

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 20.11.2019

PRONOUNCED ON : 03.01.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

A.S.No.7 of 2014

M/s.Madhuram Enterprises
Represented by its Partner
Y.Ganesh
No.33-C, Thiruvengadam Street,
R.K.Nagar, Chennai – 28.

...

Appellant

Vs.

D.Karthikeyan

...

Respondent

Prayer:- First Appeal has been filed under Section 96 of The Civil Procedure Code against the judgment and decree dated 13.07.2010 passed in O.S.No.1781 of 2009 on the file of the IV Additional Judge, City Civil Court, Chennai.

For Appellant : Mr.A.V.Arun

For Respondent : Mr.R.Elango

JUDGMENT

Aggrieved over the judgment and decree dated 13.07.2010 passed in O.S.No.1781 of 2009 on the file of the IV Additional Judge, City Civil Court, Chennai, the defendant has preferred the first appeal.

2.For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3.Suit for recovery of money.

4.The case of the plaintiff in brief is that the plaintiff and his brothers had approached the defendant for promoting the property belonging to them at Adyar and in that connection, entered into an agreement for the development of the suit property with the defendant on 24.09.1995 for the construction of the residential apartments and also a supplementary agreement with reference to the same on 28.09.1995 and it is put forth that the defendant had failed to hand over the possession of the property, after construction, within the time stipulated under the abovesaid agreement and the plaintiff was able to secure the possession of the newly constructed flat for him from the defendant only after the Tamil Pongal festival 1999 and even the construction work done by the defendant is not as per the agreement and in tune with the sanctioned plan and on account of the delay on the part of the defendant in entrusting the flat to the plaintiff, the plaintiff is entitled to obtain the rent for the relevant period i.e. rental value from September 1997 to January 1999 i.e. for 16 months at the rate of Rs.5,000/- each month which works out to Rs.80,000/- and further, according to the plaintiff, no construction is to be made in the open terrace above the third floor and the open terrace is to be left out for the usage of the flat owners in

common and instead of leaving it fully open and free, the defendant raised another portion to a larger extent in the middle of the terrace and deprived the plaintiff and other flats owners' facility to use and enjoy the open terrace fully and freely and further, put forth that the defendant has caused various deviations in the construction to a larger extent and the abovesaid deviation caused by it would entail action against the plaintiff from the authorities concerned and the defendant had not endeavoured to obtain any modification of the plan for the bona fide construction and further put forth that the defendant has failed to submit the approved plan for the construction put up by it over the property and the same had caused mental agony to the plaintiff and further, it is also stated that the defendant had put up the outer wall measuring only 4 ½ " thickness instead of 9" thickness and on account of the same, there was much heat inside the property and also it is dangerous to live with the constructed 4 ½ " outer wall and further, it is found that the defendant has failed to put up the door frames with teak wood and on the other hand, put up the door frames with the country wood of lesser quality and value and further, put forth that on account of the thinner outer wall during the rainy season, the walls become wet and leak and also put forth that the motor pump set fixed in the main building wall has caused much annoyance due to sound and vibration and thereby the plaintiff has not enjoyed his flat peacefully, hence, the plaintiff wrote letters complaining

about the abovesaid deficiency in the construction put up by the defendant and directed it to rectify the same. However, the defendant has not responded to the same. The plaintiff, thereafter, issued a legal notice dated 19.12.1999 calling upon the defendant to make good the deficiencies and pay compensation and though the same had been received, the defendant has not responded to the same. The defendant is liable to pay a sum of Rs.80,000/- for the delay in not handing over all the flat to the plaintiff and for the poor and deficient and deviated construction, a sum of Rs.2,20,000/- and for causing mental agony thereon and inconvenience, a sum of Rs.1,00,000/- and as the defendant had prolonged the issues unnecessarily on various stages and in earlier forums and considering the price escalation, in all, according to the plaintiff, the defendant is liable to pay a total compensation of Rs.6,00,000/- and the plaintiff had sought redressal against the defendant at the first instance before the Consumer Forum, however, the Forum had directed him to approach the competent civil Court and hence, according to the plaintiff, the suit for appropriate relief.

