**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

**RESERVED ON : 15.12.2016**

**PRONOUNCED ON : 06.11.2020**

**CORAM :**

**THE HONOURABLE MR. JUSTICE P.VELMURUGAN**

**C.S.No.449 of 1999**

1. M/s.Euro Properties and Investments (P) Ltd., Represented by its Managing Director, Mr.AR.Ramanathan

2.M/s.Euro Leader Fashions Ltd., Represented by its Managing Director, Mr.AR.Ramanathan .. Plaintiffs

Vs.

Mr.T.Paul Rajan .. Defendant

**PRAYER :** Civil suit is filed under Order IV Rule 1 of OS Rules r/w. Order VII, Rule 1 of CPC:-

(i) Directing the defendant to pay the second plaintiff the sum of Rs.62,93,500/- together with further interest on Rs.41,00,000/- at 18% per annum from the date of plaint till date of realization;

(ii) Directing the defendant to pay the costs of the suit and

(iii) grant such further or other reliefs.

For Plaintiffs : Mr.N.S.Manoharan
For Mr.N.Nissar Ahmed

For Defendant : Mr.R.Thirugnanam

**JUDGMENT**

The suit is instituted by the plaintiffs against the defendant for recovery of a sum of Rs.62,93,500/- together with further interest on Rs.41,00,000/- at 18% per annum from the date of the plaint till date of realization and for costs.

2. The averments made in the plaint are as follows:-

2.1. The defendant was a promoter of a property measuring an extent of 15 acres and 66 cents comprised in T.S.Nos.63 to 66 situated at Saram Village, Thiruvalluvar Nagar, Pondicherry for the development of the same into flats by an Agreement with the owners of the said land. The defendant approached the second plaintiff through P.T.Gopala Raja, who is the brother of the defendant for the development of the above said project. In pursuance of an oral understanding, a sum of Rs.5,00,000/- was initially paid to the defendant on 11.08.1994 and the terms of the Memorandum of Understanding were finalized on 31.08.1994 and later it was engrossed on non-judicial stamp paper purchased on 07.09.1994.

While engrossing the Memorandum of Understanding, the date was typed as 31.08.1994 instead of 07.09.1994 and instead of second plaintiff's name, the first plaintiff's name was typed erroneously as a party to the Memorandum of Understanding.

2.2. It is further stated in the plaint that in pursuance of the said Memorandum of Understanding, a sum of Rs.20,00,000/- was paid to the defendant through P.T.Gopala Raja to the defendant on various dates. As per the Memorandum of Understanding, the defendant is liable to pay a sum of Rs.21,00,000/- towards its share of fixed return by the said project in addition to Rs.20,00,000/-. Since the defendant failed to pay a sum of Rs.41,00,000/-, the present suit has been instituted for recovery of a sum of Rs.62,93,500/- together with further interest on Rs.41,00,000/- at 18% per annum from the date of the plaint till date of realization and for costs.



3. In the written statement filed by the defendant, it is stated that the defendant has never received the alleged sum of Rs.20,00,000/- from the second plaintiff. He has never authorized P.T.Gopala Raja to act on

his behalf and any receipt of money by the said P.T.Gopala Raja would not bind on the defendant and the second plaintiff was not advanced any money to the defendant and further the Memorandum of Understanding was not at all implemented and acted upon and no money has been advanced to the defendant as alleged in the plaint and that the defendant's brother P.T.Gopala Raja, who is not in good terms with the defendant, with a view to take vengeance, harass cause loss and damage to the defendant is behind the institution of the suit. Hence, the defendant is no way liable to pay the amount as claimed and hence, prays for dismissal of the suit.

4. Based on the above pleadings and documents filed by both parties and submission made by both the Counsel, the following issues have been framed by this Court on 08.08.2001 :-

> *"1. Whether the plaintiffs made payments to the defendant as stated in paras 4 and 5 of the plaint?*
>
> *2.Whether the defendant authorised Mr.P.T.Gopal Raj to act on his behalf and the same is not binding on the defendant?*

*3. Whether the Memorandum of Understanding was implemented and monies were advanced to the defendant as stated in the plaint?*

*4. Whether the second plaintiff is entitled to the suit claim?*

*5. To what other reliefs the parties are entitled?*

5. After framing of issues, during trial, on the side of the plaintiffs, the Managing Director of both the plaintiff companies, viz., AR.Ramanathan was examined as P.W.1 and 26 documents were marked as Exs.P1 to P26. On the side of the defendant, the sole defendant examined himself as D.W.1 and no document was marked.

