

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17 / 08 / 2016

CORAM

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA

C.S.NO.1055 OF 2009

M/s.Chaitanya Builders & Leasing Pvt. Ltd.,
Rep. By its Authorised Signatory
Kakani Towers,
No.15, Khader Nawaz Khan Road,
Chennai - 600 006. . Plaintiff

Versus

Mrs.Vijaya Padmanaban
No.34/5, Ramya Flats,
Ramakrishna Street, T.Nagar,
Chennai - 600 017. . Defendant

PRAYER: Plaint filed under Order IV Rule 1 of the Original Side Rules read with Order VII Rule 1 CPC praying for the following judgment and decree against the defendant.

a) for a sum of Rs.50,00,000.00 as damage to loss together with interest @ 12% per annum, from the date of plaint till the date of realization.

b) for cost of the suit.

For Plaintiff : Mr.S.Ramesh
For Defendant : Mr.G.Kalyan Jhabakh
for M/s. Surana & Surana

J U D G M E N T

The suit is filed by the plaintiff claiming a sum of Rs.50,00,000/- (Rupees Fifty Lakhs Only) in respect of an

alleged damage with interest at the rate of 12% per annum from the date of plaint.

2. The plaintiff is one of the leading construction company in the field for more than two decades and had executed several prestigious projects. The defendant was employed with the plaintiff from 16.04.2001. As the defendant did not meet the expectations of the plaintiff, the plaintiff had expressed displeasure about her performance. Hence, she resigned from the services in the year 2002 and took up a job in another company. Subsequently, during the year 2004, when the plaintiff company had announced yearly increments, incentives etc., based on performance, the defendant again rejoined on 01.12.2004 and assured to perform well.

2.1. As the defendant was already known to the plaintiff, the plaintiff agreed to induct her in the company as Technical Manager. After re-appointment, the defendant was assigned with certain responsibilities. Subsequently, the defendant expressed her desire to purchase a flat in one of the projects in which she was in-charge and requested the plaintiff's Management to consider allotting a flat at a concessional rate. The plaintiff also in order to encourage its employee, agreed to allot a flat to the defendant in the

project known as "NEST" which was being looked after by the defendant at that point of time. It was made clear to the defendant that the flat was allotted to her for a lesser price only in view of the employment of the defendant with the plaintiff, which would be part of the pay structure and package, otherwise, she would not be entitled for such a price. The defendant also agreed for the said terms and paid an initial advance. Despite the assurance given by the defendant that she would take care of the progress and development of the said project, she had not lived up to the commitment.

2.2. It was alleged by the plaintiff that she did not maintain the accounts properly and there were numerous lapses on her part. When the plaintiff questioned about the same, the defendant had come up with certain issues including the problems in her domestic front. The lapses on the part of the defendant had resulted in considerable loss to the plaintiff and when the plaintiff questioned about the same, the defendant abstained from attending office and also did not attend the phone calls. As the defendant was in-charge of two on-going projects, the plaintiff had made request to her to continue to complete the same before quitting.

2.3. The plaintiff further alleged that in the Besant Nagar Project, the defendant had caused a loss of Rs.5,00,000/- (Rupees Five Lakhs Only). In another case, a work order was issued for Rs.2,00,000/- (Rupees Two Lakhs Only), but billing value was many times over the original value and the bills were certified by the defendant for payment. It is further alleged that the defendant had placed orders for excess materials and in some cases, double or triple orders were made, which resulted in excess stocking of materials, causing unnecessary financial loss to the company.

2.4. It is the further allegation of the plaintiff that the defendant had misused her position as in-charge of the project and got various additional works and alterations done to her flat, which was allotted to her earlier. Having caused severe damages and loss to the plaintiff, the plaintiff was not willing to extend the concession given to her and withdrew the offer given to the defendant initially. The plaintiff had engaged a team of internal auditors to verify the accounts and records relating to two projects handled by the defendant. Even before that, the defendant wanted the allotment of flat to continue and had refused to receive the money returned to

her. As the flat was not handed over to her, the defendant initiated proceedings before the State Consumer Disputes Redressal Commission seeking for a direction to deliver possession of the property.