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5.The defendant resisted the plaintiff's suit contending that the suit laid by the plaintiff is not maintainable either in law or on facts. The plaintiff had preferred the complaint against the defendant before the Consumer Forum alleging certain deficiency in the construction and the

Consumer Forum had been pleased to dismiss the said complaint by its order dated 12.01.2005 and the appeal preferred by the plaintiff had also been disposed of by the appellate authority by dismissing the same with liberty to the plaintiff to approach the appropriate civil Court. However, the plaintiff has not presented the suit within the stipulated period and therefore, on that ground alone, the plaintiff is not entitled to maintain the suit. The defendant has disputed the case of the plaintiff that it had not entrusted the construction of the flats to the plaintiff within the stipulated period and on the other hand, according to the defendant, after obtaining the due permission for the construction of the flats from the appropriate authority, thereafter, within the stipulated period, he had finished the construction of the flats and entrusted the flats and therefore, the plaintiff is not entitled to seek any compensation, on account of the abovesaid aspect, of a sum of Rs.80,000/- as put forth in the plaint being the loss in the payment of rent. The defendant further denied the allegations put forth by the plaintiff that it has put up the construction much against the plan and deviation of the same and that the same would entail action from the competent authorities against the plaintiff. According to the defendant, the plaintiff has not come forward clearly as to what are the deviations made by the defendant qua the construction. The defendant further denied the case of the plaintiff that it had not entrusted the approval plan to the plaintiff and contended that

the same had been already handed over to the plaintiff and according to the defendant, by constructing the outer wall with thickness 4 ½ " the plaintiff is put to the advantage of more space of plinth area and the thickness of the wall is in accordance with the standard specifications. The defendant had provided the door frames as provided under the agreement. The defendant had denied the allegations that the fixation of the pump set had caused annoyance to the plaintiff due to the sound and vibration and the plaintiff cannot complain anything about the same and the defendant explained, for the letters received from the plaintiff, in person and the plaintiff had accepted the same and on that account, the defendant did not send any reply. The plaintiff is not entitled to get any compensation from the defendant as claimed in the plaint. The plaintiff having lost his remedy before the Consumer Forum is not entitled to maintain the suit, there is no cause of action and the suit is liable to be dismissed.

6. On the basis of the abovesaid pleas set out by the respective parties, the following issues were framed by the trial Court for consideration:

"(1). Whether the plaintiffs is entitled for the amount of Rs.6,00,000/- as claimed?"

(2).Whether there is any cause of action for this suit?

(3).To what relief?"

7.In support of the plaintiff's case, PWs1 & 2 were examined and Exs.A1 to A14 were marked. On the side of the defendant, DW1 was examined and no documentary evidence has been marked.

8.On a consideration of the oral and documentary evidence adduced by the respective parties and the submissions made, the trial Court was pleased to hold that the plaintiff is entitled for the suit claim excepting the rental damages of Rs.80,000/- from the defendant and accordingly, disposed of the plaintiff's suit directing the defendant to pay the abovesaid sum with interest at 6% from the date of the plaint till realisation. Impugning the same, the first appeal has been preferred by the defendant.

9.The following points arise for determination in this first appeal:

"(1).Whether the plaintiff is entitled to recover the amount from the defendant for the reasons claimed by him qua the construction of the Flat as put forth in the plaint?

(2).To what relief the plaintiff is entitled to?

(3).To what relief the defendant/appellant is entitled to?"

10.Point No.1

The plaintiff has laid the suit against the defendant seeking compensation of a sum of Rs.6,00,000/- for the deficiencies in the construction work put up by the defendant qua the flat put up in the property. It is found that the flat in question along with the other flats had been put up in the property by the defendant following the agreement entered into between the parties concerned.

11.According to the plaintiff, the defendant has not put up the construction of the flat entrusted to him in accordance with the plan and made various deviations and also constructed the flat with poor and substandard materials and on account of the same, the plaintiff is put to much annoyance, hardship and mental agony and in toto the plaintiff has claimed a sum of Rs.6,00,000/- as compensation from the defendant.

12.The defendant in toto has disputed the case of the plaintiff and

further put forth that the complaint levied by the plaintiff with reference to the cause pleaded before the Consumer Forum had been rejected and thereafter, the plaintiff has come forward with the civil action and according to the defendant, it has not put up the construction with any deviations and also not put up the construction with substandard materials and without adhering to the requirements and therefore, according to the defendant, the plaintiff is not entitled to maintain the lis against it.

