

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.02.2019

PRONOUNCED ON : 06.03.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1176 OF 2005

1.Maria Auxilla

2.Margaret Estella Mary

...Appellants/Respondents/Defendants

Vs.

V.Sebastian

...Respondent/Appellant/Plaintiff

Prayer :- Second Appeal has been filed under Section 100 of the Civil Procedure Code against the Judgement and Decree dated 21.04.2005 passed in A.S.No.32 of 2004 on the file of the District Court, the Nilgiris at Udhagamandalam, reversing the judgement and decree dated 22.09.2004 passed in O.S.No.63 of 2003 on the file of the Subordinate Court, Udhagamandalam.

For Appellants : Mr.C.Kulanthaivel

For Respondent : Mrs.AL.Ganthimathi

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 21.04.2005 passed in A.S.No.32 of 2004 on the file of the District Court, the Nilgiris at Udhagamandalam, reversing the judgement and decree dated 22.09.2004 passed in O.S.No.63 of 2003 on the file of the Subordinate Court, Udhagamandalam.

2.The second appeal has been admitted on the following substantial questions of law:

"a.Whether the lower appellate Court is right in holding that the plaintiff is entitled for the claim amount when no supporting documents produced for the disputed facts?

b.Whether the lower appellate Court is right in allowing the claim only on the

basis of the Commissioner/Expert Report?

c. Whether the lower appellate Court is right in holding that amount on the basis of the Commissioner's report when it was prepared after the reconstruction and repair work of the building?

d. Whether the lower appellate Court is right in allowing the claim on the basis of the Engineer's report without discussing the escalation cost at the time of inspection?

e. Whether the lower appellate Court is right in allowing the claim that the non reply to the telegram will amount to acceptance of the claim of the plaintiff?

f. Whether the lower appellate Court is correct in holding that the quality used for the construction is not of inferior quality since the defendants have done the house warming ceremony?

g. Whether the lower appellate Court erred in misappreciated the Engineer's report and only on the basis the relief was granted to the plaintiff?"

3. Considering the scope of the issues involved in the second appeal between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

4. The parties are referred to as per their rankings in the trial Court, for the sake of convenience.

5. The suit has been laid by the plaintiff for recovery of money.

6. Briefly stated, according to the plaintiff, he being a Civil Engineer by profession has been engaged by the defendants for the purpose of putting up the construction of two residential buildings for them in the site and according to the plaintiff, in connection with the abovesaid work, the parties had entered into an agreement on 08.04.2002 and the plaintiff had agreed to put up the construction of the two buildings for

the defendants at the rate specified in the abovesaid agreement and consequently, it is put forth by the plaintiff that he had put up the construction and further, according to him, while the construction was in progress, the defendants requested him to make certain additional construction works to the extent of Rs.1,73,900/- and accordingly, the plaintiff had also put up the construction including the additional construction as requested by the defendants and thus, it is put forth by the plaintiff that he had put up the construction of the two houses to the value of Rs.9,85,900/- and with reference to the same, the defendants had paid only a sum of Rs.7,40,000/- during the course of the said construction and subsequently, after the issue of the telegram by the plaintiff, they paid a sum of Rs.20,000/-, leaving a balance sum of Rs.2,25,900/- unpaid and the defendants, without paying the said amount, unlawfully obtained the possession of the two houses put up by the plaintiff for them and hence, according to the plaintiff, he has issued a legal notice calling upon the defendants to pay the amount due to him, in connection with the additional construction put up by him at the request of the defendants and to the same, the defendants sent a reply containing false allegations and hence, according to the plaintiff, he has been necessitated to lay the suit for recovery of the money due to him from the defendants.