2.5. In the meanwhile, the audit report revealed that there was an excess expenditure, in both the projects handled by the defendant. The defendant also alleged to have mishandled the projects, resulting in one of the contractors known as "EMAS Engineers and Contractors Private Limited", initiating arbitration proceedings for a huge claim. As the loss to the company was purely due to the negligence and willful act of the defendant, the plaintiff has filed the present suit claiming damages.

3. The suit was resisted by the defendant on various grounds. The employment of the defendant in the year 2001, her resignation in the year 2002 and the re-joining in 2004 and resigning job in 2007 were all admitted by the defendant. It is also admitted that a flat was booked by her, which subsequently the plaintiff refused to deliver possession. As the defendant had moved the State Consumer Disputes Redressal Commission, as a counter blast, the plaintiff has come up with the said suit. The defendant had further stated that her resignation was due to the ill-

health and not as alleged by the plaintiff. While resigning the job, the defendant claims to have handed over all the details of the projects to one Mrs. Benita and clarified the details as required by the plaintiff. The defendant denied the negligence alleged. The defendant also denied the allegation of the loss caused to EMAS Engineers and Contractors Private Limited at her instance and prayed for dismissal of the suit.

4. Heard the submissions made on either side and perused the materials available on record.

5. This court on, 17.06.2011, framed the following issues for consideration in the suit :

"1. Whether the defendant requested the plaintiff's Management to consider allotting the flat at a price lesser than the one provided to others for sale?

2. Whether the defendant was allotted the Flat in the Project, known as "NEST" at the lesser price only in view of the employment of the defendant as part of pay structure and package?

3. Whether the plaintiff incurred loss of nearly Rs.5,00,000/- (Rupees Five Lakhs Only) in the Project at Besant Nagar only on account of lapses on the part of the defendant?

4. Whether plaintiff incurred loss of Rs.2,00,00,000/- (Rupees Two Crores Only) on account of non-adherence of approved procedures, carelessness, negligence and indifference by the defendant?

5. Whether additional work and alterations were carried out by the defendant in the Flat allotted to her without the knowledge and consent of the plaintiff? If so, whether the plaintiff suffered any loss on account of the same?

6. Whether the price fixed for the Flat allotted to the defendant was an agreed price between plaintiff and defendant without any conditions for the continued employment of the defendant in the plaintiff's company?

7. Whether the defendant was solely in charge of the Project "Laurels" and "Nest"?

8. Whether the plaintiff incurred excess expenditure of Rs.497.36 Lakhs in the Project "Laurels" and Rs.432.78 Lakhs in the Project "Nest" only on account of the defendant?

9. Whether the defendant committed tort and is liable to pay damages on account of tortuous liability?

10. Whether the defendant is liable to pay Rs.50,00,000/- (Rupees Fifty Lakhs

Only) to the plaintiff as compensation?

11. Whether the suit claim is maintainable in law?"

6. On behalf of the plaintiff, one Mr.Y.Naseer Ahmed, Executive in the plaintiff Company was examined as P.W.1 and 23 documents were marked as Exs.P1 to P23. The defendant examined herself as D.W.1 and marked 4 documents as Exs.D1 to D4.

ISSUE NOS.1, 2, 5, 6 AND 7 :-

7. The main contention of the plaintiff in the suit is that the defendant had misused her position as a Senior Technical Manager of the plaintiff, who was in-charge of two on-going projects at the relevant point of time, namely "NEST" and "LAURELS". The defendant who was allotted a flat in the project "NEST" also had made unauthorised additions, alterations, deviating from the original plan.

8. The learned counsel for the plaintiff pointed out Ex.P4 dated 02.07.2007, a letter from the defendant to the plaintiff and in para 5 of the said document, the defendant had admitted as follows:

" 5..... In part performance of the

agreement entered into, I have already made modifications to the said flat, as per my convenience and I have converted the same into 2 bed room flat and the flooring, skirting and wall tiles dado, painting, CP fittings and sanitary ware and granite counter etc., are fittings at my cost and as to my taste."