6.1 The case of the plaintiffs is that the defendant, who was carrying on real estate business in the name and style of M/s.Fast Builders, as its sole proprietor at Puducherry. The defendant's brother P.T.Gopala Raja, is one of the Directors of the plaintiffs Company. The defendant approached the second plaintiff through his brother for financial assistance. After some negotiations, the second plaintiff agreed to pay a sum of Rs.20,00,000/- subject to the terms and conditions of Ex.P1 Memorandum of Understanding dated 31.08.1994 and the same was engrossed on non-judicial stamp paper purchased on 07.09.1994. Though, the said Memorandum of Understanding was made between the second plaintiff and the defendant, the name of the first plaintiff and date were typed erroneously, as though the Managing Director of the both the plaintiff Companies are one and the same viz., Mr.AR.Ramanathan.

6.2. It is further stated that as per the terms of the Memorandum of Understanding, the defendant, who is the promoter of the said project shall construct 24 Units of residential flats with 28000 sq.ft of built up area at Saram Village, Thiruvalluvar Nagar, Pondicherry/Oulgaret Commune. The second plaintiff, who is the co-promoter of the said project shall provide financial assistance, as such, Rs.20,00,000/- was paid to the defendant. Further, the second plaintiff is entitled for a sum of Rs.75/- per sq.ft of the constructed area or a sum of Rs.21,00,000/- as its share of fixed returns from the said project in addition to Rs.20,00,000/-. The defendant also agreed to complete the construction within a period of 18 months and to pay a sum of Rs.41,00,000/- to the second plaintiff. Hence, the defendant is liable to pay interest at the rate of 18% per annum and the amount due after expiry of the 18 months from the date of the Memorandum of Understanding.

6.3 It is further stated that the defendant has received a sum of Rs.20,00,000/- from the second plaintiff in instalments during the period from August 1994 to January 1995 and had completed the construction within a prescribed time. However, the defendant failed to repay the said amount along with fixed return, the plaintiffs sent a legal notice through their counsel. Since the defendant sent a reply notice denying his liability, the plaintiffs are constrained to file the suit for recovery of a sum of Rs.62,93,500/- together with further interest on Rs.41,00,000/- at 18% per annum from 06.03.1996 to till the date of realization and for costs.



7.The case of the defendant is that the defendant never received a sum of Rs.20,00,000/- from the second plaintiff and has denied the receipt of the said payment. The defendant never authorised his brother P.T.Gopala Raja to act on his behalf to receive the money from the second plaintiff. As such, any receipt of money by P.T.Gopala Raja would not bind on the defendant. Further, it is stated that the Memorandum of Understanding was not at all acted upon between the defendant and the second plaintiff. The defendant's brother P.T.Gopala Raja, who was not in good terms with the defendant, due to wreak vengeance and to cause loss and damage to the defendant, was behind the institution of the suit. The defendant is no way liable to pay the amount as claimed by the plaintiffs and hence, the suit is liable to be dismissed.

8.The learned counsel for the plaintiffs would submit that the Memorandum of Understanding was entered into between the second plaintiff and the defendant, which was marked as Ex.P1. But, by inadvertently, in the said Memorandum of Understanding a typographical error has been occurred with regard to the dates and parties names. He would further submit that the defendant's brother P.T.Gopala Raja received the money on behalf of the defendant and the same was used for purchasing materials for the defendant's project at Pondicherry. Further, the payments made by the second plaintiff on various dates were acknowledged and confirmed by P.T.Gopala Raja. The said confirmation letter dated 28.04.1997 has been marked as Ex.P.5. He would further submit that the plaintiffs are tenants in the defendant's family property. The defendant's brother P.T.Gopala Raja is also one of the Directors of the plaintiffs Company.

9. The learned counsel for the plaintiffs would submit that the payments made to P.T.Gopala Raja were utilised for purchasing materials for the defendant's project. Further, the defendant admitted that he is an income tax assessee and he has maintained the accounts regularly. But none of them were produced. During the cross examination, the defendant has deposed that he has not received any money from the second plaintiff and he borrowed money from the Bank of Baroda. However, the defendant has not produced any documents related to the loan transactions with the Bank of Baroda for the construction of the said project. He would further submit that since the defendant was in need of finance, he approached the second plaintiff through his brother. After some negotiations, the second plaintiff agreed to pay a sum of Rs.20,00,000/- to the defendant. Since the brother of defendant is also one of the Directors of the plaintiffs Company, all

the payments except one transaction of Rs.4 lakhs, remaining Rs.16,00,000/- paid to the defendant through P.T.Gopala Raja. He would further submit that Ex.P5 letter of confirmation issued by P.T.Gopala Raja would clearly show that the defendant after utilising the financial assistance extended by the plaintiffs, has completed the project in time. However, since the defendant has failed to repay the said payments, the plaintiffs' counsel sent a legal notice to the defendant. The defendant also sent a false reply and denied the liability. The learned counsel would further submit that the defendant is liable to pay Rs.41,00,000/- after expiry of 18 months from the date of Memorandum of Understanding with 18% interest per annum. Therefore, as on date of filing of the plaint, the defendant is liable to pay a sum of Rs.62,93,500/- and hence, the present suit.