7.The defendants resisted the plaintiff's case and as far as the agreement entered into between the parties dated 08.04.2002 in respect of the construction of the two houses by the plaintiff for them, the same has not been controverted by the defendants and however, stiffly disputed the case of the plaintiff that the defendants made an oral request to put up certain additional construction at the cost of Rs.1,73,900/- and according to the defendants, no such additional construction had been required to be made by them to the plaintiff as put forth in the plaint and according to the defendants, the plaintiff has not put up the construction as undertaken by him under the agreement entered into between parties and furthermore, would also plead that the plaintiff had used highly defective materials of substandard quality and failed to put up the various constructions as agreed to by him under the agreement and when the defendants took the possession of the two houses, they noticed the various defects in the construction put up by the plaintiff as detailed in the written statement and thereby, according to them, they had been necessitated to put up the additional construction on their own and at their own costs and therefore, disputed the claim of the plaintiff that he has put up the construction of the two houses for the defendants at a cost of Rs.9,85,900/- and put forth the case that the plaintiff, with a view to make undue gain by taking advantage of the

innocence of the defendants, they being ladies, it is stated that the suit has come to be laid by the plaintiff without any cause and therefore, sought for the dismissal of the plaintiff's suit.

8. In support of the plaintiff's case, PWS1 & 2 were examined and Exs.A1 to A14 were marked. On the side of the defendants, DW1 was examined and Ex.B1 series were marked. Further, Exs.C1 to C7 were marked.

9. On a consideration of the oral and documentary evidence adduced by the respective parties and the submission made, the trial Court was pleased to dismiss the plaintiff's suit. On appeal, the first appellate Court was pleased to set aside the judgment and decree of the trial Court and thereby, decreed the suit in favour of the plaintiff as prayed for. Impugning the same, the defendants have come forward with the present second appeal.

10. It is not in dispute that the defendants had entrusted the construction work of the two houses to the plaintiff, who is a Civil Engineer and it is seen that there is no dispute with reference to the same, the plaintiff and the defendants had entered into an agreement on 08.04.2002, which has come to be marked as Ex.A1. It is seen that following Ex.A1, the plaintiff had put up the construction of the two houses for the defendants and according to the plaintiff, during the progress of the construction, the defendants had orally requested him to put up the additional construction works in the houses to the value of Rs.1,73,900/- and accordingly, he has also put up the additional construction works as requested by the defendants and accordingly, claiming that he had put up the construction of the two houses at a cost of Rs.9,85,900/- and putting forth the case that in all, the defendants had paid only a sum of Rs.7,60,000/- and liable to pay the balance sum of Rs.2,25,900/-, accordingly, it is put forth by the plaintiff that inasmuch as the defendants had failed to pay the said sum, despite the legal notice, he has been necessitated to levy the suit against the defendants.

11. The execution of Ex.A1 agreement between the parties is not disputed by the defendants. They have however disputed that they had instructed or requested the plaintiff to put up the additional construction works in the premises to the extent of Rs.1,73,900/-. In such view of the matter, as rightly determined by the trial Court, inasmuch as the defendants had disputed that they had requested the plaintiff to put up the additional construction works as put forth by the plaintiff, it is for the plaintiff to establish that other than the works contemplated under Ex.A1 agreement, he had also put up the additional construction works in the houses put up by him for

the defendants.

12. Materials placed on record go to show that the plaintiff has received a sum of Rs.7,60,000/- from the defendants towards the cost of the construction of the two houses. Furthermore, as rightly determined by the trial Court, it is seen that the defendants on their own had put up the main Door, overhead tank, septic tank, underground water tank storage tank, main gate fixed in the compound wall at their costs and the same had been determined by the trial Court, on the basis of the materials available on record and, as such, there is no dispute as regards the abovesaid factual aspects. It is further seen that the plaintiff had put up the compound wall not contemplated under Ex.A1 at a cost of Rs.60,000/- and therefore, when according to the defendants, they have not dictated the plaintiff to put up any additional construction works to the extent of Rs.1,73,900/- and on the other hand, the plaintiff insisting that he had put up the additional construction works as suggested by the defendants and inclusive of the additional construction works put up by him, the total value of the construction put up by him amounts to Rs.9,85,900/-, it is for the plaintiff to establish that he had put up the additional construction works as projected by him.

