



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON : 27.01.2023

PRONOUNCED ON : 28.03.2023

C O R A M

THE HON'BLE MRS JUSTICE N. MALA

A.S(MD)No.315 of 2004

S.Robert ... Appellant/Plaintiff
Vs.

1.M.Thangaraj
2.Jobfred Stephen (Died)
3.Vimala Rajkumar
4.Vijaya Thangaraja
5.Vince Stephen ... Respondents

(Respondents 3 to 5 are brought on record as LR's of the second respondent vide Court order dated 01.11.2022 made in CMP(MD)No.11507 of 2018 in AS(MD)No.315 of 2018 by KMSJ)

PRAYER: Appeal Suit filed under Section 96 of the Code of Civil Procedure, to set aside the decree and the judgment dated 25.07.2003 rendered in O.S.No. 125 of 1997 on the file of the Subordinate Judge, Padmanabhapuram.

For Appellant	: Mr.S.Ramesh
For Respondent 1	: Mr.G.Ramanathan
For R2	: died
For R3, R4 & R5	: No Appearance



JUDGMENT

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2.The facts in brief necessary for the appreciation of the appeal are as follows:-

The plaintiff is a contractor and he entered into an agreement with the second defendant on 26.06.1996 for construction of a house in R.S.No.105, situated at Thakkalai Village for the first defendant. The rate was fixed at Rs.350/- per sq.ft and it was agreed that the work would be completed within 10 months from the date of the contract. The total area of construction as per Rough Plan submitted by the defendants to the plaintiff was 2560 sq.ft. It was further agreed between the parties that the plaintiff would be paid the excess rate for the additional works, if any, done by him at the instance of the defendants. According to the plaintiff, even at the time of laying foundation, an excess area was laid, as the defendants and the wife of the first defendant wanted the same. According to the plaintiff, this was an additional work. The site with the house had to be constructed slopped from East – West and so, the plaintiff had to take the foundation to a depth of 11 feet in some places as against the agreed depth of 3 feet. After completion of foundation work, the defendants wanted the plaintiff to construct two under ground rooms.

According to the plaintiff, the construction of two under ground rooms was



also a additional work. The plaintiff referred to various additional works apart from the one's stated above and the same are not repeated because the sum and substance of those pleadings is that the plaintiff was entitled to recover a sum of Rs.9,54,070.80 ps towards cost of completed construction made by him. The pleadings with reference to the details of completed works and the amounts due to him are as follows:-

“7.At the time of the alteration of sitout in the ground floor the 2nd defendant and his son gave another sketch to the plaintiff and stated that the roof for the car porch much be slanting then again portions of carport must serve as balcony for the first floor. The plaintiff has done the construction in much a way as wanted by defendants. This additional work is not in the rough plan or in the blue print.

8.At the time of roof concrete of ground floor another plan was given to the plaintiff by the 2nd defendant stating that his daughter has sent another plan. So, the construction must be made according to that plan. As per that plan, a hall is to be constructed in the first floor in such a way so as to have a view of the ground floor hall with balcony on the north west. The plaintiff effected construction accordingly. Again in the first floor inside the hall north-south balcony constructed and from the southern varantha (sitout) balcony to the eastern side above car porch as decided by the defendants. The plaintiff changed the direction of the ground floor stair



case. All the above works are additional works.

9. After completing the ground floor, the plaintiff constructed upto the lintel level in the first floor and demanded money from the 2nd defendant. The 2nd defendant did not make any payment and directed the plaintiff to contact the first defendant and gave his phone number in muscat. The plaintiff telephoned to the first defendant by spending Rs.183.80 pas. The defendants are bound to return the same with 12% interest. In response to telephone the first defendant came and told to the plaintiff that the entire construction is to his satisfaction and he wanted to provide four hooks for providing a swing. Before that the defendants paid Rs.3,75,000/- (Three lakhs seventy five thousand only) to the plaintiff on several occasions. The first defendant told to the plaintiff that he did not bring any money and he will make arrangements with the 2nd defendant to pay the amount to the plaintiff and the plaintiff should not stop the work fearing that the amount will not be paid. After that the defendants paid Rs.2,90,000/- (Two lakhs ninety thousand only) on several occasions to the plaintiff. The defendants did not make any lumpsum payments as per the agreement. The first defendant also agreed that the alterations and modifications suggested by 2nd defendant and his son Advocate Vino Stephens are quite correct except the arches in between the halls and dinning rooms in the ground floor and first floor. The first defendant gave direction to the plaintiff how the arches should be



constructed. As wanted by the first defendant the plaintiff reduced the width of the arches to 9 inches. Then the wife of the first defendant wanted to construct the arches in another way. The plaintiff has done that also. The alteration of arches twice as directed by the first defendant and his wife are additional works. The plaintiff constructed retaining walls. That is also additional work.