10. The learned counsel for the plaintiffs by placing reliance on the decisions of the Hon'ble Supreme Court in the cases of ***K.M.Patel V. Firm, Mohamadhussain Rahimbux*** reported in AIR 1981 SCC 977 and ***Ramdas Oil Mills Vs. Union of India (Military Dept)*** reported in AIR 1977 SCC, submitted that the defendant has withheld the important

documents and he has also failed to produce the accounts books. Therefore, for the non-production of best evidence, the Court can draw adverse inference against the defendant.

11. The learned counsel for the plaintiffs would submit that as per the Memorandum of Understanding Ex.P1, the second plaintiff agreed to pay a sum of Rs.20,00,000/- for construction of the said project. As per oral arrangements, the second plaintiff paid the said amount through the defendant's brother and the defendant also received the same. However, the defendant has denied the same and stated that he has borrowed loan from the Bank of Baroda and completed the project. Further, the plaintiffs' counsel sent a notice to the defendant for production of necessary documents, for which, the defendant sent a reply notice Ex.P22 stating that he cannot produce any document. If the statement of accounts maintained by the defendant in the Banks and also the Income tax returns are filed before this Court, it will enlighten the source of income to construct the building or to complete the project. He would further submit that the defendant admitted Ex.P1 and advance payments. The brother of the defendant has also given Ex.P5, confirmation and

acknowledgment letter regarding confirmation of payments made by the plaintiffs to the defendant. However, the defendant has denied the same and stated that since the second plaintiff has not paid the amount, he approached the Bank of Baroda and obtained loan and completed the construction. Had it be true, it is the duty of the defendant to produce those documents, which are vital documents to this case and he cannot withhold the best evidence. Therefore, the adverse inference can be drawn as per the above referred judgments supra.

12.The learned counsel for the defendant would submit that the defendant never borrowed any money from the second plaintiff. Though, Ex.P1 Memorandum of Understanding was entered into between the second plaintiff and the defendant, the second plaintiff has not paid any amount to the defendant and as per the Memorandum of Understanding. He would further submit that the defendant has not appointed any agent neither his brother nor any person to act on his behalf to receive the money from the second plaintiff. Therefore, the defendant is not liable to pay the said amount. Further, the Memorandum of understanding Ex.P1 was not at all acted upon and implemented. Therefore, the defendant is not liable to pay the amount of Rs.21,00,000/- as the share of the second plaintiff's fixed returns in addition to Rs.20,00,000/-. He would further submit that Ex.P1 was entered into between the first plaintiff and the defendant, however, it was signed by the second plaintiff and therefore, the defendant was not consensus and the Memorandum of Understanding is not valid and it will not bind the defendant. Further, the non-judicial stamp paper was purchased on 07.09.1994 and while engrossing the Memorandum of Understanding, the date was mentioned as 31.08.1994, which itself will go to show that the Memorandum of Understanding is not valid in law.

13. The learned counsel for the defendant would further submit that even in Clause1 of Memorandum of Understanding, the co-promoter/the second plaintiff herein agreed to pay a sum of Rs.20,00,000/- being the total financial assistance required by the promoters/the defendant herein and that the promoter shall issue a receipt for the said amount. However, the second plaintiff has not filed any

receipt for the alleged payment made to the defendant. He would further submit that the Managing Director of the plaintiffs Company viz., AR.Ramanathan was examined as P.W.1 and he deposed that on 12.08.1994, Rs.5,00,000/- was not directly paid to the defendant and the same was paid to the defendant's brother. Further, the payments of Rs.1,00,000/-, Rs.3,00,000/-, Rs.50,000/- were also not paid to the defendant directly and the same were paid to the defendant's brother. Further, on 20.10.1994, the payment of Rs.2,50,000/- was paid to M/s.Fast Builders, represented by its sole proprietor the defendant herein. Further the other payments were also not made to the defendant. There is also difference in the details of payments shown in the plaint as well as in the proof affidavit. The amount of Rs.20,00,000/- was not paid to the defendant directly. Therefore, P.W.1 himself admitted that the plaintiffs have not made any payment directly to the defendant and also the plaintiffs have not proved that the defendant has appointed his brother P.T.Gopala Raja as his agent.