13. On a reading of the terms of the agreement Ex.A1, it is stipulates that if any additional construction is carried over, the payment will be separate. Therefore, if at all the defendants had made any suggestion or requested the plaintiff to put up the additional works in the house construction, definitely, as rightly held by the trial Court, the plaintiff being a civil engineer, would have endeavoured to enter into an additional or supplementary agreement with the defendants with reference to the same one way or the other to bring out the nature of the additional construction requested to be made by the defendants in the premises and the costs to be incurred with reference to the same etc., On the other hand, the case of the plaintiff that he had readily complied with the oral request of the defendants in putting up additional construction works to the extent of Rs.1,73,900/- without endeavouring to bring the same on record one way or the other, that too in the 21 century and as rightly determined by the trial Court, no prudent person would have endeavoured to put up the additional construction without bringing the request of the defendants with reference to the same in writing one way or the other and in such view of the matter, when the defendants had thrown a stiff challenge to the claim of the plaintiff that he had put up the additional construction on their behalf and on the other hand, the defendants having come forward with the case that the construction work made by the plaintiff is done with the

defective materials and of substandard quality and the plaintiff has not completed the construction in full shape and thereby, the defendants had been forced to put up further construction in the premises as detailed in the written statement, in such view of the matter, with reference to the putting up of the additional construction in the premises, when other than the interested testimony of the plaintiff, we have no other evidence adduced with reference to the same on the part of the plaintiff, the case of the plaintiff cannot be easily countenanced.

14.No doubt, in this case, the Engineer had been appointed and the commissioner had also been appointed and the commissioner had inspected the premises in question and ascertained the nature of the construction put up and filed his report and plan and the other allied documents which have come to be marked as Exs.C1 to C7. No doubt, the defendants have not put forth any objection to the same. Be that as it may, it is seen that based on the commissioner's report and plan and the evidence of the engineer examined as PW2, we cannot hold that the construction works as detailed thereunder which had been put up and not covered under Ex.A1 agreement had been put up only by the plaintiff at the oral request of the defendants as claimed by the plaintiff. It is further seen that the engineer, who had been assigned to determine the value of the construction in the premises, had taken the value as prevailing on 02.08.2003 and the same had been accepted by him during the course of his evidence. As rightly determined by the trial Court, when the parties had entered into agreement with reference to the construction work on 08.04.2002, if at all the value of the construction has to be ascertained by the engineer examined as PW2, he should have endeavoured to ascertain and fix the value as prevailing on the date of the agreement marked as Ex.A1 and on the other hand, his case that he had taken the value of the articles /materials utilised for the construction work as on 02.08.2003 would only lead to the position that the value based on the exaggerated price had been arrived at by the engineer in his report projected in the matter. Furthermore, as could be seen from the evidence of the engineer, he has ascertained the construction put up in the premises by viewing the outer appearance and it is found that he has not endeavoured to conduct the inspection of the premises and the materials used therein by ascertaining the value of the same in a scientific manner and in such view of the matter, as rightly determined by the trial Court, when no inspection had been made by the engineer to value the building on scientific methods by digging up the foundation, noting the density of the iron rods used for making concrete pillars and the RCC roofing and not ascertained proportion of cement, sand and jelly used towards the construction, in such view of the matter and further more, when the engineer has assessed the value of the construction seen by

him as available on 02.08.2003, it is not unnatural to note that the value of the construction assessed by the engineer would be definitely only on the higher side as determined by the trial Court. Furthermore, merely from the report of the commissioner and engineer marked as Exs.C1 to C7 in toto, we cannot safely conclude that the works noted by them and not included in Ex.A1 agreement had been only carried on by the plaintiff and accordingly, the defendants are liable to pay the cost to the plaintiff towards the same. Merely because, the defendants have not filed any objection to the commissioner's report and plan projected in the matter nor preferred any counter claim against the plaintiff in the lis that by itself would not entitle the plaintiff to contend that he had put up additional constructions works in the premises as requested by the defendants and accordingly, entitled to claim the value towards the same as put forth by him that too based on Exs.C1 to C7 projected in the matter, when the works noted and mentioned in Exs.C1 to C7 are not shown to have been put up in complete shape by the plaintiff inclusive of the additional constriction not covered under Ex.A1 agreement. On the other hand, when the materials placed on record go to disclose that the defendants after obtaining the possession of the premises had put up additional construction on their own at their cost, in such view of the matter, it is seen that without any basis, the plaintiff cannot be allowed to claim the costs towards the alleged additional construction put up by him in the premises, particularly, having failed to establish that he had actually put up the same as requested by the defendants.

