

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.456 of 2005

J.R. Swarnkar, S/o. Shri Sewak Ram Swarnkar, Aged about 58 years, R/o. Sindhiya Nagar, Durg (CG)

----- Appellant/Plaintiff

Versus

1. Nathani Prasad, S/o. Shri Devsharan Shah, Aged about 55 years, R/o. Mekan India Limited Rauklela (Orissa) Present Address-471 Sindhiya Nagar (Laxmi Sadan), Durg (CG)
2. Akhilesh Kumar Sahu @ Gupta, Aged about 40 years, R/o.471 Laxmi Sadan, Sindhiya Nagar, Durg (CG)

----- Respondents/Defendants

For Appellant/Plaintiff : Mr.Arvind Dubey, Advocate
 For Respondents/defendants : None present

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

04/12/2019

1. This plaintiff's second appeal under Section 100 of the CPC was admitted for hearing by formulating the following substantial questions of law:-

"1. Whether the Courts below erred in law in accepting the Commissioner's report dated 4.11.95 when admittedly the Commissioner performed the measurement in absence of the plaintiff ?

2. Whether the said report vitiates on the said ground alone and it cannot be made basis of the decree particularly in view of the provisions of Order 26 Rule 18 C.P.C. ?"

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The plaintiff is contractor. He entered into agreement for construction of house of the defendants. According to the plaintiff, he has completed the construction work and ₹34,616/- is outstanding against the defendants, which he is entitled along with interest and as such, he filed a suit for recovery of ₹34,616/-.
3. The defendants filed their joint written statement and denied the averments made in the plaint stating inter-alia that additional amount of ₹ 4000/- has already paid to the plaintiff, therefore, he is entitled for recovery of the same by way of counter-claim.
4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 25.2.2003, dismissed the suit and allowed the counter-claim of the defendants on the basis of report of the Commissioner to the tune of ₹ 3,938/-. On appeal being preferred by the plaintiff, the first appellate Court dismissed the appeal and upheld the judgment and decree of the trial Court, against which, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.

5. Mr.Arvind Dubey, learned counsel for the appellant/plaintiff, would submit that concurrent finding recorded by two Courts below dismissing the suit and granting counter-claim is perverse and contrary to record.

6. None present for the respondents/defendants.

7. I have heard learned counsel for the appellant/plaintiff and considered his submissions made hereinabove and went through the record with utmost circumspection.

8. Both the Courts below relying upon report of Commissioner Shobha Ram Tamrarkar (PW-1) has clearly reached to the conclusion that the plaintiff has completed the construction work of ₹2,96,462/-, whereas he has been paid ₹ 3,00,400/-, as such, he has been paid excess amount of ₹ 3938/-, which the defendants are entitled to recover from him. Both the Courts below have recording a finding that the defendants have already paid ₹ 3,00,400/- to the plaintiff for construction of house, whereas he has been completed the construction work of ₹ 2,96,462/- and thereby he has been paid excess amount of ₹ 3938/-, which the defendants are entitled to recover from him, as such, the said finding is finding of fact based on evidence available on record, which is neither perverse nor

contrary to record.

9. The argument that the Commissioner has taken measurement in absence of the appellant is not correct and is not admitted position on record. He has only said that he has not given written notice.

10. Accordingly, the second appeal being without substance is liable to be and is hereby dismissed leaving the parties to bear their own cost(s). The substantial questions of law are answered in favour of the defendants and against the plaintiff.

11.A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

B/-