IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

A.S.No.27 of 2012
A.S.No.176 of 2012,
and
M.P.Nos.1 and 2 of 2012

M/s. Concrete Constructions
Represented by its Sole Proprietor
V.Prakashlal, s/o. Vishindas
No.37, Ormes Road,
Kilpauk, Chennai - 600 010. ...Appellant in both the Appeals/Defendant

Vs.

1. R.Subramaniam

2. N.Rajagopal

3. P.N.Radha Bai

4. S.Sudhakar

5. K.Kumar ...Respondents in both the Appeals/Plaintiffs

(Respondents 1 to 3 represented by their duly constituted Power of Attorney S.Sudhakar & K.Kumar, the Respondents 4 & 5)

Prayer in A.S.No.27 of 2012 : Appeal Suit filed under Section 96 read with Order 41 Rule 1 of the Code of Civil Procedure, against the Judgment and Decree, dated 30.06.2011 made in O.S.No.13663 of 2010 on the file of the Additional District Judge (Fast Track Court No.5), Chennai and prays the same be set aside and the counter claim made in O.S.No.13663 of 2010 be decreed.

Prayer in A.S.No.176 of 2012 : Appeal Suit filed under Section 96 read with Order 41 Rule 1 of the Code of Civil Procedure, against the Judgment and Decree, dated 30.06.2011 made in O.S.No.13663 of 2010 on the file of the Additional District

Judge (Fast Track Court No.5), Chennai and prays the same be set aside and the suit in O.S.No.13663 of 2010 be dismissed.

For Appellant : Mr.K.Sridhar
for M/s. K.Sridhar Associates

For Respondents : Mr.K.Ramu

COMMON JUDGMENT

(Judgment of the Court was delivered by P.KALAIYARASAN, J)

These Appeal Suits are directed against the Judgment and Decree, dated 30.06.2011 passed by the Additional District and Sessions Judge (Fast Track Court No.5) in O.S.No.13663 of 2010.

2. The defendant filed two appeals, (1) A.S.No.176 of 2012 against the Judgment and Decree, dated 30.06.2011 made in O.S.No.13663 of 2010 and (2) A.S.No.27 of 2012 against the dismissal of the counter claim made by him in the said O.S.No.13663 of 2010.

3. The averments in the plaint and reply statement in nutshell are as follows:

(i) The suit schedule Item No.1 of the property belonged absolutely to the first plaintiff and the suit schedule Item No.2 belonged absolutely to the second and third plaintiffs.

(ii) The above owners executed power of attorney deed and sale agreement in favour of 4th and 5th plaintiffs for their respective properties and handed over vacant possession after receiving the consideration fully under 4 documents. Pursuant to that plaintiff 4 and 5, got building approval describing as one single plot.

(iii) The plaintiffs 4 and 5 entered into an agreement with defendant on 11.01.2004 for development of the property. As per the agreement, the defendant agreed to take 65% of the undivided share for himself and his nominees and in consideration for the same, agreed to give 35% super built area of the total constructed area in the proposed residential flats to be built up by the defendant, exclusively at his cost. The defendant pursuant to the agreement obtained planning permission afresh to put up residential flats in the suit schedule properties. The defendant handed over to the plaintiffs 4 and 5 fully completed six residential flats towards the entitlement of the plaintiffs in June 2006. The plaintiffs 4 and 5 paid a total sum of Rs.1,55,000/- to the defendant towards deposits for securing water, sewerage connection and Electricity connection and deposits for the same to the six flats allotted to the plaintiffs.

(iv) As the plaintiffs 4 and 5 decided to sell all the six flats, the plaintiffs 4 and 5 requested the defendant to join in execution of a tripartite agreement, showing the defendant as Builders and the plaintiffs as owners of the land and third party purchasers. This was done at the instance of the third party purchasers to facilitate them to avail loan from Financial Institutions, namely M/s. LIC Housing Finance Ltd., The said tripartite agreements came to be executed by the defendant and the plaintiffs 4 and 5 with the purchasers for sale of the flats, to which the plaintiffs 4 and 5 were entitled to, showing as if they were entitled to the sale consideration of undivided share in land alone and the balance amounts, as if to be paid to the defendant, for putting up construction, which amounts, the defendant agreed to receive cheques from proposed purchasers of land and repay the same in full to the plaintiffs.