14. The learned counsel for the defendant would further submit that the plaintiffs have to prove that they have paid Rs.20,00,000/- to the

defendant as per the Memorandum of Understanding Ex.P1. He would further submit that the defendant has not given anything in writing to the plaintiffs authorising to pay the amount to P.T.Gopala Raja. As such receipt of any amount from the second plaintiff by P.T.Gopala Raja on behalf of the defendant would not bind on the defendant. The plaintiffs have not proved that the Memorandum of Understanding was acted upon between the second plaintiff and the defendant. Even, in the cross examination P.W.1 has admitted that the said amount was not paid to the defendant directly, however, the same was paid only to the defendant's brother. The defendant has categorically stated in the reply notice and also in the written statement that he did not receive any amount from the second plaintiff. Therefore, the plaintiffs have not proved that they have paid the amount as per Ex.P.1, the Memorandum of Understanding executed between the second plaintiff and the defendant and hence, the defendant is not liable to pay the said amount claimed in the plaint.



15. The learned counsel for the defendant would further submit that it is settled proposition of law that the plaintiffs have to prove their case independently. The plaintiffs have to stand on his own legs and they

cannot take advantage of any loop holes left by the defendant. Even though, the defendant has not produced any documents, it is the duty of the plaintiffs to establish that they have made payments to the defendant or otherwise at least they have to prove that P.T.Gopala Raja was appointed as an agent on behalf of the defendant and to receive the money from the second plaintiff. Therefore, non-production of any documents sought for by the plaintiffs will not lead adverse inference against the defendant. It is the burden of the plaintiffs to prove their case and the initial burden is always with the plaintiffs. Once, the plaintiffs proved their initial burden, then only the onus will shift to the defendant, in this case the plaintiffs have not proved initial burden and miserably failed to prove their case, hence, the submission of the counsel for the plaintiffs are liable to be rejected.



16. Heard both sides and perused the pleading and oral and documentary evidence.

17. **Issue No.2**

17.1 The plaintiffs have specifically stated that the defendant is a promoter, since he was in needs of money for his project, he approached the second plaintiff through P.T.Gopala Raja, who is the brother of the defendant for joining as a co-promoter for development of the property situated at Pondicherry. In pursuance of the oral undertaking, Rs.5,00,000/- was paid to the defendant on 11.08.1994 and the terms of Memorandum of Understanding was entered on 31.08.1994, later it was engrossed on the non-judicial stamp papers purchased on 07.09.1994. While engrossing the Memorandum of Understanding, the date was typed as 31.08.1994 instead of 07.09.1994 and instead of second plaintiff's name, the first plaintiff's name was typed erroneously as a party to the Memorandum of Understanding.

17.2 As per the terms of Memorandum of Understanding, a sum of Rs.20,00,000/- was paid to the defendant through P.T.Gopala Raja on various dates as mentioned in the paragraph 4 of the plaint. The plaintiffs have specifically stated that the defendant approached the second plaintiff through P.T.Gopala Raja, who is brother of the defendant and also one of the Directors of the plaintiffs Company for financial assistance and also for joining as a co-promoter for development of the project situated at Pondicherry. The plaintiffs have categorically stated that to extend the entire financial assistance, the second plaintiff has paid a sum of Rs.20,00,000/- to the defendant, for which, the defendant is liable to pay a sum of Rs.21,00,000/- towards its share of fixed returns in addition to Rs.20,00,000/-. Further, as per the Memorandum of Understanding, the second plaintiff has agreed to join as a co-promoter and subsequently, they have paid the amount to the defendant through his brother. The defendant has taken the defence that he has not authorised his brother to act as an agent on his behalf and has not given any authorisation letter in writing to the plaintiffs to pay the amount to P.T.Gopala Raja or to his brother to receive money from the plaintiffs. Therefore, in the absence of the same whatever, the amount paid to the brother of the defendant will not bind on the defendant.



17.3 It is settled proposition of law that the appointment of an agent either can be expressed or implied, they need not be always in writing. Even, it can be inferred from the circumstances and the contact of the parties, including the correspondences between them. Therefore, the Power Agent always need not necessarily be appointed only through written contract. The implied agency may arise from the contract or the situation or the parties or by operation of law by out of its necessity. It is useful to extract Section 187 of the Indian Contract Act, 1872, which reads as follows :

> "An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case."

17.4 Section 187 of Indian Contract Act, 1872 defines the terms expressed and implied authority. The expressed authority is one which is given by words spoken or written. The implied authority is one to be inferred from the circumstances of the case, which is accounted by things spoken or written or the ordinary course of dealing. The implied authority which is inferred from the contact of the parties or from the nature of the employment. Where the authority is not expressed the questions whether the agent had an authority to act in a particular matter on behalf of the principal is to be decided according to the circumstances of the case. It is necessarily required to be proved by circumstantial evidence of an agreement and surrounding facts of the contact of the parties may be on the basis of the inference. The course of dealing between the parties may also be held in determining the implied agency. It is an admitted fact that P.T.Gopala Raja is the brother of the defendant as well as one of the Directors of plaintiffs Company.