13. On various accounts, the plaintiff sought for the compensation from the defendant. At first, the plaintiff would claim a sum of Rs.80,000/- on account of the delay committed by the defendant in the entrustment of the flat within the stipulated period as per the agreement entered into between the parties. However, considering the materials placed on record and as determined by the trial Court also, when it is found that the defendant has agreed to put up the construction within 20 months from the date of obtaining the permission from the competent authority and accordingly, when the permission had been obtained from the Corporation by the defendant only on 13.06.1997 and immediately, thereafter, within the stipulated period, the defendant had handed over the possession of the flat to the plaintiff in January, 1999, in such view of the matter, the abovesaid ground projected by the plaintiff for claiming a

sum of Rs.80,000/- by way of rental dues as such, cannot be accepted in any manner and the same had been rightly found to be negated by the trial Court. The plaintiff has not preferred any cross appeal challenging the same in the present first appeal or preferred any independent appeal challenging the same. Further, no material has also been projected by the plaintiff to interfere with the abovesaid finding of the trial Court in the present appeal.

14.The plaintiff would complain that the defendant has not put up the construction as per the approved plan and has committed various deviations and thereby, on account of improper construction put up by the defendant, the plaintiff would entail action from the authority concerned and therefore, the plaintiff should be compensated. Accordingly, in this connection, the plaintiff mainly relied upon the notice sent by CMDA to him marked as Ex.A9. However, the plaintiff has not placed any material to show that any further action had been contemplated by the CMDA pursuant to Ex.A9 before the laying of the present suit in 2009 or subsequent thereto i.e. till date. That apart, as rightly put forth by the defendant, the plaintiff has not come forward in a clear manner as to what are the defects committed by the defendant in the construction put up by him and in that connection, the plaintiff has not come forward with clear pleas and also not placed acceptable

materials as such. No doubt, the demolition notice has been received by the plaintiff from CMDA. By way of Ex.A9, at the most, it could be construed that the construction put up by the defendant is strictly not in accordance with the plan and certain defects had been committed by the defendant. However, as to what further requirements are to be done by the plaintiff with reference to the same, no clear pleas and materials had been projected by the plaintiff. Be that as it may, as rightly put forth by the plaintiff's counsel, the plaintiff having received the flat, has to meet the action contemplated by the authority concerned. To some extent, in my considered opinion, the plaintiff would suffer and thereby should be compensated accordingly.

15.It is found that the defendant has not put up the outer wall with 9" thickness and on the other hand, put up the outer wall with 4 ½" thickness. As regards the construction put up by the defendant, contrary to the approved plan, DW1 would admit that many deviations had been made and further admitted that the construction had not been put up in accordance with plan and certain discrepancies had arisen and therefore, it is found that the defendant had put up the construction in deviation to the plan and the plaintiff should be compensated accordingly. Further DW1 has also admitted that it is the plaintiff, who has to face the action if any proceedings are initiated against him by the appropriate authority.

Therefore, as rightly contended by the plaintiff due to the abovesaid lesser thickness of the outer wall, there is every possibility of the leakage of water inside the premises during the rainy season and also, there is every possibility of heat radiation passing inside the premises during the summer season. The defendant had not disputed the construction of the outer wall with only 4 1/2" thickness and according to the defendant, by way of the same, the plaintiff would stand benefited by having more plinth area. However, the abovesaid contention of the defendant does not merit acceptance. In this connection, DW1 examined on behalf of the defendant has admitted that if the outer wall had been put up with 9" thickness, there is also the possibility of rain water seeping in and the building having put up in Adyar adjacent to the sea shore, there is every possibility of corrosion of the building due to sea breeze and accordingly, it is seen that the abovesaid deviated construction put up by the defendant had caused serious loss and hardship to the plaintiff and the plaintiff would be required to rectify the same at his own cost.

16. According to the plaintiff, the defendant has not entrusted the plan or the other documents pertaining to the construction. Though the same had been disputed by the defendant, DW1 has admitted that he had not entrusted any certificate to the plaintiff qua the construction of the flat and furthermore, it is found that the defendant has not responded

to the various letters and the legal notice issued by the plaintiff complaining of deficiencies in the construction. The same has also been admitted by DW1. There is no material to hold that the defendant had entrusted the approved plan to the plaintiff. Further DW1 has admitted to the same. Therefore, it is seen that when the defendant has not furnished the approved plan and other documents pertaining to the completion of the construction, the plaintiff being the person at the receiving end, would be required to face the necessary authorities concerned on account of the failure of the defendant to furnish the requisite documents. It is thus evident that the plaintiff would be seriously affected and properly required to be compensated. The plaintiff would also complain that the door frames had been put up by the defendant with inferior quality of wood. Though the defendant would claim that the door frames had been put up as per the plan, however when the door frames are found to be put up by the defendant with inferior quality of wood, in such view of the matter, during the long usage of the abovesaid door frames, they would wither away and get destroyed and consequently, the plaintiff would be necessitated to replace the same and by way of the same, the plaintiff would incur expenses. On that ground also it is found that the plaintiff has to be suitably compensated.

