



WEB COPY



1

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :18.12.2023

PRONOUNCED ON :03.01.2024

CORAM

THE HONOURABLE MR. JUSTICE S.SOUNTHAR

S.A.Nos.653 and 654 of 2017
and CMP.No.16230 of 2017

B.Sakthivel

...Appellant in both S.As

Vs.

K.Mitra

...Respondent in both S.As

Prayer in S.A.No.653 of 2017 : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 18.02.2016 on the file of the learned XVI Additional Judge, City Civil Court, Chennai, made in A.S.No.228 of 2014 reversing the judgment and decree dated 08.11.2013 made in O.S.No.10967 of 2010 on the file of the learned VIII Assistant, City Civil Court, Chennai.

Prayer in S.A.No.654 of 2017 : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 18.02.2016 on the file of the learned XVI Additional Judge, City Civil Court, Chennai, made in A.S.No.235 of 2014 and thereby confirm the decree and judgment passed by the VIII Assistant City Civil Court, Chennai,



in O.S.No.10967 of 2010, dated 08.11.2013 with cost.

WEB COPY

For Appellant
in both SAs : Mr.V.Anilkumar
for M/s.S.R.Rajagopal

For Respondent
in both SAs : Mr.R.Thiagarajan

COMMON JUDGMENT

The defendant in the suit is the appellant in these second appeals. The respondent herein filed a suit for recovery of money towards cost of the construction made by the respondent under the construction agreement dated 10.02.2006. The appellant herein filed a counter claim for a sum of Rs.3,42,000/- towards cost of the balance construction work and loss of rentals. The trial Court dismissed the suit filed by the respondent and decreed the counter claim filed by the appellant. Aggrieved by the same, the respondent/plaintiff preferred two appeals. The first Appellate Court allowed the appeals and decreed the suit in part by directing the



appellant/defendant to pay a sum of Rs.70,000/- together with interest at the rate of 9% to the respondent. The counter claim preferred by the appellant was dismissed by reversing the findings of the trial Court. Aggrieved by the same, the appellant is before this Court.

2. According to the respondent/plaintiff he entered into a construction agreement with appellant on 10.02.2006 under Ex.A1 for construction of flat with a built up area of 1100 sq.ft for consideration (cost of construction) of Rs.11,50,000/-. It was agreed the construction of flat shall be completed within four months with a grace period of one month. It was claimed by the respondent that the appellant herein insisted certain additional work like marble flooring for bed rooms and kitchen, granite skirting etc. It was also claimed that the respondent incurred certain additional expenses towards obtaining TNEB service connections and miscellaneous charges for planning permission. It was further claimed by the respondent that the appellant paid a sum of Rs.10,40,000/- but refused to release the balance sum of Rs.1,10,000/- as per the agreement. He also failed to pay a sum of Rs.45,000/- towards additional expenses incurred by respondent. Thus, the respondent claimed that the appellant was liable to



pay a sum of Rs.1,10,000/- towards balance of consideration and Rs.45,000 towards cost of additional works done by the respondent. The respondent sent a bill dated 06.06.2007 calling upon the appellant to settle the amount. Since there was no favourable response, issued a legal notice dated 15.03.2009 calling upon the appellant to pay a sum of Rs.5,00,000/- towards unpaid construction cost, additional cost of construction and for delayed payment. The appellant sent a reply notice dated 27.10.2009 making frivolous allegations. In these circumstances, the respondent was constrained to file a suit for recovery of money.

3. The appellant/defendant filed a written statement denying the various allegations made by the respondent. It was claimed by him that inspite of expiry of the time limit fixed for completion of project, respondent failed to complete the construction and abandoned project without finishing the work as per the construction agreement. The appellant claimed that as many as fourteen works were not completed by the respondent and the appellant incurred a sum of Rs.1,50,000/- towards cost of completing the pending works. It was also claimed by the appellant that due to delay caused by the respondent in finishing the work, the appellant



incurred rental expenditures to the tune of Rs.1,92,000/- and the said amount should be paid by the respondent. It was claimed by the appellant, he obtained loan for construction of flat and was liable to make periodical payments towards amount borrowed, the respondent did not complete the work within the agreed time and hence he was liable for expenses incurred by the appellant. On these allegations, the appellant raised a counter claim for a sum of Rs.3,42,000/- against the respondent (Rs.1,92,000/- towards loss of rentals and Rs.1,50,000/- towards cost of completion of unfinished works undertaken by the appellant).

4. Before the trial Court, the respondent/plaintiff was examined as PW.1 and ten documents were marked on his side as Exs.A1 to A10. On behalf of the appellant/defendant, he was examined as DW.1 and five documents were marked on his side as Exs.B1 to B5.