17.5 Further a perusal of Ex.P1, it is seen that the defendant's brother signed as one of the witnesses and he was also present at the time of execution of Memorandum of Undertaking. Once, the plaintiffs have stated that the defendant approached the second plaintiff through his brother and the second plaintiff has also agreed to extend the financial assistance to complete the construction and also agreed to join as a co-promoter. Further, Ex.P5, letter of the acknowledgment given by P.T.Gopala Raja would clearly show that the second plaintiff paid a sum of Rs.20,00,000/- to the defendant through P.T.Gopala Raja and the defendant has also received the said amount. However, the defendant denied the same. But, the issue in this regard is that the defendant has not given any authorisation letter in writing to pay the amount to P.T.Gopala

Raja. Hence, he has stated that transactions made by the second plaintiff with the defendant through P.T.Gopala Raja is not genuine and it would not bind on the defendant. Though, the defendant has not authorised P.T.Gopala Raja in writing to act as agent on his behalf and as stated earlier the contract of the agency can be either in writing or oral by contact. Therefore, considering the pleadings oral and documentary evidence, by contact the defendant allowed P.T.Gopala Raja to act as an agent or in other words the defendant authorised P.T.Gopala Raja to act on his behalf and therefore, the same is binding on the defendant. Accordingly, the issue No.2 is answered in favour of the plaintiffs and against the defendant.

18. **Issue No.1**

18.1 The specific case of the plaintiffs is that the defendant as a promoter approached the second plaintiff through his brother for financial assistance. They have also entered into an agreement Ex.P1, both the second plaintiff and the defendant have signed in the Memorandum of Understanding and the second plaintiff has agreed to pay Rs.20,00,000/- as advance for construction of the projects at Pondicherry. As per the Memorandum of Understanding after utilising the amount of Rs.20,00,000/- the defendant has to complete the project within 18 months, for which the defendant has to pay a sum of Rs.21,00,000/- towards share of the second plaintiff's fixed return in the said project in addition to Rs.20,00,000/-. However, the defendant has not paid Rs.41,00,000/- even after completion of the project and hence, the defendant is liable to pay 18% interest for Rs.41,00,000/- till the date of payments.

18.2 Though the plaintiffs have stated in paragraph 4 of the plaint regarding the mode of the payments to the defendant i.e cheques, demand drafts and by cash through P.T.Gopala Raja, except one payment i.e Clause D in paragraph 4 of the plaint. Further, the plaintiffs have stated that by utilising the amount paid by the second plaintiff, the defendant completed the project within the stipulated time, but he failed to repay the amount of Rs.20,00,000/- and fixed returns of Rs.21,00,000/-. Therefore, the plaintiffs' counsel sent a legal notice, the defendant denied the fact that he has not received money from the plaintiff. Though, the defendant has denied the receipt of the payments made through his brother, the amount received by the defendant's brother will not bind on the defendant. The plaintiffs have not denied the relationship with P.T.Gopala Raja. During the cross examination, the defendant has clearly admitted that the plaintiffs are the tenants in their family property situated at Chennai. The defendant's elder brother viz., P.T.Gopala Raja was carrying out their family business after the death of his father in 1981 and was collecting rents from the family property. Therefore, the contention of the defendant that he was not in good terms with his brother is not acceptable and he has not substantiate the said defence by examine any witness.

18.3. According to the defendant, Alvitone Laboratory was run by the defendant's brother as the authorised person on behalf of all the brothers and he has also having 20% share in the said Laboratory. The defendant's brother is also one of the Directors of the plaintiffs Company. The defendant was promoting Flats in Tiruvalluvar Nagar, Pondicherry. M/s.Fast Builders is the sole proprietory business of the defendant. There was a delay in obtaining loan from the Bank, therefore, he approached the plaintiffs through his brother P.T.Gopala Raja, the first plaintiff offered financial assistance to the project of M/s.Fast Builders. Hence, Ex.P1 was entered into between the defendant and second plaintiff. Even though, the name of the first plaintiff mentioned in Ex.P1, it was signed and sealed by the second plaintiff. Further, the plaintiffs have admitted that the Managing Director for the first and second plaintiffs Companies are one and the same. It is an admitted fact that the promoter requested the co-promoters to join them in the said project to provide financial assistance and hence, in the Memorandum of Understanding, the name of the first plaintiff has been wrongly referred to as a co-promoter of the said project. Though, the defendant has stated that since the plaintiffs failed to provide financial assistance, he obtained loan from Bank of Baroda. But he has not produced any document for the same.