Though the defendant has stated so in Ex.P4, there is no evidence to show that prior permission from the plaintiff was obtained by the defendant. It was further pointed out in the same Ex.P4 that the defendant had deducted a sum of Rs.1,71,154/- towards carrying out certain items of work as mentioned in para 5 of Ex.P4. It is pointed out that the said act of deduction of the above said sum by the defendant is unilateral, without any sanction or authorisation from the plaintiff. This is pointed out as the misuse of her position as in-charge of the project. It is also pointed out by the learned counsel for the plaintiff that even in her evidence, the defendant had not answered the question, with respect to the authority or sanction, for carrying out the modifications. The defendant also had not produced any proof for spending such sum.

9. Resisting the said contention, the defendant would contend that there was no document in writing to show

that the defendant was allotted a flat at a concessional rate in view of the employment. The plaintiff had not produced any document to show that the defendant was given allotment at discount. The said aspect is also admitted by P.W.1 that the defendant had not been informed in writing about the benefits. P.W.1 was also not able to say the actual price fixed for the project at the time of booking and what was the concession given to the defendant. The plaintiff, being a reputed organisation having experience of more than two decades in the field, would know that the defendant alone is not the only person in-charge of the project and there would be various other employees equal to or superior to the defendant dealing with the multi-crore projects. The plaintiff being in control of the realm of affairs could easily establish the allegations if true by producing all the records.

10. Further, the plaintiff also had not produced any documents to show that there was a loss with respect to the arbitration proceedings, between the plaintiff and EMAS Engineers and Contractors Private Limited. Though the plaintiff had alleged that the defendant had purchased materials differently to suit her modifications inside the flat, the plaintiff is unable to produce any material to

establish the same. Even P.W.1 has not spoken about the actual loss incurred by the plaintiff in this regard. The plaintiff being in construction business for several decades would know how to handle various departments. All the staff, the transactions are all under its control. While so, it is easy for the plaintiff to have examined any other staff or produce the documents available in this regard. Having failed to establish the allegations made in the plaint, the above issues viz., **issue nos. 1, 2, 5, 6 and 7 are answered against the plaintiff.**

ISSUE NOS. 3 AND 4 :-

11. Admittedly, the defendant had joined services with the plaintiff in the year 2001 as Senior Technical Manager and resigned on 30.10.2002. Though she was on probation for a period of six months, there was no complaints by the plaintiff about the defendant. The defendant seem to have joined the plaintiff company again on 01.12.2004 and resigned on 09.01.2007 almost after two years. As the projects were nearing completion, at the request of the plaintiff, the defendant continued to help the plaintiff in completing the pending job. This is also evident from the fact that the plaintiff had sent a computer to the residence of the defendant. Though the plaintiff had

alleged that the defendant had unauthorisedly absented herself by abruptly giving resignation on the ground of health issues, there was no medical record produced by the defendant about her hospitalization. The said allegation may not be acceptable because the plaintiff, accepting her reasons, had requested for the continuous service and permitted her to work from home by sending computer to her residence.

12. Though the health condition of the defendant was disputed by the plaintiff, the defendant had produced Ex.D3, which is the discharge summary issued by the Lifeline Rigid Hospital. The defendant seems to have undergone surgery on 12.04.2007 and was discharged on 18.04.2007. The resignation was on 09.01.2007, three months prior to the same. Admittedly, though the defendant had tendered her resignation in early January 2007, for the months of January, February and March 2007, she had been working from home and extending her services to the plaintiff. This is evident from the fact the salary for the month of April 2007 was released to her only after she agreed to extend her assistance and give all necessary clarifications to the new person, in April 2007. From the above facts, it is clear that the defendant had not quit the job abruptly, but only

due to the health reasons. Hence, the defendant cannot be found fault with in this regard.