10. The roof of 1st floor hall, sitout and eastern side of balcony are constructed in slanting position as wanted by the defendants. This work is additional work.”

3. The plaintiff stated that after receiving the amount of Rs.7,65,000 /- from the defendants, balance of Rs.9,54,070.80 ps was due to him from the defendants. The plaintiff further pleaded that he had constructed a water tank as requested by the defendants for which he spent Rs.3759/- and so he was entitled for payment of the same with 18% interest per annum. He further stated that he was entitled to a sum of Rs.48,655/- along with 18% interest for the materials purchased by him for further construction, which were not taken back by him. The plaintiff further stated that the defendants terminated the agreement dated 26.06.1996 through a Advocate Notice, dated 28.05.1997, for which he gave a fitting reply, on 13.06.1997, and thereafter, the suit was filed claiming the following reliefs:-

Reliefs:-

“A. Plaintiff be given a decree for recovery of Rs.

9,54,070.80 ps (Nine Lakhs Fifty Four Thousand and



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Seventy paise eighty only) with future interest at the rate of 18% per annum from the date of suit till recovery from the defendants and their assets.

B. Plaintiff be given a decree for recovery of Rs. 48,655/- (Forty Eight Thousand Six Hundred and Fifty Five only) with future interest at the rate of 18% per annum from the date of suit till recovery from the defendant and their assets.

C. Plaintiff be given a decree for recovery of rs. 3759/- with future interest at the rate of 18% per annum from the date of suit till recovery from the defendants and their assets.

D. Plaintiff be given a decree for recovery of Rs.5,000/- with future interest at the rate of 18% per annum from the date of suit till recovery from the defendants and their assets.

E. Plaintiff be given a decree for recovery of Rs.183.80 ps with future interest at the rate of 18% per annum from the date of suit till recovery from the defendants and their assets.

F. Such other incidental reliefs which the Court deems just and proper in the nature of the case also may be granted.”

4.The defendants filed a written statement denying the various contentions raised in the plaint and further stated that the defendants were constrained to terminate the agreement, dated 26.06.1996 because of the



failure of the plaintiff to complete the construction within the stipulated time and also for deviating from the approved plan. According to the defendants, the claim of the plaintiff towards various heads was unjustified as he had voluntarily constructed more than the agreed area and that too, in violation of the approved plan.

5. According to the defendants, the plaintiff was warned at every stage for deviation from the approved plan, but he did not heed the defendants' warnings. The defendants denied the fact that the plaintiff had completed the construction work for Rs.17.80 lakhs. The defendants further submitted that the rates claimed by the plaintiff were not commensurate with the quality of work done and the statement of estimates and the rates claimed by the plaintiff were fantastical.

6. The defendants further submitted that after the termination of the contract, their Advocate Manikandan Nayar tried for an amicable settlement and as per the settlement, the plaintiff and the defendants agreed to measure the construction work done by the plaintiff by a qualified Engineer. Accordingly, an Engineer was engaged and the total construction work done by the plaintiff was measured in the presence of the Engineer, plaintiff and the defendants. The Engineer recorded all the measurements taken by him.



According to the defendants, the Engineer submitted his estimate and gave a copy to the plaintiff. As per the estimate of the Engineer, the plaintiff had completed only 50% of the work and the total cost of work done by the plaintiff was only Rs.6,16,560/-. According to the defendants, the plaintiff refused to accept the estimate prepared by the Engineer. On 11.10.1997 at 03.00 a.m, the plaintiff trespassed into the defendants' property and broke open the door and damaged the articles worth about Rs.4.2 lakhs. The second defendant, therefore lodged a complaint before the Thakkalai Police Station and the case was registered in Crime No.932 of 1997 under Sections 147, 148, 447, 448, 427, 373 and 380 of IPC against the plaintiff and his henchmen. The plaintiff got anticipatory bail from the Court in CrI.OP(MD)No.14891 of 1997 on 27.10.1997. According to the defendants, the case is still pending and the plaintiff filed the present case only to escape from the clutches of law in the criminal proceedings. For these and the other reasons stated in the written statement, the defendants prayed for dismissal of the suit.