18.4 Further, the defendant would depose that there was no written communication about their failure to provide financial assistance and he had not taken any steps to enforce the terms of Memorandum of Understanding. The defendant has spoken to AR.Ramanathan regarding Memorandum of Understanding. Further, the defendant would depose that he has negotiated with the Bank of Baroda, Pondicherry, but, he has not filed any document to show that he negotiated with the Bank of

Baroda and obtained loan. Though, the defendant has stated that at the time of contract, he was not in good terms with his brother, but, the defendant has denied that Ex.P1 was arranged by his brother and his brother signed as one of the witnesses in Ex.P1. A perusal of the written statement and also proof affidavit he has not stated any where that he never went along with P.T.Gopala Raja to approach the plaintiffs. Therefore, the contention of the defendant that he was not in good terms with the defendant's brother was not acceptable. Further contention that the second plaintiff has not paid the amount, the defendant approached the Bank of Baroda and obtained loan and completed the project. But, he has not produced any document for the same. The plaintiffs issued notice to produce the documents related to the statement of accounts of the Bank. However, the defendant has not produced any documents and denied the liability.



18.5 First of all the defendant should have sent a written communication directed the plaintiffs to act upon as per Ex.P1. If at all they failed to do the same he could have canceled it and approached the Bank. If at all the defendant approached the Bank and obtained loan, certainly he could have filed the documents relating to the loan obtained from the Bank. Further, the Bank will not give loan without obtaining the documents relating to plan approval, collateral security of the project and quantum of loan. If the defendant availed the loan from Bank of Baroda and completed the project with the loan amount he could have produced the documents. However, despite notice to produce the documents given, but not produced. Therefore, from the oral and documentary evidence, the submissions of the learned counsel for the plaintiffs and the citations referred to supra it is clear that the defendant has withheld the best piece of evidence, this Court can draw adverse inference.

18.6 Further on reading of the Ex.P5, the defendant's brother has clearly admitted that he received the money from the second plaintiff and the same was paid to the defendant. However, the defendant has denied the same, as already stated that by contact and circumstantial evidence, this Court finds that the defendant authorised his brother to receive the money from the second plaintiff. However, the defendant's brother was not examined, since the defendant himself admitted that before commencement of the trial, the defendant's brother expired. The defendant has not denied in the written statement and the proof affidavit, that there was no good relationship with his brother. Therefore, in the absence of pleadings, no amounts of evidence can be let in, even if it is let in, the same cannot be taken into consideration. Therefore, without pleadings the contention of the defendant that at the time of the contract, the defendant was not in good terms with his brother is not acceptable. On reading of the oral and documentary evidence, the admission made by the defendant and Ex.P5 the confirmation letter given by the defendant's brother, the defendant has not denied the signature found in Ex.P5 and not stated that the letter was not written by the defendant's brother. Further, the defendant has not produced any document to show that he has not availed loan from the second plaintiff as mentioned in Ex.P1 Memorandum of Understanding and availed loan only from the Bank of Baroda. In the absence of documentary evidence, this Court finds that from the preponderance of probabilities, the plaintiffs have extended the financial assistance to the defendant for development of the said project and made payments to the defendant through his brother. This Court finds that though there is a discrepancy in paragraph No.4 of the plaint and also the documents marked through Bank statements. However, the facts remains that all the payments were made through P.T.Gopala Raja except one payment and the same was also made in the name of M/s.Fast Builders. Therefore, this Court finds that the plaintiffs made payments to the defendant. Hence, the Issue No.1 is answered accordingly in favour of the plaintiffs as against the defendant.

19. **Issue No.3**

19.1 The defendant has categorically stated that the Memorandum of Understanding was not implemented and not acted upon. However, the plaintiffs have stated that the Memorandum of Understanding was implemented and acted upon. As stated above though the agreement was drafted in the name of the first plaintiff, it was signed by the second plaintiff. The signatory and the Managing Director of both the plaintiffs Companies are one and the same viz., AR.Ramanathan. Further, by inadvertently, the date was typed as 31.08.1994 instead of 07.09.1994 in the draft Memorandum of Understanding and instead of second plaintiff's name, the first plaintiff's name was typed erroneously.

19.2 According to the plaintiffs an oral agreement was arrived between the second plaintiff and the defendant on 31.08.1994. Subsequently, they decided to reduce into writing and therefore, they purchased non-judicial stamp papers on 07.09.1994 and written the document. But, instead of mentioning the date of agreement as 07.09.1994, it was mentioned as 31.08.1994, which was not possible, since the document itself was purchased only on 07.09.1994. Therefore, the document could not have been come into existence on 31.08.1994. Since the plaintiffs have accepted the date and name of the first plaintiff mentioned in the agreement is an inadvertent mistake and the same is genuine and therefore, the case of the plaintiffs is acceptable. Though, the plaintiffs have stated that on the date of agreement the second plaintiff has paid Rs.5,00,000/- to the defendant through his brother and the same was accepted by both the parties and the same was incorporated in writing, Though it was omitted to type in Ex.P1, the same was written in Ink in the Clause 3 of the Memorandum of Understanding and the second plaintiff and the defendant have put their initials. During the cross examination, the defendant denied the initials made in page No.3 in Clause 3 of Memorandum of Understanding. But, at the same time, he admitted the initials put in page No.1 of the said Memorandum of understanding. Therefore, the contention of the defendant is not acceptable.