13. Though the defendant had been designated as Senior Technical Manager, according to the defendant, it was purely clerical in nature, that is, maintaining files and checking the bills. Even though she might have approved the bills for clearing payments, it is only for cross checking the bills and the approving authority would be the Finance Manager. When the defendant was confronted with a question whether she had various bills to be paid to the contractors, she had specifically stated that checking the bills only is her job and not approving. For those complaints from the contractors, who would allege that reconciling of the accounts could not be done since the defendant had left services, the defendant had stated that approval of the bills were not within the purview of her duties. Therefore, according to the learned counsel for the defendant, the job of the defendant is only clerical in nature and she had no authority to make payments.

14. It is alleged by the learned counsel for the plaintiff that an employee in any organisation would tender resignation in a proper manner, after giving sufficient

notice to the employer, that the services of the resigning employee, will not be available after a particular date. In this case, the defendant had abruptly abandoned her job, by tendering resignation, without notice period, thereby causing loss and damages to the plaintiff. Since the plaintiff's business, being construction, where the day-to-day bills have to be settled by the plaintiff were affected. Such payments and other details were only within the exclusive knowledge of the defendant. While so, the defendant absenting herself from duty, without resolving the pending issues, is against a spirit of contract of employment and therefore, is liable to pay the damages.

15. In turn, the learned counsel appearing for the defendant would contend that though it is alleged that the defendant had caused loss of nearly Rs.5,00,000/- to the plaintiff, in the Besant Nagar project, there is no iota of evidence of the same produced by the plaintiff. No piece of paper produced in this regard to establish that the loss to the Besant Nagar project was only due to the act of the defendant. P.W.1., who had been examined on behalf of the plaintiff was only a HR person and he was unable to substantiate the claim of the plaintiff. It is specifically admitted by him that only from the auditor's report, the

loss caused by the defendant was ascertained, otherwise there are no independent materials to substantiate the claim. With respect to the two projects, for which, the defendant was in-charge, the plaintiff has produced auditor's report as Exs.P16 and P17.

16. It is pointed out by the learned counsel for the defendant that the said Exs.P16 and P17 were objected to by her even at the time of marking them as documents. The specific objection raised by the defendant was that the said documents were marked through P.W.1, who is not the author of the said documents and the same cannot be marked and looked into. As the said certificates under Exs.P16 and P17 were issued only by the private auditors of the plaintiff's company, the same could have been marked only through them to have evidentiary value for the same. One another objection raised by the defendant was that the said accounts were not maintained in the normal course of business, but were specifically made ready for the sake of the suit.

17. As stated earlier, the suit itself is filed only as a counter blast to the complaint before the State Consumer Disputes Redressal Commission. Therefore, it is specifically alleged by the defendant that the said auditor's reports were fabricated for the purpose of the

case. Independent of Exs.P16 and P17, the plaintiff had not filed any document to prove the excess expenditure alleged to have been incurred by the defendant or the same was only due to the negligence on the part of the defendant. It is also worthwhile to mention that there was no correspondence between the plaintiff and the defendant regarding the said allegation. Only in Ex.P5, a letter sent on 09.07.2007, for the first time, the plaintiff had raised all these allegations, that too after the defendant had left the job. Ex.P5 precedes Exs.P16 and P17. When there is no independent evidence brought in by the plaintiff for the alleged loss caused by the defendant, reliance is placed on Exs.P16 and P17. Whereas, in Ex.P5 itself, the plaintiff had alleged that the defendant had caused substantial loss to the company.

18. It was contended by the learned counsel for the plaintiff that though the defendant had claimed that she was not in-charge of the said project, she had signed the purchase orders, work contracts and estimate of works as per Exs.P8, P9, P15 and P23. Therefore, the defendant should be made liable for the loss incurred. It is not the case of the plaintiff that the defendant was not authorised to sign the purchase orders or work contractd. When the plaintiff has

come up with the specific case that a loss was caused to the company due to the act of the defendant, the burden is on the plaintiff to establish the same and not to pick holes in the case of the defendant.

