



Original Side Appeal (CAD) No.115 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on
15.02.2024

Delivered on
14.03.2024

CORAM:

THE HONOURABLE MR JUSTICE R.SUBRAMANIAN

AND

THE HONOURABLE MR JUSTICE R.SAKTHIVEL

Original Side Appeal (CAD) No.115 of 2021
and CMP Nos.19288 of 2021, 75 & 5802 of 2022

1. M/s. Sri Abhirami Foundations,
rep. by its Partner, R.Premanayagam

2. R.Premanayagam

3. Shareen Premanayagam

... Appellants

The proposed third appellant is struck off
as per the order dated 08.11.2021 in CMP No.14139/21
Cause Title accepted vide Court Order dated 08.11.2021

Versus

1. K. Cowndamani
2. C.M.Shanthi
3. C.M.Selvi
4. C.M.Sumitra



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5. Ponnusamy (died)
6. Murugan
7. Avudainayagi
8. K. Dhanapal
9. Kirthilal
10. R.Lakshmi

.... Respondents

- [i) A.Ponnusamy D.2 in C.2 No.509/2011
R.5 in O.S.A./Partner of D.1 (died)
ii) Murugan D.3 in C.S.No.509/11
R.6 in O.S.A.
iii) K.Dhanapal D.6 in C.S.No.509/2011
R.8 in O.S.A
iv) Kirthilal D.7 in C.S.No.509/2011
R39 in O.S.A

are all remained exparte in C.S.and hence
no Notice to be served on them in this O.S.A]

PRAYER: Original Side Appeal (CAD) filed under Order XXXVI Rule 1
of the Original Side Rules read with Clause 15 of Letters Patent under
Section 13(1) of the Commercial Courts Act, to set aside the Judgment and
decree passed in C.S. No.509 of 2011 dated 26.11.2019.

For Appellants : Mr.B.Kumar, Senior Counsel
for Mr.A.Kalaivanan



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For Respondents : Mr. A.R.Karunakaran, for RR 1 to 4

J U D G M E N T

(Judgment of the Court was delivered by R.SUBRAMANIAN, J.)

The defendants 1 and 4 in CS No.509 of 2011 are on Appeal challenging the decree for recovery of possession, permanent injunction, damages towards illegal occupation and mandatory injunctions directing the return of the original documents granted in favour of the plaintiffs. The parties will be referred to as per the ranks in the suit.

2. The suit came to be filed by the plaintiffs claiming the reliefs aforesaid on the following backdrop:

2.1. The plaintiffs, who are members of one family, had purchased an extent of 5 grounds and 454 sq. feet of land (suit property) under 12



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different Sale Deeds that were executed between March 1996 and March 1997 from Mrs.K.C. Nalini Bai and others. The fourth defendant, who was the partner of the first defendant, a construction firm, acted as the power of attorney of the vendors under the 12 Sale Deeds. Simultaneously the plaintiffs entered into 16 construction grievances with the first defendant firm represented by its partner, the fourth defendant, appointing the first defendant as contractors for construction of a commercial complex in the suit property. A sum of Rs.3,58,00,911/- was agreed to be paid towards the cost of construction. Necessary powers of attorney empowering defendants 1 and 4 to prepare, submit and obtain plans for the purposes of construction were also executed.

2.2. According to the plaintiffs, the fourth defendant represented that the Parent Title Deeds were required for inspection by the Chennai Metropolitan Development Authority and the Greater Chennai Corporation for the purposes of sanctioning of plans for construction and took those documents, viz. the Sale Deed dated 21.05.1958 and the family arrangement



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dated 31.12.1968. A plan for construction of a commercial complex measuring about 22700 sq. feet was granted by the Chennai Metropolitan Development Authority on 07.03.1997. The defendant was permitted to enter upon the suit property for the purposes of construction.

2.3. As per the agreements, the first defendant was to complete the construction within 20 months. Though the plaintiffs were making payments of monies as required by the agreement, the second defendant required more monies and demanded payments ahead of the periods scheduled in the agreement. Between March 1996 and February 1999, the plaintiffs had paid a sum of Rs.1,04,53,465/- to the first defendant towards the cost of construction.