19.3 However, on a perusal of the initials at page Nos.1 and 3, it would reveal that both the initials are appears to be made by one and the same person. Further, the defendant has not sent any notice and even in the written statement, the defendant admitted the signature and execution of the Memorandum of Understanding and he has not questioned the same and further, the defendant has got one of the copies of Ex.P1. If at all in Clause 4 of the Memorandum of Understanding the plaintiffs have arbitrarily written anything in the agreement, if the defendant produced the copy of the Memorandum of Understanding which is in his possession, the same will reveal the truth, since the defendant has not produced copy of the agreement, which was in his possession. Hence, the contention of the defendant is not acceptable.



19.4 The defendant has admitted the receipt of Rs.5,00,000/- through P.T.Gopala Raja. Subsequently, the plaintiffs have stated that they have paid the amount on various dates only through cheques, demand drafts and by cash through the defendant's brother. The defendant's brother also admitted the same in Ex.P5. The defendant hardly denied and has stated that he has not received any amount from the second plaintiff. Since the second plaintiff has not paid the money he approached the Bank of Baroda and obtained loan. Though, he has got the account, he has not produce the statement of accounts or otherwise he has not taken steps to send the records from the Bank or any Bank officials have not been examined that they have provided loan for completing the project. Therefore, in the absence of the same, the defendant has failed to prove his defence that the Memorandum of Understanding has not acted upon. But, the plaintiffs have proved the same by way of pleadings and by oral and documentary evidence. Therefore, as stated by the plaintiffs the Memorandum of Understanding was implemented and acted upon. Therefore, the Issue No.3 is answered accordingly in favour of the plaintiffs as against the defendant.



20 **Issue No.4**

20.1 The plaintiffs have categorically stated that the defendant approached the second plaintiff through his brother and Ex.P1 was entered into between them and the same was executed on 31.08.1994, instead of 07.09.1994 and instead of second plaintiff's name, the first plaintiff name was typed erroneously in the Memorandum of Understanding. Though, on a careful perusal of Ex.P1, has already stated, that the stamp paper itself was purchased on 07.09.1994, therefore, it would not have been executed on 31.08.1994. The plaintiffs have deposed in their evidence that there was a prior talking terms with the plaintiffs and the defendant and P.T.Gopala Raja.

20.2 Ex.P5 would clearly shows that in the 2nd week of August, 1994, the Memorandum of Understanding was initially arrived and a token advance of Rs.5,00,000/- was paid and accordingly, Ex.P1 was entered into by the second plaintiff with the defendant orally on 31.08.1994. But, in the Memorandum of Understanding it was typed instead of the actual date of its execution i.e. 07.09.1994, similarly instead of second plaintiff's name, the first plaintiff's name was wrongly mentioned as the co-promoter. Though, AR.Ramanathan was the Managing Director for both the plaintiffs' Companies, whereas in the agreement he signed only for the second plaintiff. Further, the Memorandum of Understanding was executed only on 07.09.1994. As per Ex.P5, on 31.08.1994 itself Rs.5,00,000/- was paid to the defendant through his brother and has stated that it was omitted to be typed. Subsequently, the same was hand written in Clause 3 of the Memorandum of Understanding by ink and the second plaintiff and the defendant have put their initials on it. However, the defendant denied the initials. Further, in Ex.P5, the defendant's brother has clearly stated the dates and details of the payment. Though, the plaintiffs have stated that two copies of Memorandum of Understanding were prepared and one is with the plaintiff and another is with the defendant. If the defendant produced the copy of the Memorandum of Understanding, which was in his possession, it would have revealed the truth. Therefore, the non-production of copy of Ex.P1, which is in possession of the defendant itself leads adverse inference. Further, the plaintiffs have stated that they have made payments to the defendant through P.T.Gopala Raja and the same was admitted in Ex.P5 and therefore, Ex.P1 was implemented. Though, the defendant has denied the same and has stated that he obtained loan only from the Bank of Baroda. However, he has not produced any documents and witnesses to show that he raised funds from the third party or Bank to complete the project. Therefore, when the defendant has no financial capacity or if he has not received money from the plaintiffs, if he availed any loan or any financial assistance from the third party he would have produced necessary documents. Therefore, in the absence of the same, the case of the plaintiffs is genuine and the plaintiffs have proved the same by oral and documentary evidence. The defendant has failed to establish his defence. Though, it is settled proposition of law, the plaintiffs have to prove their case, but, the same is not like as criminal case beyond the reasonable doubt. The plaintiffs can also prove their case with preponderance of probabilities with available materials. The initial burden has been proved by the plaintiffs and the defendant admitted Ex.P1 and he has not specifically denied that he has not approached the second plaintiff through his brother till his life time and his brother was looking after their family properties. The plaintiffs are not strangers and they are tenants of the defendants family property. The brother of the defendant P.T.Gopala Raja was one of the Directors of the plaintiffs Company. There is no reason to file such a huge claim with one of the landlords and therefore, the case of the plaintiff is believable.