15.If really, the defendants had not paid the amount to the plaintiff towards the construction put up by him in the premises, particularly, towards the full construction therein put up by him, the plaintiff would not have allowed the defendants to take the possession of the premises and occupy the same. On the other hand, the materials placed on record go to show that the possession of the premises had been taken by defendants with the knowledge of the plaintiff and following the same, they have also performed the house warming ceremony function and this would only go to show that inasmuch as the defendants had paid the cost towards the construction agreed to and put up by the plaintiff as per Ex.A1 agreement, accordingly, the plaintiff had also not resisted the defendants in taking the possession of the premises one way or the other and the case of the plaintiff that the defendants had forcibly taken the possession of the premises stealthily and performed the house warming ceremony function, as such, cannot be accepted and rightly rejected by the trial Court.

16.If really, the defendants had taken the unlawful possession of the premises in question without the plaintiff's knowledge one way or the other, at least, immediately thereafter, the plaintiff would have resorted to necessary legal action against the defendants with reference to the same. On the other hand, it is seen that no action whatsoever has been initiated by the plaintiff against the defendants with reference to the occupation of the premises by them and the performance of the house warming ceremony function and also putting up of the additional construction on their part and all would go to show that inasmuch as the plaintiff had been paid the amount due to him towards the construction put up by him as per Ex.A1 agreement, in such view of the matter, the plaintiff had not also endeavoured to take any further action against the defendants in any manner with reference to the occupation of the premises by them.

17.Merely because, the defendants have not responded to the telegram sent by the plaintiff, that by itself, would not lead to the conclusion that the defendants had admitted the case of the plaintiff in toto. On the other hand, to the legal notice issued by the plaintiff marked as Ex.A3, the defendants have sent a reply marked as Ex.A4 refuting the claim of the plaintiff that he has put up additional construction work in the premises at the cost of Rs.1,73,900/- and in such view of the matter, despite the same, when there is no acceptable and reliable materials on the part of the plaintiff that any such oral request had been made by the defendants with reference to the additional construction works and also when there is no evidence or material on the part of the plaintiff that he himself had put up the additional construction works as requested by the defendants and with reference to the same, no agreement had been entered into between the parties one way or the other and merely on the basis of Exs.C1 to C7 and the evidence of the engineer, who has been examined as PW2, we cannot conclude that it is only the plaintiff, who had put up the full construction works in the premises and on the other hand, the conduct of the plaintiff in allowing the defendants to occupy the premises without any protest in any manner, all would go to disclose that inasmuch as the plaintiff had been paid the amount due to him towards the construction work put up by him as per Ex.A1 agreement, accordingly, it is seen that the defendants had been allowed to occupy the premises in question and further, proceeded with the construction at their own cost and allowed to be in the possession of the premises peacefully thereafter. In such view of the matter, the case of the plaintiff that the defendants are liable to pay a further sum towards the additional construction works said to have been made by him in the premises cannot be countenanced, particularly, when there is no reliable and

convincing materials projected on the part of the plaintiff pointing to the same.

18. The first appellate Court seems to have accepted the plaintiff's case, merely, on the footing that the defendants had not preferred any objection to the commissioner's report and plan projected in the matter as Exs.C1 to C7. Merely because, the defendants had failed to put forth their objection to the abovesaid commissioner's report and plan, that by itself, would not be sufficient to conclude that the construction works noted by the commissioner and as per the evidence deposed by the engineer, are only put up by the plaintiff as per the request of the defendants and furthermore, when the engineer has also not assessed the value of the construction put up in the premises as on the date of Ex.A1, in all, it is seen that the first appellate Court is found to have committed a serious error in accepting the plaintiff's case only based on Exs.C1 to C7 coupled with the evidence of the engineer examined as PW2. On the other hand, as rightly determined by the trial Court, the first appellate Court has failed to note that no supporting documents had been projected by the plaintiff that he had put up additional construction works in the premises at the oral request of the plaintiff and when the commissioner has not valued the construction on the date of Ex.A1 agreement and had arrived at value as on 02.08.2003 and when furthermore, the plaintiff having allowed the defendants to occupy the premises without any protest, in all, it is seen that and furthermore, the determination of the first appellate Court that the failure of the defendants in not responding to the telegram sent by the plaintiff would tantamount to the acceptance of the plaintiff's case being found to be not tenable in the eyes of law, particularly, when it is seen that the defendants had refuted the case of the plaintiff by sending a reply to the legal notice issued by the plaintiffs, it is evident that the judgement and decree of the first appellate Court upholding the plaintiff's case is not based upon the proper appreciation of the materials placed on record, both oral and documentary, as per the principles of law governing the same. In such view of the matter, they are liable to be set aside as being illogical and irrational and accordingly, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the defendants and against the plaintiff.

