6) He did not find it necessary to replace any Aluminium work near the staircase or living room. He found that a sum of Rs.1,500/- would be sufficient for providing proper drainage facility and to prevent rain water splashing and dropping

through the walls. It was further found that the floor was found to have dampness apparently on account of the passage of 5 years after construction and due to usage. The Advocate Commissioner has in his report found that there was possibility of getting the rain water splashed over the front of the house on the front door due to scarcity of space; the mosaic chips used were of different sizes in the floor of drawing cum dining room and appeared to have dampness; he found unevenness in laying the glazing tiles; the floor of the bedroom and kitchen dirty; the slab in the bath room was found towards the direction of the drain itself , but found the possibility of getting the water from the bathroom overflowed to the bedroom; the downfall pipe from the terrace fixed was only upto the top portion of the wall and therefore there was possibility of splashing of water on the car; the door on the front side of the house was found to have a height of 78" and width of 34^{7/8}" and thickness of 3" and did not have any facility of locking it from outside. He further added on each of his observations on inspection, that the technical reasons and the approximate cost for the repair are furnished by the Expert Commissioner. But it is seen that neither the Advocate Commissioner nor the Expert Commissioner is examined.

Records reveal that defendants had filed an objection to the Commission Report. But no further proceedings are seen pursued or initiated.

13. On an overall assessment of the evidence on record, it can be seen that the claims raised in the counter claim to the tune of Rs.50,000/- are not substantiated on the basis of any material on record. Except in the deposition of the DW1 where she states certain amount for each claim, there is no material to show either that the defects alleged were caused by the plaintiff contrary to the terms of the agreement or that the amount claimed against each item is required for curing the respective defects. At the same time, the report of the Commissioner as well as the Expert Commissioner show that the amount required to cure the defects they could notice, that too after after about 6 years of the construction is only a sum of Rs.3,070/-. At the same time it is seen that the claim made by the plaintiff for a sum of Rs.30,831.92 was originally admitted by the 1st defendant in Ext.B4(a) letter, which was later adjusted to Rs.29,294.16. The counter claim was raised towards carrying out repairs to the car porch, providing decorative door, repairs of the flooring, slippage of water from bathrom, etc. From Ext.B2 letter dated

19.10.1989 it can be seen that the defendants had agreed to have a car porch with the width of 2.7 metres, even after the plaintiff had furnished the sketch and plan for providing car porch of 3 metres in width. In this context, we have noticed that the agreement Ext A1 does not provide for the specifications of door. It only provides in clause C : "flush doors for all rooms except for bath rooms where panel doors will be provided. Window will be of steel with glass shutters and iron security bars" It was by Ext.A9 letter dated 24.01.1990, that the 1st defendant demanded that frames and doors were to be made using seasoned termite proof teak wood and that the entrance door was to be artistic. According to the appellant, the furniture department is dealing with the issues relating to door and that is not in any way related to plaintiff and at any rate in respect of the agreement of construction with defendants. Even assuming that the decorative doors were to be provided, as claimed by defendants, the maximum that can be deducted will be a sum of Rs.12,000/- as claimed in the counter claim and in the deposition of the DW1, even in the absence of any material to substantiate the same. This coupled with a sum of Rs.3,070/- as found by the Expert Commissioner in Ext.C1 report will make the amount

liable to be adjusted to the defendant to a sum of Rs.15,070/-. After deducting the same from the amount due to the plaintiff as per the letter dated 26.12.1991, the plaintiff will be entitled to a decree for payment of Rs.14,224.16. Based on the above findings, we are of the view that the appellant is entitled to a decree for payment of a sum of Rs.14,224.16 (Rupees Fourteen thousand two hundred and twenty four only) from the defendants which will carry interest @ 6% per annum from 3.9.91, the date of Ext A11 letter .

The appeal is accordingly allowed to the above extent and the decree passed in the counter claim is set aside. Accordingly there shall be a decree against the defendants in favour of the plaintiff for realisation of a sum of Rs.14,224.16 (Rupees Fourteen thousand two hundred and twenty four only) along with interest at the rate of 6% per annum from 3.9.91. No costs.

Sd/-

T.R.RAMACHANDRAN

Judge

Sd/-

P.VASHA

Judge

rtr/

/true copy/

P.S to Judge