19. The plaintiff also was relying on Exs.P20 and P23, the letters addressed by EMAS Engineers and Contractors Private Limited, to fix liability on the defendant for the loss caused to the company. In response, the defendant had stated that the said project was never handled by the defendant and there was a separate Project Engineer to look after the said project. When the plaintiff cancelled the contract of EMAS Engineers and Contractors Private Limited, which resulted in arbitration claimed by them, the defendant was deputed to inspect the premises to know the status of the project. Though the inspection was completed by the defendant, she could not submit a report, before which, she fell ill. Therefore, the defendant was not actually handling the projects, but she was assigned to file only the status report after the dispute arose. The defendant has got no role to play in the dispute between the plaintiff and EMAS Engineers and Contractors Private Limited.

20. It is alleged by the plaintiff that the defendant is otherwise liable for the loss on account of

breach of implied terms of contract of employment, which include within its ambit, competence, obedience and fidelity. However, this may not be acceptable because there is no contract specifying the terms of employment between the parties and therefore, the defendant cannot be held responsible for any allegation as set out in the plaint. The other allegation of the plaintiff that the approval of payment without seeking clearance resulting in overshooting of expenditure is only based on the auditor's report and quoting of excess of the building materials, were all not substantiated by clear evidence. In the absence of terms of employment, the claim of the plaintiff is only to be rejected as not maintainable. The plaintiff though made a claim against the defendant, had miserably failed to establish the same. Hence, the suit is liable to be dismissed.

21. The learned counsel for the plaintiff placed his reliance on the judgment of the Honourable Supreme Court in **JAY LAXMI SALT WORKS (P) LTD., VS. STATE OF GUJARAT [1994 (4) SCC 1]** for the claim made in the plaint. It was contended that the test whether injury or damage occasioned due to failure of duty to take reasonable care by the defendant is an actionable claim and that the defendant is

liable for the same. In this regard, it is relevant to extract para 11 and 14 of the said judgment, as follows:

"11. 'Negligence' ordinarily means failure to do statutory duty or otherwise giving rise to in damage, undesired by the defendant, to the plaintiff. Thus its ingredients are -

(a) a legal duty on the part of A towards B to exercise care in such conduct of A as falls within the scope of the duty;

(b) breach of that duty;

(c) consequential damage to B"

14. In Black's Law Dictionary the meaning of each of these expressions is explained as under:

"Malfeasance.- Evil doing; ill conduct. The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do. Comprehensive term including any wrongful conduct that affects, interrupts or interferes with the performance of official duties.

Misfeasance.- The improper performance of some act which a man may lawfully do.

Non-feasance.- Non-performance of some act which ought to be performed, omission

to perform a required duty at all, or total neglect of duty".

Stroud defines it as under:

"Misfeasance.- There is no such distinct wrongful act known to the law as 'misfeasance'.

22. Based on the above decision, the learned counsel for the plaintiff contended that negligence in performance of duty is only a step to determine if no loss or injury is resulted which should be compensated. Therefore, the basic element of tort is duty and that comes into play when there is a contractual agreement. Since in this case admittedly there is no agreement between the plaintiff and the defendant, therefore, the question of negligence, mistake, omission etc., may not arise in this case and the above decision may not be applicable in the given case.

23. It is well settled principle that suit for damages should be maintainable only on the ground of breach of terms of conditions of contract and when there are acts of malfeasance, misfeasance or non-feasance. In the absence of such act by the defendant, being proved by the plaintiff, the plaintiff is not entitled for the suit claim. **Issue**

Nos.3 and 4 are answered accordingly.

