

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 04.09.2017

CORAM

THE HONOURABLE MR. JUSTICE. R.SUBRAMANIAN

A.S.No.757 of 2006

Chitra Gopinath

.. Appellant/Plaintiff

Vs

V.Sattanathan

.. Respondent/Defendant

PRAYER: This Appeal Suit has been filed under Section 96 of the Code of Civil Procedure against the judgment and decree dated 09.10.2001 passed by the learned IV Additional Judge, City Civil Court, Chennai decreeing O.S.No.15188 of 1996, insofar as the rate of interest, the date from which the respondent is liable to pay the said amount, disallowing the appellant's claim of Rs.47,320.61 (Rupees Forty Seven Thousand Three Hundred and Twenty and Paise Sixty only).

For Appellant : Ms.Saranya Vaidhyanathan for
Mr.S.Raghunathan
For Respondent : No appearance

JUDGMENT

The plaintiff in O.S.No.15188 of 996 is the appellant. The suit was filed by the plaintiff for recovery of a sum of Rs.6,76,036/- with interest on Rs.4,47,074.03 at 18% p.a. from the date of suit till the date of realisation.

2.The sum and substance of the plaint on the averments is as follows:

The defendant is the owner of the property. With a view to develop the same, he entered into an agreement with one A.S.B.Enterprises, a builder for construction of flats in the land belonging to him. Pursuant to the same, on 09.12.1985, the defendant had executed a power of attorney in favour of the builder and on the same date, an agreement for development of flats was also entered into between the defendant and the builder. Acting on the said power of attorney, the builder of A.S.B. Enterprises has entered into agreement of sale dated 09.04.1986 for construction, with the plaintiff agreeing to convey 1/15th UDS of the land and also put up construction to an extent of 1165 sq.ft. Pursuant to the said agreement dated

09.04.1986, the plaintiff claimed that she had paid to the builder a sum of Rs.3,99,753.42 out of total sale consideration of Rs.4,25,000/- towards part of land as well as building. It is also contended that she had purchased certain building materials for a sum of Rs.37,320.61, apart from paying a sum of Rs.10,000/- towards electricity, metro-water and drainage connection on 16.05.1988. According to the plaintiff, she had paid a sum of Rs.4,47,074.03 to the builder for construction of the land as well as obtaining electricity, metro-water and drainage connection.

3. Subsequently, the plaintiff came to know that there was a dispute between the builder and the defendant, due to which, the defendant had cancelled the power of attorney executed in favour of the builder on 26.07.1989 and the agreement entered into between the builder and the defendant was also cancelled. Without knowledge of the said cancellation, the plaintiff had entered into a Memorandum of Understanding with the builder on 15.08.1989, in and by which, she has to complete the construction and the payment of the balance amount of Rs.25,246.58 was dispensed with by the builder. It is only from the letter dated 30.10.1989 addressed by the defendant to the plaintiff, she came to know that the power of attorney had been cancelled. Since the defendant did not come forward to execute the sale deed in respect of UDS as agreed in the the power of attorney, the plaintiff had issued notice to the defendant on 05.12.1989 calling upon the defendant to execute the sale deed with reference to 1/15th undivided share as agreed in her favour within a period of five days from the date of receipt of the notice, failing which the agreement dated 09.04.1986 would be treated as cancelled and she would be constrained to initiate appropriate proceedings against the defendant for recovery of monies paid by her along with interest. However, the defendant did not reply to the said notice and he was not willing to execute the sale deed in favour of the plaintiff and on 14.12.1989. The plaintiff had come forward with the above suit seeking recovery of a sum of Rs.4,47,074.03 along with interest at 18% p.a. The suit claim includes the interest till date for filing the suit and the plaintiff claimed a sum of Rs.6,76,036.55 and the subsequent interest on Rs.4,0473.03 at 18% p.a.

4. The defendant resisted the suit claim contending that there is no agreement between the plaintiff and the defendant and that the agreement entered into between the defendant and the builder was cancelled only on the ground that the builder did not complete the construction within the time schedule. He would further contend that the suit is bad for non-joinder of necessary party. He would also point out that the plaintiff herself is responsible for the present suit since she did not

come forward to settle the dispute with the defendant immediately after cancelling of the power of attorney.