2.4. To their dismay, the plaintiffs found that the construction has not progressed up to the desired levels and the planning permission also expired. The defendants permanently abandoned the project in July 2004. They have removed their men and material from the plot schedule



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property. Finding no other alternative, the plaintiffs took over the property and appointed their own security personal to enable completion of the construction through other contractors. They had also to seek renewal of the sanctions and licenses obtained for construction.

2.5. The fourth defendant, in February- March 2006, attempted to forcibly evict the security men appointed by the plaintiffs and this attempt was, however, scuttled by Mr.Pradeeshkumar, a relative of the first plaintiff. The plaintiffs left without any other alternative filed the suit in CS No.196 of 2006 seeking a permanent injunction in order to protect their possession. Interim orders of injunction were also granted by this Court. However, the fourth defendant using rowdy elements forced out the plaintiffs' security men and installed his maid servant and her family and the seventh defendant, who is said to be the Yoga Teacher of the fourth defendant.

2.6. The seventh and eighth defendants viz. the Yoga Teacher and the maid servant have nothing to do with the suit property and they are



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occupying the property only as the representatives of the fourth defendant.

By an order dated 17.03.2006, this Court while granting status – quo in OA No.207 of 2006 in CS No.196 of 2006 had also appointed an Advocate Commissioner in Application No.1122 of 2006 to inspect the property evaluate the construction made therein and file a report.

2.7. The Advocate Commissioner also filed a Report on 25.04.2006 and the fourth defendant filed his objections to the said Report on 02.07.2007. The plaintiffs also filed an application under Order II Rule 2 of the Code of Civil Procedure seeking leave to maintain the suit for injunction and reserving their right to claim damages later in point of time. The said application came to be allowed by this Court on 17.11.2009. While the seventh defendant left the property, the eighth defendant and her family continued to stay there, threatening the plaintiffs.

2.8. To their shock and surprise, the plaintiffs came to know that the defendants 4 to 6 had retired from the first defendant Firm, even as early as



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on 11.11.1997 and they had falsely claimed to be partners of the first defendant firm. Terming the defendants as a rank trespassers and contending that their assertion in the legal notice dated 28.06.2010 that they are in possession is false, the plaintiffs sued for recovery of possession and other reliefs as stated above. They also quantified the damages at Rs.1,00,000/- per month and made a claim for damages of Rs.35,00,000/-.

3. The suit was resisted by the defendants 1, 4, 5 and 8 alone while defendants 2, 3, 6 and 7 remained ex-parte. The contesting defendants filed a written statement contending that there is no cause of action for the suit, the plaintiffs have come to Court with unclean hands since they had suppressed material facts. The filing of the suit in CS No.106 of 2006 was projected as a bar for a suit for the relief of possession which, according to the defendants, was available to the plaintiffs even in the year 2006 when they filed the suit for bare injunction. The conduct of the plaintiffs in filing an application under Order II Rule 2 of the Code of Civil Procedure reserving the right to sue for damages separately was also pointed out as a



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ground.

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4. It was claimed that defendants 7 and 8 are unnecessary parties, as there was no privity of contract between them. It was also claimed that the suit filed beyond a period of six months from the date of dispossession as alleged by the plaintiffs is barred by limitation. It was also contended that the entire transaction was a tripartite agreement, wherein originally the heirs of Chitty Babu wanted to part only with 50% of the property and retained 50% of the property for themselves. The plaintiffs had also purchased only 50% of the property when they entered into the Construction Agreements. Therefore, according to the defendants, it was actually a tripartite contract, till such time the heirs of Chitty Babu viz. the vendors of the plaintiffs decided to part with the entire property and the plaintiffs upon becoming owners of the entire property continued the construction contract with the defendants.

5. These facts have been suppressed in the plaint, which would,



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according to the defendants, disentitle the plaintiffs from seeking the reliefs.

It was also contended that the plaintiffs had defaulted in payment of money for construction which led to the delay in the construction work. According to the defendants, the agreements dated 07.12.1995, 22.12.1995 and 07.01.1996 will have to be read together as they are interlinked and are inseparable. It was also contended that there was a raid by the Income Tax Department in the first plaintiffs house in January and February 1996 which led to the freezing of his Bank Accounts by the Department. Therefore, the first plaintiff was unable to make payment as per the contract.