5. The trial Court based on the evidence available on record, came to the conclusion that the respondent failed to complete the work within the time fixed under the construction agreement and consequently dismissed the suit claim. The trial Court also came to the



conclusion that the appellant/defendant was entitled to recovery of Rs.3,42,000/- as per the counter claim and hence the counter claim preferred by the appellant was decreed. In the result, the trial Court dismissed the suit claim and decreed the counter claim. Aggrieved by the same, the respondent preferred two appeals in A.S.Nos.228 and 235 of 2014 on the file of XVI Additional City Civil Court, Chennai. The First Appellate Court on re-appreciation of evidence available on record, came to the conclusion that the respondent was entitled to decree for recovery of Rs.70,000/- from the appellant and consequently partly decreed to the suit to the said amount. The First Appellate Court also reversed the findings of the Trial Court with regard to the counter claim and dismissed the same, on the ground that the appellant failed to prove his entitlement for counter claim. Thus the appeal in A.S.No.235 of 2015 filed by the respondent, challenging the dismissal of the suit claim was allowed in part and decree for a sum of Rs.70,000/- with interest was passed in favour of respondent and against the appellant. The Appeal in A.S.No.228 of 2014 preferred by the respondent challenging the decree allowing counter claim was allowed and the counter claim of the appellant was dismissed in its entirety. Aggrieved by the same, the appellant is before this Court with these second appeals.



(i) *Whether the First Appellate Court was right in dismissing the counter claim and allowing the claim of the plaintiff to an extent of Rs.70,000/-?*

(iii) *Whether the First Appellate Court was right in interpreting the documents in Exs.A1, A3, A4 and A6 and which is the foundation of the claims between the parties and coming to a conclusion to reverse the decree of the trial Court?;*

(iv) *Whether the First Appellate Court was right in holding that there was no evidence and dismissing the counter claim of the appellant and in the absence of any evidence, pleadings and admissions, right in decreeing the*



suit to an extent of Rs.70,000/- in favour of the plaintiff?.

WEB COPY

7. The learned counsel appearing for the appellant submitted that as per the terms of construction contract, the respondent has to complete the construction work within four months from the date of agreement. However, he failed to complete the work within the time stipulated and dragged on the construction beyond the time stipulated under the agreement and ultimately abandoned the work. The appellant who have taken possession of unfinished flat incurred lot of expenditure in undertaking the unfinished works. The First Appellate Court without taking into consideration Ex.B2 marked by the appellant erroneously interfered with the decree passed by the trial Court allowing counter claim of the appellant. The learned counsel further submitted that the respondent himself admitted in Ex.A3 that certain works were not completed in the flat and in such circumstances, the First Appellate Court ought not to have granted decree in favour of respondent, as if, he completed entire construction work as agreed. The learned counsel in this regard relied on Exs.A1, A3, A4 and A6.

8. Per contra, the learned counsel appearing for the respondent submitted that the appellant has not sought for appointment of



any independent Engineer to note down and value the pending work in the flat. In the absence of any concrete evidence to show that the appellant had undertaken unfinished works and incurred expenditure, the said statement is not believable. The learned counsel further submitted that the appellant has not examined any independent witnesses to prove that he had undertaken unfinished works and incurred expenditure. The learned counsel further submitted that Ex.B2 measurement book said to have been prepared by one Muthukumar was not examined to prove the same and hence, the same should have been rejected as self serving document taking into consideration the admitted fact that the respondent himself was a Civil Engineer.

9. Though the respondent laid a suit for recovery of Rs.1,97,270.50/-, the First Appellate Court granted decree only for a sum of Rs.70,000/-. The respondent has not preferred any appeal or cross appeal challenging the negatived portion. Therefore, these second appeals are only concerned with a dismissal of the counter claim filed by the appellant and decree granted against the appellant to the tune of Rs.70,000/-.



WEB COPY

10. It is the specific case of the respondent that though as per the construction agreement Ex.A1, appellant agreed to pay a sum of Rs.11,50,000/- towards cost of construction, he paid only Rs.10,40,000/-. It is the further case of the respondent that he incurred extra expenses towards certain additional works done by him at the request of the appellant. Thus, he sought for recovery of Rs.1,10,000/- towards the amount due under the agreement and Rs.45,000/- towards the additional work. The respondent sought for Rs.42,270.50 towards interest of Rs.1,55,000/- at the rate of 18% per annum from the date of legal notice to date of suit. Thus he laid a suit for recovery of Rs.1,97,270.50/-. On the other hand, the appellant contended that the respondent abandoned the flat without completing construction and he occupied the unfinished flat and completed the unfinished works by incurring expenditure out of his own pocket. He also claimed that due to delay on the part of the respondent in handing over the completed flat, he incurred additional expenditure towards rentals. Thus, he sought for recovery of Rs.1,92,000/- towards loss of rental and Rs.1,50,000/- towards cost of completion of construction. In all, the appellant sought for recovery of Rs.3,42,000/- from respondent by way of counter claim. In order to prove the



unfinished works and the expenditure incurred by the appellant to undertake the unfinished work, the appellant has not examined any independent witnesses. Except interested testimony of appellant/DW.1, there is no other oral evidence available on record to prove the said fact. In order to prove the additional work undertaken by the appellant, the learned counsel for the appellant relied on Ex.B2 bills and measurement book. During cross examination of DW.1, he clearly admitted the measurement book was prepared by one Muthukumar, his friend. However, the said Muthukumar has not been examined to prove the measurement book. Therefore, based on the measurement book filed by the appellant, who himself is a Civil Engineer, we cannot come to a definite conclusion, the same is regarding the construction undertaken by the appellant with regard to the unfinished flat. Likewise, the bills produced by the appellant for purchase of various construction and finishing materials cannot be taken into consideration in the absence of any independent witnesses, especially in the light of the admitted fact, the appellant himself is a Civil Engineer. Thus the First Appellate Court on appreciation of evidence available on record rightly came to the conclusion that the appellant failed to prove the counter claim made by him and dismissed the same. I do not find anything to interfere with the said factual



conclusion reached by the First Appellate Court.