5.The suit was initially filed before this Court in C.S.No.990 of 1989 on 14.12.1989 and on the enhancement of pecuniary jurisdiction, the suit was transferred to the IV Additional Judge, City Civil Court, Chennai and the same was renumbered as O.S.No.15188 of 1996.

6.On the basis of the above pleadings, this Court had framed the following issues in the suit:

1.Whether the suit is bad for non joinder of necessary party?

2.Whether the payment made by the plaintiff to the encounter ASB Enterprises could be construed as payment to the defendant?

3.Whether the plaintiff had made any payment for the sale of the land to the defendant?

4.Whether the plaintiff who has terminated the agreement dated 09.04.1986 on 12.12.1989, is entitled to enforcement or claim damages, from the defendant for any alleged non performance of the same?

5.Whether there was any agreement between the plaintiff and the defendant that in the event of breach by the contractor (ASB Enterprises) and/or termination of the agreement, the defendant has to pay back the money paid by the plaintiff to the contractor (ASB Enterprises)? and

6.Whether the plaintiff was given any right under the agreement against the defendant to maintain this suit?

7.Whether the suit is collusive?

7.The plaintiff examined herself as PW1 and marks Exhibits A1 to A37. The defendant examined himself as DW1 and on Exhibits D1 to D6 were marked.

8. The learned trial Judge, on considering oral and documentary evidence placed before him, concluded that the plaintiff is entitled to recovery for a sum of Rs.3,99,753.42 which payment was made by her to the builder in his capacity as power agent of the defendant under Exs.A20 to A15. Though the defendant would deny the liability, the trial Court concluded that since the plaintiff had paid money to the power agent of the defendant, the defendant is liable to refund the said amount. As regards the claim of the plaintiff for a sum of Rs.10,000/- towards electricity, metrowater and drainage connection, which is evidenced by receipt dated 16.05.1988 and a sum of Rs.37,320.61 was claimed towards cost of building materials purchased by the plaintiff, the trial Judge came to

the conclusion that those amounts were not covered by the agreement between the plaintiff and the builder as the power agent of the defendant. The trial Court also found that the plaintiff has not established the nexus between the purchase of materials under Exs.A20 to A37 as well as the payment of Rs.10,000/- for electricity, metrowater and drainage connection and the agreement of sale dated 09.04.1986. On the aforesaid findings, the learned trial Judge, decreed the suit only in respect of a sum of Rs.3,99,753.42 along with interest at 9% p.am. to be paid by the defendant to the plaintiff from 12.12.1989 till the date of filing of the suit and thereafter interest at 6% till the date of realisation. Aggrieved by the same, the plaintiff has filed the present appeal.

9. The respondent/defendant though served, has not chosen to appear either in person or through his counsel. I have heard Ms.Saranya Vaidhyanathan, learned counsel for the appellants/plaintiff.

10. Learned counsel for the appellants would submit that the trial Court was not right in dismissing the suit with reference to a sum of Rs.47,320.61 having held that the amount that was received by the builder in his capacity as power agent of the defendant. Learned counsel for the appellants has also drew the attention of this Court to the reply under Ex.A19 issued by the defendant to the claim made by the plaintiff under Ex.A18. She would point out that the defendant had not denied the fact that the construction materials purchased under Exs.A20 to A37, were used for construction of the apartment and a sum of Rs.10,000/- was paid on 16.05.1988 for getting electricity, metrowater and drainage connection for the property in dispute. She would also contend that the trial Court was not right in granting interest at 9% p.a. from 12.12.1989 till the date of suit, since according to her, the development of a apartment complex is a commercial transaction. Learned counsel would further submit that the grant of interest must have been at higher rate and it cannot be at 9% and 6% p.a.

11.The following points arise for determination in the appeal:

1.Whether the trial Court is right in dismissing the suit with reference to a sum of Rs.47,320.61 (Rs.37,320.61 towards value of the construction materials purchased for the apartment + Rs.10,000/- towards electrical, metrowater and drainage connection)?

2.Whether the trial Court is right in granting interest only at 9% from 12.12.1989 till the date of filing the suit and at 6% p.a.thereafter.