(v) Out of six flats, four flats to which plaintiffs 4 and 5 were entitled were sold to four purchasers, who availed housing loans from LIC. M/s. LIC Housing Finance Ltd., issued six cheques to the defendant as Builders. Thus the defendant had received a total sum of Rs.69,15,000/- from M/s. LIC Housing Finance Ltd., towards cost of construction, which the defendant is bound to repay to the plaintiffs 4 and 5. The said amounts had been received by the defendant in trust and for the benefit of the plaintiffs 4 and 5, as per the oral understanding, since the defendant was not entitled to any amount towards the cost of construction as per agreement, dated 11.01.2004. Out of the said amount received by the defendant from M/s. LIC Housing Finance Ltd., the defendant had repaid the plaintiffs 4 and 5, a total sum of Rs.59,79,769/- alone and unlawfully retained the balance amount of Rs.9,35,231/-. There was no offer or any agreement made by the plaintiffs to the defendant towards any service charges / commission. The defendant has not rendered any service except to sign the Builders Agreement.

(vi) The plaintiffs 4 and 5 caused a lawyer's notice, dated 05.01.2008 to the defendant repudiating the claim of the plaintiffs falsely. The defendant sent an interim reply and detailed reply, dated 09.01.2008 and 22.01.2008. The plaintiffs also sent a rejoined on 12.02.2008. Therefore, the plaintiffs claim the above said amount with interest at 24% p.a.

(vii) The defendant in his written statement admits the factual aspect regarding ownership of the land and execution of agreement of sale and power of attorney deed by plaintiffs 1 to 3 in favour of plaintiffs 4 and 5 and also the Joint

Venture Agreement entered into between the plaintiffs 4 and 5 and the defendant for development of the property.

(viii) The construction was completed and the plaintiffs were put in possession of six residential flats in lieu of their 35% built up area relatable to their undivided share retained in the land. Only at the request of the plaintiffs, since they would incur heavy amount on account of stamp duty and Registration fees by getting sale deeds in their name, they requested the defendant to enter into an agreement with their nominees. The plaintiffs also offered to give the defendant a nominal amount as service charges / commission starting from Rs.85/- per sq.ft depending on the date of the sale of the flats. The defendant came forward to facilitate smooth transfer of the flats allotted to the plaintiffs in favour of their nominees and only under such circumstances, amounts were paid to the defendant.

(ix) It was never agreed that the defendant would receive the money and repay the same as stated. The receipt of money and return of money to the tune of Rs.59,79,769/- was only under the understanding stated above and the balance money was actually the amount agreed to be paid to the defendant as his service charges for the various transactions including statutory dues and expenses made by the defendant at his cost. The defendant is not retaining any amount unlawfully as alleged. The defendant is filing a detailed statement as per which it is only the plaintiffs, who are liable to pay the defendant a sum of Rs.85,255/-. Therefore, the suit filed by the plaintiffs is to be dismissed and the counter claim has to be decreed, directing the plaintiffs jointly and severally to pay a sum of Rs.85,255/- with interest at the rate of 12% p.a.

4. The learned trial Judge framed six issues and after analysing the evidence both oral and documentary adduced on both sides, decreed the suit and dismissed the counter claim of the defendant. Aggrieved against the Judgment and Decree, the defendant preferred these two Appeal suits, one against the decree granting money claim in favour of the plaintiffs and the second against the dismissal of the counter claim made by him.

5. The learned counsel appearing for the appellant / defendant contends that having handed over the possession of six flats to the plaintiffs 4 and 5 in lieu of the Joint Venture Agreement, the contract between the plaintiffs 4 and 5 and the builders came to an end. There is no continuous cause of action, as the tripartite agreement was entered into subsequently between the Builder, owner and the purchasers. Only to avoid stamp duty instead of executing sale deed, tripartite agreement was entered into under the understanding that the defendant Builder is entitled to service charges /

commission and the sale consideration from the purchasers through M/s. LIC Housing Finance Ltd, less service charges / commission is to be paid to the plaintiffs 4 and 5 / owners.

6. The learned counsel appearing for the respondents / plaintiffs vehemently contends that tripartite agreement is in continuation of the Joint Venture Agreement. The service charges for providing Electricity, water and sewerage connection, as agreed in the Joint Venture Agreement was paid by the plaintiffs 4 and 5 to the defendant and the amount comes to the tune of Rs.1,55,000/-. There is no covenant in the tripartite agreement or understanding between the parties that the service charges / commission is to be paid to the defendant. The defendant is not entitled to any amount, as per the agreement and therefore, he is bound to repay the entire amount received through M/s. LIC Housing Finance Ltd., towards the sale consideration of the flats entitled to the plaintiffs 4 and 5.