17.The plaintiff would also complain that the motor pumpset which

has been fixed inside the building wall, due to its sound and vibration, has caused huge annoyance and disturbance to his normal work and peaceful enjoyment of living. Though the defendant has disputed the same however considering the abovesaid annoyance caused to the plaintiff due to the sound and vibration caused by the motor on account of the improper fixation of the same in the premises on the part of the defendant, it is seen that to some extent, the plaintiff's living is affected and the plaintiff has to be suitably compensated.

18. With reference to the compensation claimed in a sum of Rs.6,00,000/-, according to the plaintiff, he has sought a sum of Rs.2,20,000/- on account of poor and deficient and deviated construction put up by the defendant and sought a sum of Rs.1,00,000/- towards the mental agony, strain and inconvenience and sought Rs.80,000/- towards the failure of the defendant for the entrustment of the flat within the stipulated period and according to the plaintiff, inasmuch as the defendant had not met with the abovesaid demand at the earliest and having challenged the same earlier also before the Consumer forums with reference to the same, it is stated that due to escalation of the price in rectifying the abovesaid defects, in all, the defendant has to pay Rs.6,00,000/- as compensation.

19.As abovestated, as regards the claim of the plaintiff in a sum of Rs.80,000/- towards the delayed entrustment of the flat on the part of the defendant, the same has been rightly rejected by the trial Court. Therefore, on that score, the plaintiff is not entitled to claim any compensation.

20.Considering the deviations in the construction put up by the defendant and when the plaintiff has also been called upon to explain the same by the authority under Ex.A9 demolition notice and also the poor and deficient construction put up by the defendant in the outer wall, qua the door frames and the improper fixation of the motor pumpset and the requirement of the plaintiff to rectify the same and the mental agony, strain and inconvenience caused to the plaintiff and the failure of the defendant to entrust the approval plan and other documents evidencing the completion of the construction to the plaintiff, all put together, in my considered opinion, the plaintiff is entitled to claim a sum of Rs.3,20,000/-.

21.From the materials available on record and also not in dispute, it is found that claiming compensation from the defendant, the plaintiff at the first instance had moved the Consumer Forum and in toto, therein it

is seen that the plaintiff has claimed in toto a sum of Rs.4,00,000/- from the defendant under various heads as compensation. The plaintiff has lost his case in the Consumer forum. The appeal preferred by the plaintiff against the same before the appellate authority also ended in vain. The appellate authority has directed the plaintiff to file the civil action before the civil Court and following the same, it is found that the plaintiff has instituted the present suit in the year 2009. Now, according to the plaintiff, inasmuch as the defendant had been dragging on the issues without settling the same at the earliest and also challenging the plaintiff action in the earlier forums, the plaintiff has been necessitated to levy the civil action against the defendant subsequently. According to the plaintiff, considering the price escalation in the interregnum, that would be required to be met by the plaintiff to rectify the defects, according to the plaintiff, in all, the defendant has to pay a sum of Rs.6,00,000/-. However, when it is found that the plaintiff has in toto claimed only Rs.4,00,000/- as compensation in the consumer forum and no doubt, the defendant had been challenging the action of the plaintiff in the consumer forum also and when the fact remains that the plaintiff had lost his case before the consumer forum and only thereafter the plaintiff has levied the civil action, in such view of the matter, the plaintiff's claim of enhanced compensation due to the escalation of the price of the material in the interregnum and thereby, the claim of the plaintiff for enhanced

compensation, as such, cannot be countenanced. The trial Court has failed to appreciate the abovesaid aspects of the matter and had blindly awarded the compensation in favour of the plaintiff for a sum of Rs.5,20,000/-. When the plaintiff has not chosen to levy the civil action at the earliest point of time and had only moved the consumer forum and lost his case before the consumer forum, as above pointed out, in such view of the matter, the delay in the laying of the civil action had been occasioned only by the plaintiff and not on the part of the defendant. In such view of the matter, the plaintiff cannot be allowed to claim compensation on account of the escalation of the price materials for the purpose of rectifying the defects complained by him. In such view of the matter, in my considered opinion, the total compensation of Rs.5,20,000/- fixed by the trial Court payable to the plaintiff on the part of the defendant is found to be excessive.