7.Before the Trial Court, the plaintiff examined himself as P.W.1 and 12 documents were marked as Ex.A1 to Ex.A12. On the side of the defendants, the second defendant examined himself as D.W.1 and the Engineer, who inspected the construction and filed a report, was examined as D.W.2 and 6 documents were marked as Ex.B1 to Ex.B6.



8.The Trial Court, on the basis of the pleading framed 5 issues, which

are as follows:-

- 1. Whether the plaintiff is entitled to the relief claimed against the defendants?*
- 2. Whether the termination of agreement was valid?*
- 3. Whether the plaintiff received the entire amount from the defendants towards construction?*
- 4. Whether the estimates and the accounts pleaded by the plaintiff were imaginary and false?*
- 5. What other relief, the plaintiff is entitled to?*

9.On the basis of the pleadings and the evidence on record, the Trial Court found all the issues against the plaintiff and hence, dismissed the suit with cost.

10.Aggrieved by the judgment and decree passed by the Trial Court, the plaintiff has filed the above appeal.

11.The parties will be referred to as per their ranking in the suit for the sake of convenience.

12.The learned counsel for the appellant submitted that the plaintiff was entitled to recover a sum of Rs.9,54,780/- towards construction work



completed by him. The learned counsel further submitted that the plaintiff had given the details of the completed work and the amount due to him in paragraph No.14 of the plaint and therefore, the Trial Court ought not to have non suited the plaintiff. The learned counsel further submitted that the plaintiff had given details of the materials, which were stored by him for further construction in paragraph No.17 of the plaint and the Trial Court had erred in not decreeing any amount towards the value of the stored materials not taken back by him. The learned counsel further submitted that the finding of the Trial Court as regards the termination of the contract and the rejection of claim of Rs.5,000/- towards damages, is unsustainable. The learned counsel therefore prayed the judgment and decree of the Trial Court be set aside and appeal allowed.

13. On the other hand, the learned counsel for the respondent submitted that even though the plaintiff pleaded in the plaint in paragraph 14, the amount due to him towards completion of construction, absolutely no evidence was filed to prove the claim in other words, the learned counsel submitted that in the absence of any evidence that the plaintiff had incurred the said expenditure, on mere pleadings the plaintiff would not be entitled for the reliefs claimed. The learned counsel further submitted that soon after the agreement was terminated, there were private negotiations between the



plaintiff and the defendants and an Engineer was appointed to jointly inspect the construction and to file a report. The plaintiff was present along with his supervisor when the measurements were taken and a copy of cost estimate was also given to the plaintiff. In the said report, the Engineer had categorically stated that the plaintiff had completed only 50% work and that the value of the work completed by the plaintiff was only Rs.6,80,316.47. The learned counsel for the defendants further submitted that the conduct of the plaintiff is reflected by the suppression of the said report and the attempts made for compromise. The learned counsel further submitted that the present suit was a counter-blast to the criminal case filed by the defendants against the plaintiff for trespassing into their house and carrying the goods worth about Rs.24 lakhs. The learned counsel for the respondents further submitted that the Trial Court was justified in the dismissal of the plaintiff's suit for lack of evidence to substantiate the suit claim.

14.I have heard the learned counsel on either side and have scanned the materials placed on record.

15.The following points raise for determination in the appeal:-

1.Whether the plaintiff is entitled for the recovery of Rs.9,54,70.80 towards construction cost?

2.Whether the plaintiff is entitled to the relief of



recovery of Rs.48,655/- towards stored construction materials not lifted by him, Rs.3,759/- being the cost of water tank and recovery of Rs.5,000/- towards damages and recovery of Rs.183.80 towards telephone charges?

3.What other reliefs the plaintiff is entitled to?

16.As the points are interlinked, the same are considered jointly. The unexcepted facts of the case are that the first defendant is the son-in-law of the second defendant and that the second defendant entered into the an agreement with the plaintiff for construction of a house in R.S.No.105, situated at Thackkalai Village, on 26.06.1996 for an agreed rate of Rs.350/- per sq.ft and that the work had to be completed within 10 months from the date of contract. During construction, disputes arose between the parties, which resulted in termination of the contract by the first defendant by notice dated 28.05.1997.

17.According to the plaintiff, one of the terms of the contract was that the plaintiff would be entitled to additional amount as and when additional work was done by him on the instructions of the defendants. The plaintiff referred to the various instances like the foundation, construction of 2 rooms in the basement, construction of retention wall and extension of balcony etc., to establish that the plaintiff was following the instructions of the defendants and because of the interference and instructions of the defendants, plinth area



was increased to 4760 sq.ft from the original area of 2650 sq.ft. The plaintiff therefore claimed that he was entitled to claim at the rate of Rs.350/- per sq.ft for the increased plinth area.