WEB COPY

11. The respondent sought for recovery of Rs.1,97,270.50/- from the appellant towards balance of amount payable under Ex.A1 agreement and towards cost of extra work undertaken by him. A perusal of Ex.A1 would suggest the cost of construction to be paid by the appellant to the respondent was fixed at Rs.11,50,000/-. The said amount is payable only if respondent finished entire construction work and hand over the finished flat to the appellant. In the case on hand, even as per own exhibit of respondent marked as Ex.A3, it was clearly admitted by respondent that certain works in the flat like floor polishing, main staircase flooring, door shutters, polishing and painting were not done. In the light of the statement made by the respondent in his own letter marked as Ex.A3, those works were unfinished works and in the letter by appellant to respondent dated 09.08.2007 marked as Ex.A6, the appellant claimed various other works also pending. In the light of own admission made by the respondent in his letter dated 10.07.2007 marked as Ex.A3, it is clear, certain works were pending in the flat and the respondent failed to complete the construction as agreed under Ex.A1.



WEB COPY

12. In such circumstances, the respondent is not entitled to claim entire amount of Rs.11,50,000/- as agreed under Ex.A1. The respondent failed to seek appointment of any Engineer to value unfinished works. Unless there is some acceptable evidence on record to value the unfinished works admitted by the respondent under Ex.A3, we cannot come to the conclusion what is the amount due by the appellant to the respondent. For the reasons best known to the respondent, he failed to examine any independent witnesses to value the finished work and prove the suit claim. The exchange of letters between the appellant and respondent under Ex.A2 to A10 would only prove that the respondent failed to finish the construction of the flat as agreed as per Ex.A1 and there were unfinished works, when appellant occupied the flat. In the absence of appointment of a qualified Engineer to value the finished construction work undertaken by the respondent, this Court is not in a position to come to a definite conclusion with regard to the amount payable by the appellant to the respondent. As per the admitted case of the respondent, the appellant paid a sum of Rs.10,40,000/- and unless the finished works are valued in the manner known to law by appointing an expert, this Court cannot come to a definite



conclusion with regard to the value of the finished work undertaken by the respondent. Being the plaintiff, it is the burden of the respondent to prove the value of the construction work undertaken by him. However, the respondent failed to examine any independent witnesses much less an expert witness to prove the suit claim. Even, with regard to the additional work undertaken by the respondent except the letter written by him to appellant valuing the additional work at Rs.45,000/-, there is no other acceptable evidence available on record. In these circumstances, the First Appellate Court ought not to have granted a decree by directing the appellant to pay a sum of Rs.70,000/- to the respondent when the respondent failed to lead independent evidence in support of suit claim.

13. In view of the discussions made earlier, the substantial questions of laws framed at the time of admission are answered partly in favour of the appellant in respect of suit claim and partly against him in respect of his counter claim. As a consequence the decree for recovery of money passed by the First Appellate Court in favour of respondent is liable to be set aside. In other aspects, the judgment and decree passed by the First Appellate Court is confirmed.



WEB COPY



14. In nutshell:

(a) The second appeal No.654 of 2017 is allowed by setting aside the said judgment and decree passed by the First Appellate Court;

(b) The suit claim in O.S.No.10967 of 2010 on the file of the VIII Assistant City Civil Court, Chennai stands dismissed;

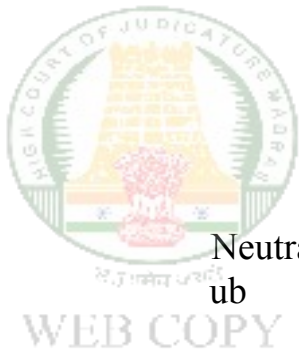
(c) The second appeal No.653 of 2017 is dismissed by confirming the judgment and decree of the First Appellate Court, reversing the decree granted by trial Court in respect of counter claim preferred by the appellant;

(d) In the facts and circumstances of the case, there shall be no order as to costs; and

(e) Consequently, connected miscellaneous petition is closed.

03.01.2024

Index : Yes/No
Internet : Yes/No



16

Neutral Citation Case : Yes/No
ub

S.SOUNTHAR, J.
ub

To

1. The XVI Additional Judge, City Civil Court, Chennai.
2. The VIII Assistant, City Civil Court, Chennai.

Pre-delivery order made in
S.A.Nos.653 and 654 of 2017



WEB COPY



17

03.01.2024