7. The fact remains that the suit schedule Item No.1 originally belonged to the first plaintiff and suit schedule Item No.2 originally belonged to the plaintiffs 2 and 3 and the above plaintiffs under 4 different documents executed the agreement of sale after getting the consideration fully and the power of attorney deed in favour of plaintiffs 4 and 5. The plaintiffs 4 and 5 entered into a Joint Venture Agreement with the defendant / Builder to develop the property by raising building with residential flats. After completion of the construction, the defendant also handed over six flats to the plaintiffs, who were put in possession of the same, in lieu of 35% built up area relatable to their undivided share retained in the land.

8. The following recitals in the Joint Venture Agreement between the plaintiffs 4 and 5 and the defendant executed on 11.01.2004 is worth mentioning :

> "PART-I
> THE OWNERS :
> 4. Shall convey 65% undivided share in the Schedule I land in favour of the nominees of the Developer.
> 8. Shall be entitled to 35% of the constructed area of the proposed Residential flats (which will be inclusive of the share in the common build up area of the Residential flats building) in lieu of conveying 65% undivided share in the Schedule I land in favour of the nominee of the Developer.
>
> PART-II
> 4. Will be entitled to take eighteen months for completion of the project from the date of the

works permit from the CMDA / Local body.
5. Agrees to construct the ownership flats on the Schedule I land at the cost as per the specifications given in the enclosed annexure and deliver 35% of the super built up area of the ownership flats, within the stipulated time.
8. Shall not claim any amount from the owner either for getting building plan sanction or service connections, except the expenses and deposits to be paid to the Water Board and the Electricity Board for independent connection for the flats earmarked for the owners.

PART-III
5. The Developer agrees and undertakes to rectify any defects in construction pointed out by the owners for their 35% of the ownership flats for a period of six months from the date of taking possession of the flats.
8. If the Developer fails to complete the ownership flats within the stipulated time and hand over the 35% of the built up area to the owners, then they are liable to pay Rs.27/- per Sq.ft to the owner as damages for the entire 35% of the built up area from the date it fell due till date of handing over vacant possession of the completed flats.
13. Sales Tax or other taxes and surcharges, if any payable for the 65% of the proposed construction of flats earmarked for the Developer herein shall be met by the Developer / the prospective buyers of flats only, in respect of 35% of flats earmarked for the owners, Sales Tax or other taxed for the works contract shall be met by the owners only."

9. The Tripartite agreements were executed with four purchasers and the same have been exhibited as Ex.A.7 to Ex.A.10. The following recitals of the said agreement will also be useful to decide the issues between the parties:

"4. Rs.23,51,350/- (Rupees Twenty Three Lakhs Fifty One Thousand Three Hundred and Fifty only) shall be payable after executing the sale deed of undivided share of land in favour of the purchaser/s and before taking the possession of the Flat.
7. On receipt of the entire sale and construction price as mentioned above, the builder through Vendor's Power Agents shall

> deliver Schedule 'C' mentioned Flat duly completed in all aspects to the Purchaser/s on or before 31st January 2007.
>
> 8. In the event of the Purchaser/s fails to pay the balance amount after the completion of the construction as agreed upon the said amount to be settled with interest @ 24% p.a to the Vendor's and in the event of builder fails to complete the construction as agreed upon to pay Rs.2/- per Sq.ft p.m to the purchaser/s."

10. Admittedly, the defendant after completing the construction handed over six flats to the plaintiffs and only after that, the tripartite agreements were executed by the builder and owner with the purchasers. A cursory reading of the above mentioned recitals of both Joint Venture Agreement as well as the Tripartite Agreement, it is very clear that the contract between the plaintiffs and defendant does not end with handing over the flats to the plaintiffs, as per their entitlement, but continues even after that. There is recital in the agreement between the plaintiffs and defendant, wherein the defendant / developer agreed to rectify any defects in construction, pointed out by the owners within a period of six months from taking possession of the flats.

11. In the Tripartite Agreement, there is a recital, wherein the Builder through vendor's power agent shall deliver the flat duly completed in all aspects to the purchaser, after receipt of the entire sale consideration. There is also recital that Builder agreed to pay Rs.2/- per sq.ft per month to the purchasers, if he fails to complete the construction as agreed upon. Though the flats were handed over to the plaintiffs 4 and 5 in lieu of 35% of their share in the land, the above Clauses were incorporated in the agreement binding the Builder to complete the construction as agreed upon or rectify the defects noted by the purchaser, through the owner. Further, the defendant having made a counter claim, cannot contend that there is no continuing cause of action through tripartite agreement. Thus from any angle, it is clear that there is continuous cause of action and the Tripartite Agreement cannot be treated as independent to that of the Joint Venture Agreement.