6. On the above contentions, the defendants sought for dismissal of the suit. The eighth defendant filed a separate written statement almost reiterating the allegations that were made in the written statement of the other defendants viz. defendants 1, 4 and 5. She would also further claim that she was appointed by the fourth defendant as a care taker of the property. On the above pleadings, the learned Single Judge framed the following issues and the additional issues.



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i) Whether the plaintiffs are entitled for the reliefs as claimed in the above suit;

ii) Whether the 4th and 6th defendants are still the partners in the 1st defendant firm;

iii) Whether the defendants 1 to 6 as contractors can continue to withhold possession of the plaint schedule property, despite, there being no construction activity;

iv) Whether the 7th and 8th defendants who are only employees of the 4th defendant are entitled to remain in possession of the suit schedule property;

v) Whether the plaintiffs are entitled for damages as claimed in the above suit;

Additional Issues:

vi) Whether the suit is liable to be dismissed on the ground of Mis-Joinder of necessary parties;



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vii) Whether the plaintiffs have got any cause of action to institute the above suit against the 1st defendant;

viii) Without revoking or enforcing the agreement of sale/memorandum of understanding dated 07.12.1995, 22.12.1995 and 07.01.1996, the plaintiffs have got any iota of right to demand vacant possession of the plaint schedule property from the defendants;

ix) Whether the above suit is maintainable on account of the pendency of the suit in C.S.No.196 of 2006, which is hit by provision of order II Rule 2 of C.P.C.

7. At trial, the Power of Attorney Agent of the plaintiffs one Mr.S.B.Sathish Kumar was examined as P.W.1 and Exhibits P1 to P52 were marked. The defendants did not let in any oral evidence, but Exhibits D1 to



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D8 were marked through P.W.1 in his cross-examination.

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8. The learned Trial Judge took up additional issue Nos. 7 and 8 first and concluded that once the sale transaction is completed, the Sale Agreements and the Memorandum of understanding entered into on 07.12.1995, 22.12.1995 and 07.01.1996 automatically fade into insignificance and the parties would be governed only by the Construction Agreements entered into thereafter.

9. On the said conclusion, the learned Trial Judge answered the two issues relating to the maintainability of the suit and relating to the scope of the Memorandum of understanding and the Agreement of Sale and the cause of action that would be available to the plaintiff to sue for possession against the defendants in favour of the plaintiffs. On additional Issue No.6 viz. mis-joinder of necessary parties, the learned Trial Judge concluded that the plaintiffs having purchased the entire property their vendors/ heirs of Chitty Babu cannot be termed as necessary parties to the suit and therefore,



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they are non-joinder will not affect the suit.

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10. The learned Trial Judge culled out from the Sale Deeds, the exact area of land purchased by the four plaintiffs and found that the plaintiffs have become owners of the entirety of the suit property by virtue of the 12 Sale Deeds executed in their favour. The said issue was also answered against the defendants.

11. Thereafter, the learned Trial Judge took up issue Nos.2, 3 and 4 in the suit. On the issue as to whether the defendants 4 and 6 continued to be partners of the first defendant Firm, the learned Judge found that in the written statement filed, in CS No.648 of 1997 by the vendors of the plaintiffs viz. Mrs.K.C.Nalini Bai and others against the defendants 1, 4, and 5, the fourth and the fifth defendants have filed the written statement contending that they had retired from the first defendant Partnership Firm on 11.11.1997. The Specific Plea taken in the written statement filed in this suit by defendants 4 and 5 to the effect that they had retired and they have



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rejoined the Firm was also noticed by the learned Judge.