12.The trial Court had concluded that the plaintiff would be entitled to the monies received by the builder in his capacity as power agent of the defendant, during the currency of the agreement, while saying so, the trial Court has concluded that the plaintiff has not established the payment of Rs.10,000/- towards charges for obtaining electricity, metrowater and drainage connection. Learned counsel for the appellant would point out that the payment of Rs.10,000/- to the builder towards electricity, metrowater and drainage connection on 16.05.1988, is evidenced by Ex.A15. She would also point out that the trial Court is not right in holding that the payment of Rs.10,000/- has not been established. With reference to a sum of Rs.37,320.61 towards cost of construction materials, learned counsel would submit that in the reply under Ex.A18, the plaintiff called upon the defendant to execute and register the sale deed. But the defendant had denied the claim of the plaintiff. Therefore, according to her, the trial Court was not right in dismissing the suit with reference to settling a sum of Rs.47,320.61.

13.As regards the payment of Rs.10,000/- on 16.05.1988, I find much force in the contention that the conclusion of the trial Court that the payment has not been established, on the face of it, is erroneous. The same has been proved by producing Ex.A15, which is receipt dated 16.05.1988 issued by the builder. It is not in dispute that on 16.05.1988, the power of attorney executed by the defendant in favour of the builder was in force and the same was cancelled only on 26.07.1989. The trial Court was in error in rejecting claim of the plaintiff with reference to a sum of Rs.10,000/- as evidenced by Ex.A15 receipt.

14. So far as the cost of construction materials is concerned, I do not think that the plaintiff is entitled to succeed in her challenge to the finding of the trial Court. Admittedly, the agreement dated 09.04.1986 entered into between the builder and the plaintiff does not contain any clause authorizing the plaintiff to purchase construction materials for the purpose of construction. Reading of the agreement shows that a sum of Rs.4,25,000/- was fixed as consideration of 1/15th undivided share in land as well as construction of the flat, which has to be in accordance with the specifications set out therein. Therefore, there is no scope for the plaintiff to have purchased the construction materials and handed over the same to the builder to be used for construction. Hence, the contention that the construction material was utilised by the builder for constuction of the apartment in the land belonging to the defendant, cannot be accepted. Hence, Point (1) is answered partly in favour of the plaintiff to the effect that she is entitled to recover a sum of Rs.10,000/- as evidenced by

Ex.A15 dated 16.05.1988.

15.As regards the second point, the learned counsel for the appellant would submit that the trial Court was not right in granting minimum rate of interest at 9% from 12.12.1989 till the date of the suit and thereafter at 6% p.a. The suit was instituted on 14.12.1989. Therefore, the trial Court erred in granting interest at 9% from 12.12.1989 till the date of suit. Admittedly, a sum of Rs.3,99,753.42 has been paid on different dates upto 25.05.1988, a sum of Rs.10,000/- was paid on 16.05.1988. Thus, the total amount paid by the plaintiff is Rs.4,09,753.42. The plaintiff would be entitled to get interest atleast from i.e.25.05.1988.

16.The trial Court has not assigned any reason for granting interest at 6% p.a. during the pendency of the suit. Interest granted at 9% p.a. before the suit and at 6% p.a. during the pendency of the suit, appears to be very low. Therefore, I am of the considered view that the plaintiff is entitled to get 9% p.a. from 25.05.1998 till the date of realisation as the payments were made for for the development of the apartment which is a commercial transaction. Hence, the second point is answered partly in favour of the plaintiff/appellant.

17.In fine, the first appeal is partly allowed and the judgment and decree of the trial Court is modified as follows:

The defendant is bound to pay a sum of Rs.4,09,753.42 with interest at 9% p.a. from 25.05.1988 till the date of realisation along with proportionate costs.

Sd/-
Assistant Registrar (CS-iv)

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सत्यमेव जयते
Sub Assistant Registrar

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To

1)The IV Additional Judge, City Civil Court,
Chennai

2)The Section Officer,
VR Section, High Court,
Chennai.

+lcc to Mr.S.RAGHUNATHAN, Advocate, S.R.No. 64163

A.S.No.757 of 2006

TR(18/01/2018)