22.The defendant's counsel in support of his contentions placed reliance upon the decisions reported in **(2006) 11 Supreme Court Cases 181 (McDERMOTT INTERNATIONAL INC. Vs.BURN STANDARD CO.LTD. AND OTHERS), (2018) 7 Supreme Court Cases 743 (VINUBHAI RANCHHODBHAI PATEL VS. RAJIVBHAI DUDABHAI PATEL AND OTHERS), (1995) 6 Supreme Court Cases 122 (V.M.Mathew Vs. V.S.Sharma and others) and 2012 (1) MWN**

(Civil) 642 (Kadirvelu Pillai Vs. V.Arjunan). The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the case at hand.

23.Considering the abovesaid factors and also the plaintiff having been necessitated to workout his remedies by laying a civil action as directed by the consumer forum, in all, in the interest of justice, I hold that the plaintiff would be entitled to receive a total sum of Rs.3,50,000/- as compensation from the defendant with interest at 6% from the date of the plaint till realisation. Accordingly, the point No.1 is answered.

24.Point Nos.2 & 3

For the reasons aforestated, the judgment and decree dated 13.07.2010 passed in O.S.No.1781 of 2009 on the file of the IV Additional Judge, City Civil Court, Chennai, are modified and the suit is decreed by directing the defendant to pay the plaintiff a sum of Rs.3,50,000/- together with interest at 6% per annum from the date of the plaint till realisation with proportionate costs. Accordingly, the first appeal is partly allowed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Index : Yes / No
Internet : Yes / No

03.01.2020

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T.RAVINDRAN, J.

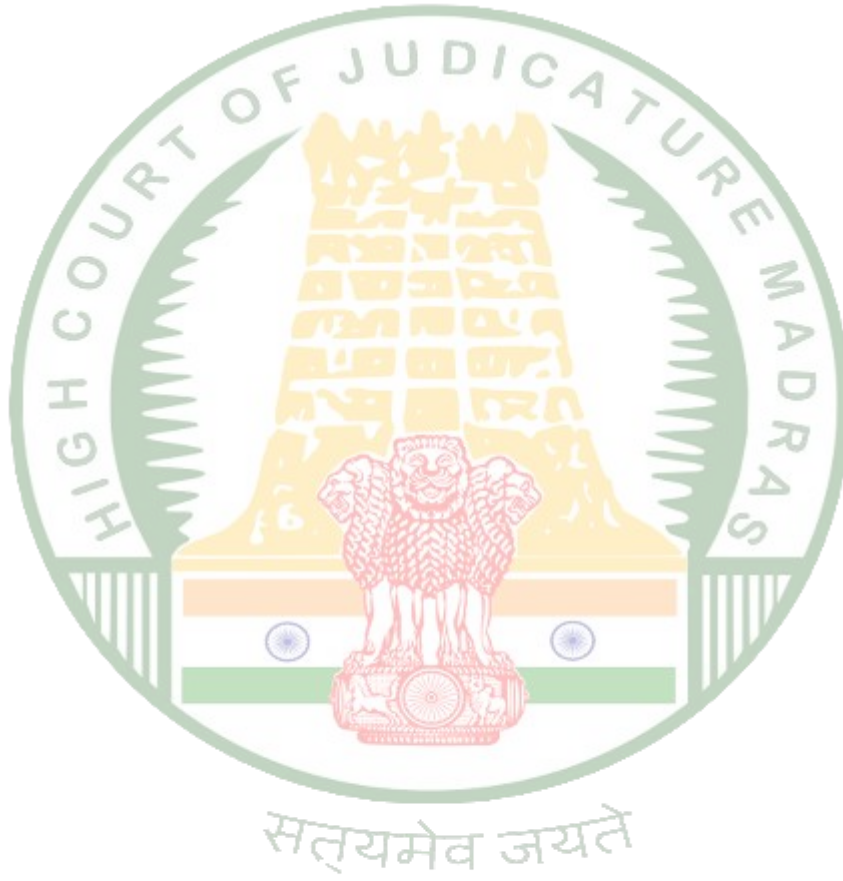
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