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12. After discussing the evidence on record the learned Judge found that defendants 4 and 5 continued to be the partners of the first defendant Firm. As regards, Issue No.3, the learned Judge found that since there is no construction activity going on the suit property, the defendants being contractors can only claim damages on a wrongful termination and cannot continue to remain in possession of the property and therefore, the action of the defendants withholding the possession of the property is illegal. The learned Trial Judge found that the defendants cannot retain possession of the property as contractors, thus the issue No.3 was answered against the defendants. On issue No.4, the learned Judge found that the seventh defendant has already vacated and the eighth defendant has also claimed that she is in possession as the security installed by the fourth defendant. Relying upon the conclusion in issue No.3, the learned Judge found that the possession of defendants 7 and 8 is illegal and they are not entitled to be in possession of the property and on such conclusion Issue No.4 was answered



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against the defendants.

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13. On issue No.9, relating to the bar pleaded under Order II Rule 2 of the Code of Civil Procedure, the learned Trial Judge found that the cause of action for the present suit is not a same as the cause of action for the Suit in CS No.196 of 2006. The cause of action being different bar under Order II Rule 2 of the Code of Civil Procedure will not come into play. The learned Judge also rejected the plea of limitation that was based on Section 6 of the Specific Relief Act, since the present suit is one for recovery of possession by the actual owner of the property against the contractor, who continued to remain in possession illegally and not a suit by a person in possession, who was dispossessed of the property *dehors* title. The option to file a suit under Section 6 of the Limitation Act, even though available to the present plaintiffs would not render a suit filed after the six months period contemplated under Section 6 as barred by limitation, as the actual period of limitation by the owner of immovable property, for recovery of possession is 12 years.



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14. Finally advertig to issue Nos.1 and 5, the learned Judge found that since the defendants are found to be wrongful possession of the property and they were put in possession only as contractors, they are bound to surrender possession. On the claim for damages, the learned Trial Judge found that since the defendants were put in possession only as contractors pursuant to construction agreements, they are not entitled to retain possession of the property, at best they could be entitled to damages if they claim that the contract was illegally terminated or they were prevented from completing the construction. Therefore, the learned Judge found that the plaintiffs are entitled to a decree for possession.

15. On the question of damages also, the learned Judge concurred with the contentions of the plaintiffs and concluded that being in wrongful possession, the defendants are bound to pay damages. The learned Judge also found that the defendants having admitted the receipt of the documents are bound to return the documents. Upon answering the issues raised as



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above, the learned Trial Judge decreed the suit as prayed for with costs.

Hence this Appeal.

16. We have heard Mr.B.Kumar, learned Senior Counsel appearing for Mr.A.Kalaivanan for the appellants and Mr.A.R.Karunakaran, learned counsel appearing for the respondents 1 to 4.

17. Mr.B.Kumar, learned Senior Counsel appearing for the appellants viz. Defendants 1 and 4 in the suit would vehemently contend that the learned Single Judge was not right in concluding that the Agreements of Sale and the Memorandum of understanding dated 07.12.1995, 22.12.1995 and 07.01.1996 would automatically fade into insignificance upon the plaintiffs becoming the owners of the entire property and the defendants 1 to 5 having entered into contracts for construction with the plaintiffs. According to the learned counsel, 50% of the undivided share was retained by the erstwhile owners and they had appointed the defendants as the contractors for construction under the Memorandum of understanding dated



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07.01.1996 and therefore, the possession of the defendants was referable to the same and hence the learned Single Judge was not right in directing delivery of possession of the property.

18. The learned Senior Counsel would also contend that the learned Single Judge was not justified in treating the possession of the defendants as illegal possession since their possession at the inception was legal. The learned Senior Counsel would also point out that a major portion of the construction had been completed and therefore, the learned Judge was not justified in awarding damages.

19. Contending contra, Mr.A.R.Karunakaran, learned counsel appearing for the respondents would submit that no doubt the original contracts viz. the Agreements of Sales and the Memorandum of Understanding dated 07.12.1995, 22.12.1995 and 07.01.1996 marked as Exs. P4, P5 and P6 were entered into between the original owners and the plaintiffs and the Memorandum of Understanding dated 24.11.1995 marked as Ex.P48 was



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entered into between the vendors of the plaintiffs, the first defendant and the plaintiffs. Subsequently there was a change in the mind of the original owners and they decided to part with the entire property. Therefore, after execution of a few Sale Deeds in favour of the plaintiffs by the original owners represented by the fourth defendant, independent construction agreements were entered into by the plaintiffs with the first defendant who also represented the fourth defendant, construction of the property.