18. On the other hand, the learned counsel for the defendants submitted that the plaintiff had deviated from the approved plan and the defendants had warned him on several occasions, in spite of it, the plaintiff increased the plinth area. According to the defendants, the plaintiff had not completed the construction work and further, the materials used by him were of inferior quality. Therefore the defendants were constrained to terminate the contract by issuing the notice dated 28.05.1997. The plaintiff sent a reply to the termination notice and thereafter, negotiations went on between the plaintiff and the defendants and the second defendant appointed an Engineer to estimate the cost of construction put up by the plaintiff. The Engineer inspected the premises in the presence of the plaintiff and his Supervisor, measured the premises and filed a report. A copy of the same was also furnished to the plaintiff. In the said report, it was categorically stated that the estimated value of the construction put up by the plaintiff was Rs.6,08,360/- and that the plaintiff had completed less than 50% of the work.



19. The learned counsel for the plaintiff submitted that the report could not be relied on as the Engineer failed to adopt the lumpsum or entire contract basis method and not the measurement basis for calculating the value of completed work. It is pertinent to note that the Engineer in his report stated that as less than 50% of the work was only completed the square feet basis could not be adopted. Be that as it may, assuming that the report of the Engineer cannot be relied on as gospel truth, it is to be seen whether any material was placed by the plaintiff before the Court to establish his right to the relief claimed in the suit. I find that absolutely no material is placed before the Court to substantiate the cost estimates furnished by the plaintiff in the plaint. It is well known that mere pleading without evidence is of no avail. The plaintiff has to prove his case by placing the material evidence and establish his right to the amounts claimed by him. The plaintiff has not filed the M-book, bills, vouchers, wage register etc., in respect of the works done and expenditure incurred by him. In the absence of such documentary evidence, the plaintiff cannot expect the Court to grant a decree on mere assumptions and presumptions. The plaintiff has to discharge the burden cast on him to establish the suit claim. It is trite in law that the burden of proof rests on the party who asserts the affirmative and that pleadings is not evidence, much less proof. In Anil Rishi Vs. gurubakshi Singh (2006(5) SCC 558), the Hon'ble Supreme Court has reiterated the above legal propositions.



20. The plaintiff has claimed Rs.350/- per sq.ft, which according to him is the agreed rate as per the contract. In my view, the claim of Rs.350/- is fallacious. The contractual rate of Rs.350/- per sq.ft includes not only the construction, but all the other works which go into the completion of the building like plastering, painting, electrical works etc., As per the terms of agreement, the amount is fixed at Rs.350/- per sq.ft for completion of construction which as stated above include the related works.

21. In the written submissions filed by the plaintiff he has referred to the deposition of the defendants to show that the plaintiff relies on the evidence of D.W.1 and D.W.2 in support of his contention that he was entitled to reliefs claimed in the suit. It is trite in law that the plaintiff has to prove his own case and cannot rely on the loop holes in the defendant's case.

22. In my view, the Trial Court has rightly rejected the plaintiff's suit as the plaintiff has failed to produce material evidence in support of his claim. The defendants, terminated the contract as the plaintiff did not complete the construction within the time. Though, the plaintiff has claimed Rs.5,000/- towards damages for termination of the contract, he has not challenged the termination. I am of the view that in the absence of challenge to the termination of the contract, mere relief of damages cannot be sustained. As



regards the claim towards stored materials is concerned, I am of the view that the defendant is right in contending that the suit is a counter blast to the criminal case filed against the plaintiff for trespassing into the defendant's property and lifting the goods. The plaintiff in his evidence stated that he is a Contractor and constructed two other buildings and if that is so, nothing prevented the plaintiff from maintaining the accounts of the expenditure and produce bills in support of the same. I find no impropriety or illegality in the Trial Courts findings on the issues framed by it. I am of the view that on the facts and in the circumstances of the case the plaintiff is not entitled to the reliefs claimed in the suit.

23. Accordingly, the judgment and decree in O.S.No.125 of 1997, on the file of the Subordinate Judge, Padmanabhapuram, dated 25.07.2003, is confirmed and the Appeal Suit is dismissed. There shall be no order as to costs.

28 .03.2023

NCC : Yes/No
Index : yes/No
Internet : yes/No
dss/ah



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To

1. The Subordinate Judge,
Padmanabhapuram.
2. The Section Officer, V.R.Section,
Madurai Bench of Madras High Court.



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N. MALA.J.,

dss

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