In the light of the above discussions, the Judgement and Decree dated 21.04.2005 passed in A.S.No.32 of 2004 on the file of the District Court, the Nilgiris at Udhagamandalam are set aside and the judgement and decree dated 22.09.2004 passed in O.S.No.63 of 2003 on the file of the Subordinate Court, Udhagamandalam, are confirmed. Accordingly, the second appeal

is allowed with costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar (CS-VI)

//True copy//

Sub Assistant Registrar

sms

To

1.The District Court, the Nilgiris at Udhagamandalam.

2.The Subordinate Court, Udhagamandalam.

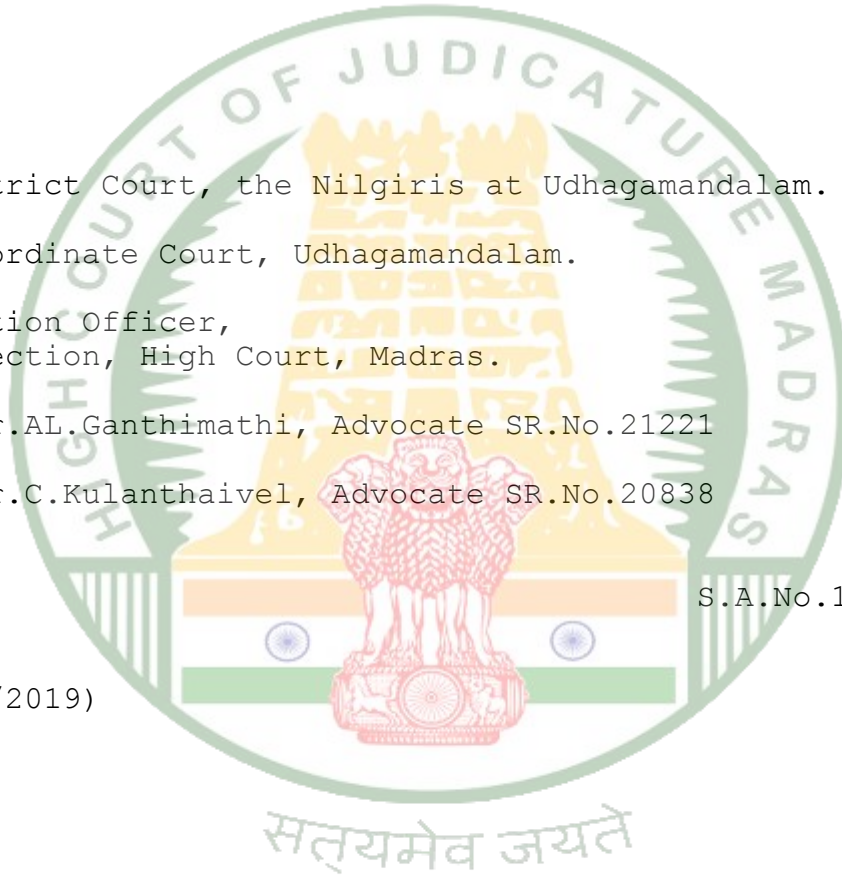
3.The Section Officer,
V.R. Section, High Court, Madras.

+1cc to Mr.AL.Ganthimathi, Advocate SR.No.21221

+1cc to Mr.C.Kulanthaivel, Advocate SR.No.20838

S.A.No.1176 of 2005

GJ (CO)
GMY (22/05/2019)



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