20. Subsequently upon execution of other Sale Deeds in favour of the other plaintiffs in respect of the remaining undivided share construction agreements were entered into between the plaintiffs and the first defendant separately with reference to each of their share. The Sale Deeds have been marked as Exhibits P7 to P10, P16, P20, P21, P23, P24, P26 and P27, the Construction Agreements have been marked as Exhibits P11, to P14, P17, P18, P19, P22, P25, and P26 to P32. Therefore, according to the learned counsel, it is only the terms of the Construction Agreements marked above that would be binding between the parties and not the original



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Memorandum of understanding that was superseded by the Construction Agreements.

21. On the claim for damages, the learned counsel would submit that admittedly the contract period has come to an end and the defendants have not completed the construction. The learned Single Judge has found that the default is on the part of the defendants. The Commissioner appointed by the Court, has found that the construction has not been completed in full. Admittedly, the defendants have abandoned the property. The planning permissions granted had expired. Therefore, the defendants have no right to be in possession of the property. Once it is found that the defendants have no right to be in possession of the property, they are bound to pay damages for the illegal occupation, which has been determined by the learned Judge at Rs.1,00,000/- per month, considering the nature and location of the property. It is not disputed that the property is situate in one of the busiest commercial areas in the City. Therefore, according to the learned counsel, the decree for damages should also be sustained.



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22. An application in CMP No. 75 of 2022 has been filed by the appellant seeking to raise additional grounds contending that the suit ought not to have been disposed of as a commercial suit by the Commercial Division of the High Court.

23. We have considered the rival submissions made by the counsel for the parties.

Upon arguments of the counsel for the parties the following points are emerged for determination:

1. Whether the learned Single Judge was right in concluding that the subsequent construction contracts marked as Exhibits P11 to P14, P17 to P19, P22, P25 and P28 to P34 would supersede the Memorandum of Understanding dated 24.11.1995 marked as Ex.P48;

2. Whether the decree for damages could be



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sustained;

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3. Whether the dispute is a commercial dispute within the meaning of Section 2(1) (c) of the Commercial Courts Act, 2015.

Point No,1:

24. Mr.B.Kumar, learned Senior Counsel appearing for the appellants would invite our attention to the Memorandum of Understanding dated 24.11.1995 marked as Ex.P48 and contend that the right created in favour of the appellants is a right coupled with interest and therefore, the appellants are entitled to remain in possession till the entire consideration is paid.

24.1. Contending contra, Mr.A.R.Karunakaran, learned counsel would submit that the Memorandum of Understanding was entered into at a point when the original owners had retained a portion of the property and the development was confined only to the remaining portion of the property which is alienated by them, the same would not continue to apply even after the original owners had parted with possession of the entirety of the



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property.
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24.2. Drawing us to the dates, the learned Senior Counsel would submit that while the Memorandum of Understanding is dated 24.11.1995, the Construction Agreements are between March 96 and March 97 by which time, the original owners had expressed their intension to sell away the entirety of the property and had executed various Sale Deeds in favour of the plaintiffs. Therefore, according to the learned counsel, the learned Single Judge was justified in coming to the conclusion that the Memorandum of Understanding was superseded by the subsequent Construction Agreements.

24.3. No doubt, the Memorandum of Understanding is a tripartite instrument where the original owners, the plaintiffs and the first defendant had entered upon an agreement to develop the property. Subsequently, as pointed out by the learned counsel for the plaintiffs, the original owners had parted with the entirety of the property under the 12 Sale Deeds executed



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between 25.03.1996 and 10.03.1997 marked as Exhibits P7 to P10, P15, P16, P20, P21, P23, P24, P26 and P27.

24.4. Upon becoming owners of different extents of undivided share in the suit property, the four plaintiffs have entered into various Construction Agreements, as pointed out *supra*, with the first defendant. Therefore, it is the construction agreements entered into by the owners of different undivided shares in the property that would be binding on the parties and not the Memorandum of Understanding entered into at the time when the parties only contemplated development of the property. It is clear to our mind that the appellants are harping upon the Memorandum of Understanding only to hold on to the possession of the property and deprive the plaintiffs, who are the owners of the property, the beneficial enjoyment of the same.