20.3 Further, the defendant has also not proved that he raised finance from the third party. If at all he raised finance to complete the project other than the plaintiffs, it is for him to prove that he has not availed financial assistance as stated in the Ex.P1 that he has availed the loan only from Bank of Baroda. Admittedly, he has not produced any document, even after receipt of notice to produce documents. Therefore, the defendant has with held the best piece of evidence, this Court can draw the adverse inference. Considering the facts and circumstances, this Court finds that the second plaintiff is entitled for the suit claim. Accordingly, the Issue No.4 is answered in favour of the plaintiffs and against the defendant.



21. **Issue No.5**

This Court founds that the plaintiffs have proved their case that the defendant is liable to pay Rs.21,00,000/- in addition to Rs.20,00,000/- as per the agreement, since the defendant has availed the financial assistances extended by the plaintiffs and also admitted that the project was also completed within a period of 18 months from the date of the agreement. Subsequently, the defendant has failed to repay the said amount, even after issuance of notice. Further, the defendant has availed loan for commercial purpose and for constructing the building. Under these circumstances the second plaintiff is entitled to claim 18% interest from the date of the plaint. Accordingly, the Issue No.5 is answered in favour of the plaintiffs and against the defendant.

22. In the result, the suit is decreed as prayed for by the plaintiffs. The defendant is liable to pay the suit claim to the second plaintiff within a period of six months from the date of this judgment. However, as far as interest is concerned, since the transaction is a commercial transaction, from the date of plaint, till the date of Decree, the second plaintiff is entitled 18% interest per annum and from the date of Decree till the date of realisation, the second plaintiff is entitled 12% interest per annum.



**06.11.2020**

Index : Yes/No
speaking order/non speaking order.
ms

**List of Witness examined on the side of the plaintiffs**

AR.Ramanathan - PW1

**List of documents marked on the side of the plaintiffs**

| SL. No | Exhibits | DESCRIPTION OF DOCUMENTS | DATED |
|---|---|---|---|
| 1. | P1 | Memorandum of Understanding (Original) | 31.08.1994 |
| 2. | P2 | Letter (Xerox copy) | 22.10.1996 |
| 3. | P3 | Legal notice (Carbon copy) | 15.03.1997 |
| 4. | P4 | Reply notice (Carbon copy) | 26.03.1997 |
| 5. | P5 | The letter | 28.04.1997 |
| 6. | P6 | Rejoinder (Carbon copy) | 30.12.1998 |
| 7. | P7 | Acknowledgment card (Original) | - |
| 8. | P8 | Acknowledgment card (Original) | - |
| 9. | P9 | Reply notice (carbon copy) | - |
| 10. | P10 | Reply notice (carbon copy) | 11.01.1999 |
| 11. | P11 | Reply notice (carbon copy) | 18.01.1999 |
| 12. | P12 | Acknowledgment card | - |
| 13. | P13 | Legal notice (Original) | 08.02.1999 |
| 14. | P14 | The certificate from Bank of Madurai in favour of the second defendant (Photocoy) | 22.10.1999 |
| 15. | P15 | General Ledger (Original) | - |
| 16. | P16 | The letter | 22.10.1999 |
| 17. | P17 | The letter | 23.10.1999 |
| 18. | P18 | The letter | 25.10.1999 |
| 19. | P19 | Ledger P.327 Photocopy) | - |
| 20 | P20 | The letter (Original) | 12.09.2001 |

| SL. No | Exhibits | DESCRIPTION OF DOCUMENTS | DATED |
|---|---|---|---|
| 21. | P21 | The letter (carbon copy) | 20.09.2001 |
| 22. | P22 | The legal notice (original) | 27.09.2001 |
| 23. | P23 | The letter | 14.10.2001 |
| 24. | P24 | Memorandum and Articles of Association of Euro Properties & Investment Pvt. Ltd., | 10.09.1994 |
| 25. | P25 | Memorandum of Articles of Association of Euro Leder Fashion Limited | 24.01.1992 |
| 26. | P26 | The letter & enclosure | 14.12.1995 |

**<u>List of Witness examined on the side of the defendant</u>**

T.Paul Rajan - DW1

**<u>List of documents marked on the side of the defendants</u>**

Nil.

C.S.No.449 of 1999

**P. VELMURUGAN, J.**

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**Pre Delivery Judgment in C.S.No.449 of 1999**

**06.11.2020**