12. As per the Joint Venture Agreement, the plaintiffs are entitled to six flats towards their 35% share in the land. Out of that six flats, Tripartite Agreements were executed with respect to four flats. The plaintiffs 4 and 5 are entitled to the entire sale consideration of these four flats.

13. There is no dispute that as per the Tripartite Agreement, the defendant / Builder received Rs.69,15,000/- from the purchasers through M/s. LIC Housing Finance Ltd., and in turn paid a sum of Rs.59,79,769/- alone to the plaintiffs 4 and 5 and detained the balance amount. The defendant contends that as per the understanding between the plaintiffs and defendant, to avoid stamp duty, he agreed to be included as a party to the Tripartite Agreement and the plaintiffs 4 and 5 agreed to pay service charges / commission, starting from Rs.85/- to Rs.150/- per sq.ft and if that is to be taken into account only plaintiffs has to pay Rs.85,255/- to him.

14. Clause 8 in Part I of the Joint Venture Agreement provides that the defendant / Builder shall not claim any amount from the owner, except the expenses and deposits to be paid to the Water Board and Electricity Board, for independent connection for the flats.

15. In the reply notice, Ex.A.14 sent by the defendant, he states that money spent for Electricity connection and sewerage connection was not given to the defendant and the same is to be deducted from the cheque issued by M/s. LIC Housing Finance Ltd.

16. The Builder, being sole proprietor of M/s. Concrete Constructions was examined as D.W.1. He deposed that the plaintiffs 4 and 5 paid Rs.1,55,000/- through cheque towards Electricity connection and water connection. Thus the plaintiffs fulfilled their obligation, as per the Joint Venture Agreement. There is no whisper as to the service charges in the Tripartite Agreement.

17. When there is written contract, oral understanding that the plaintiffs 4 and 5 are to pay Rs.85/- to 150/- per sq.ft towards service charges / commission as alleged by the defendant is not acceptable. Though counter claim is made by the defendant, there is absolutely no material or account for such a claim. Therefore, the contention of the appellant / defendant regarding service charges and the counter claim is not maintainable.

18. Learned counsel appearing for the appellant cited our Hon'ble Supreme Court Judgment, in Nahar Singh v. Harnak Singh, reported in (1996) 6 SCC 699 and contended that the agreement entered into between the parties to save stamp duty and Registration fee is opposed to the public policy.

19. Here in this case on hand, the Tripartite Agreement cannot be said to evade the stamp duty or Registration fee. As already pointed out, this Agreement is not independent to the Joint Venture Agreement. Clause 4 of the Tripartite Agreement, specifically says that sale consideration shall be payable,

after executing the sale deed of undivided share of land in favour of the purchasers. Thus, there is provision in the contract itself for execution of the sale deed in accordance with law. Therefore, the question of evading stamp duty and Registration fee does not arise and the argument of the learned counsel for the appellant is not sustainable.

20. In the Tripartite Agreement, in Clause 8, 24% interest is stipulated in case of default either by the purchaser or the Builder. Therefore, awarding contractual rate of interest at 24% by the trial Court is also correct.

21. For the aforesaid reasons, both the appeal suits are liable to be dismissed.

In fine, both the Appeal Suits are dismissed with costs, confirming the Judgment and Decree of the trial Court. Consequently, connected miscellaneous petitions are also dismissed.

tsvn 22.07.2016

After pronouncing the Judgment, the learned counsel appearing for the respondents / plaintiffs has represented that by virtue of the order, dated 17.06.2014 in M.P.No.1 of 2012 in A.S.No.176 of 2012, the appellant / defendant has deposited a sum of Rs.5,00,000/- (Rupees Five Lakhs only) in O.S.No.13663 / 2010 on the file of the trial Court. Since A.S.No.176 of 2012 is dismissed, the respondents / plaintiffs are entitled to withdraw the said amount.

2. Considering the representation made on the side of the respondents / plaintiffs and also considering the fact that the trial Court has granted an executable money decree in favour of them and also considering that in M.P.No.1 of 2012 in A.S.No.176 of 2012, such order has been passed and the amount has been deposited, the respondents / plaintiffs are at liberty to withdraw the same from the trial Court.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

tsvn

To

1.The Additional District Judge/
Fast Track Court No.5,
Chennai.

2.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.K.Ramu, Advocate, S.R.No.42022

A.S.No.27 of 2012
and
A.S.No.176 of 2012

KJI(CO)
CA(01/09/2016)