24.5. The fact that the plaintiffs are the absolute owners of the entirety of the suit property is admitted. Though the defendants would like



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to relate their possession to the Memorandum of Understanding of the year 1995, by their own subsequent conduct viz. entering into Construction Agreements with the plaintiffs, the possession of the defendants could only be relatable to the construction agreements and not to the Memorandum of Understanding. Being contractors, who are put in possession of the property and having agreed to construct and re-deliver possession of the property, the defendants cannot with hold possession and at best they would be entitled to damages, if they are able to show that there is a breach of contract on the part of the plaintiffs. Admittedly the defendants have not moved in that direction.

24.6. As we have pointed out earlier, there is enough and more evidence to show that the defendants did not complete the construction as agreed to and they had also committed breach of contract. Though a faint attempt is made by the learned Senior Counsel appearing for the appellants/defendants to contend that the plaintiffs had not paid the monies as per the contract, we do not find any material whatsoever to support such



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a claim. The evidence available on record is otherwise. Despite the payments made by the plaintiffs, the defendants had not completed the construction work as per the contract. Therefore, their possession of the property cannot be held to be legal and they have no right to continue in possession of the property. We are therefore, unable to fault the learned Judge for having granted a decree for possession of the property.

24.7. The learned Senior Counsel would submit that the decree for mandatory injunction for delivering the documents ought not to have been granted. The construction contracts recite that the documents have been delivered to the defendants for the purposes of obtaining planning approval and the defendants, who are not the owners of the property have no right to retain the documents and the defendants have not denied the receipt of the documents. They being not the owners of the property are not entitled to retain the documents. Therefore, the decree granting mandatory injunction directing return of the two documents cannot also be said to be incorrect or illegal.



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Point No.2:

25. The learned counsel for the appellants would contend that having been put in possession pursuant to the contract, the Court was not right in directing the defendants to pay damages. The fact that the construction has not been complete is admitted. The learned Single Judge has, as of fact, found that the breach was committed by the defendants. We have also upheld the said finding of the learned Single Judge while confirming the decree for delivery of possession. Once it is found that the possession of the property by the defendants is illegal a decree for damages cannot be faulted.

25.1. The plaintiffs have made a claim for Rs.1,00,000/- per month. The property of an extent of about nearly 12454 sq. feet in a busy arterial road in Chennai is the subject matter of the suit. The defendants have been retaining possession of the property illegally and therefore, they are liable to pay damages. The quantum of damages has been spoken to by P.W.1 and



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there is no contra evidence on the side of the defendants. Therefore, we do not find any reason to interfere with the decree for damages as granted by the learned Single Judge.

Point No.3:

26. This point is sought to be raised for the first time in the Appeal that too by way of an application for raising additional grounds. The construction agreements are for construction of a Commercial complex. The term commercial dispute is defined in Section 2(1)(c) of the Commercial Courts Act, 2015 and Clause vii of Sub Section (c) reads as follows:

“vii – agreements relating to immovable property
used exclusively in trade or commerce”

Clause xviii of Sub Section (c) reads as follows:

“xviii – agreements for sale of goods or provision
of services”



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34. A perusal of the construction contract shows that it is a construction of a commercial building which will fall within Clause vii. Even assuming that the same does not fall within Clause vii, the agreement is with the first defendant which is the construction Company, therefore it would amount to a provision of service by a construction company which will fall within Clause xviii of Sub Section (c) of Section 2 of the Commercial Courts Act. Therefore disposal of the suit as a Commercial Suit cannot be faulted. No other contention was urged on behalf of the appellants.

27. Hence in view of the answers to the points framed for determination, the Appeal fails and it is accordingly dismissed. In fine, OSA No.115 of 2021 is dismissed with costs. Consequently the connected miscellaneous petitions are closed.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)

14.03.2024

jv

Index : Yes

Internet : No



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Neutral Citation : Yes
Speaking Order

To
The Section Officer,
Original Side,
High Court of Madras.



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