ISSUE NOS.8, 9, 10 AND 11:-

24. The plaintiff has made a claim of Rs.497.36 Lakhs in the project "LAURELS" and Rs.432.78 Lakhs in the project "NEST" only on account of the defendant excepting the auditor's report under Exs.P16 and P17, no other evidence has been let in. The excess expenditure alleged to have incurred by the plaintiff should be substantiated by acceptable evidence. As discussed earlier, the plaintiff having a renowned name in the construction business would have a centralised team of employees to take care of every department in the process of construction. While so, proper maintenance of accounts also is expected to be maintained. In such circumstances, the plaintiff without producing any material to prove such loss and the loss being attributed to the act of the defendant is unacceptable. In the absence of any material to prove the loss, the plaintiff is not entitled to the claim made in respect of the same. **Hence, issue nos.8, 9, 10 and 11 are answered in the negative.**

25. In the result, the suit is dismissed. No costs.

LIST OF WITNESSES EXAMINED ON THE SIDE OF THE PLAINTIFF

P.W.1 - Mr.Y. Naseer Ahmed

LIST OF EXHIBITS MARKED ON THE SIDE OF THE PLAINTIFF

Sl.No.	Exhibits	Description of documents	Date
1	P-1	Authorisation letter	09.01.2012
2	P-2	Office copy of letter written by the plaintiff, informing defendant allotting a flat	17.12.2004
3	P-3	Office copy of letter written by the plaintiff, informing defendant about the loss suffered by the plaintiff	29.06.2007
4	P-4	Original reply sent by the defendant	02.07.2007
5	P-5	Office copy of the letter sent by the plaintiff	09.07.2007
6	P-6	Photo copy of reply received from the defendant	22.09.2007
7	P-7	Photo copy of the complaint in C.C.No.49/2007 filed by the defendant before the Consumer Commission	-
8	P-8	Office copy of project expenditure statement relating to Arundale project	-
9	P-9 Series (4 Nos.)	Proof of purchases made by the defendant	-
10	P-10	Original proof for returning excess quantity of items	-
11	P-11	Photo copy of statement with defendant in writing, showing excess of stock	-

Sl.N o.	Exhib its	Description of documents	Date
12	P-12	Photo copy of list of excess stock found in Rathnagar project	-
13	P-13	Photo copy of Credit Note received from Victoria Arts and Crafts	-
14	P-14	Original credit note from Vaigai Sanitation Pvt. Ltd., for taking back excess materials	-
15	P-15 Series (5 Nos.)	Original proof of purchases made by defendant from Goyal Marbles and Granites on credit and not paid	-
16	P-16	Original certificate issued by the Chartered Accountant	04.06.2008
17	P-17	Original certificate issued by the Chartered Accountant	11.08.2008
18	P-18	Original certificate issued by the Chartered Accountant regarding bill approval details in respect of plaintiff's project	-
19	P-19	True copy of claim statement filed by EMAS Engineers and Contractors Private Limited before the Sole Arbitrator	-
20	P-20	Office copy of counter statement and claim statement filed by the plaintiff before the Sole Arbitrator	-
21	P-21	True copy of rejoinder filed by EMAS Engineers and Contractors Private Limited before the Sole Arbitrator	-
22	P-22	True copy of reply to the rejoinder filed by the plaintiff before the Sole Arbitrator	-
23	P-23	True copy of correspondence filed by EMAS Engineers and Contractors Private Limited before the Sole Arbitrator with reference to the defendant's reply	-

LIST OF EXHIBITS MARKED ON THE SIDE OF THE DEFENDANT

D.W.1 - Mrs.Vijaya Padmanabhan

LIST OF EXHIBITS MARKED ON THE SIDE OF THE DEFENDANT

<i>Sl.No.</i>	<i>Exhibits</i>	<i>Description of documents</i>	<i>Date</i>
1	D-1	Hand copy of the resignation letter given by defendant to the plaintiff	09.01.2007
2	D-2	Bank statement of the defendant showing credit of salary by the plaintiff in April 2007	-
3	D-3	Discharge summary of the defendant	10.04.2007
4	D-4	Statement of account belonging to the defendant with Oriental Bank of Commerce, Kilpauk Branch for the period from 04.06.2001 to 31.12.2004	-

sd/.P.S.N.J

17.08.2016

//Certified to be a true copy//

Dated this the day of 2016

R.s/01.12.2016

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.

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