



S.A.(MD)No.82 of 2004

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.08.2024

CORAM

THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

S.A(MD).No.82 of 2004

S.Sudalaiyandi

...Plaintiff/Appellant/Appellant

.VS.

1.Correspondent/Principal,
South Indian Church Karur,
Ind.School, Karur.

2.Trichy Tanjore, Christian Dist.,
South Indian Church, Trichy.

... Defendant/Respondent/
Respondent

PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree dated 23.04.2004 and made in A.S.No.20 of 2003, on the file of the District Court, Karur confirming the judgment and decree, dated 12.02.2001 in O.S.No.352 of 1995 on the file of the Sub-Court, Karur.



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For Appellant : Mr.P.Thiyagarajan
for T.R.Rajaraman
For R1 & R2 : Mr.P.Rajagopalan
for Mr.R.Devaraj

J U D G M E N T

The appellant is the plaintiff and the respondents are the defendants in the suit. The plaintiff filed a suit in O.S.No.352 of 1995, on the file of the Sub-Court, Karur praying to direct the defendants to pay a sum of Rs.60,996/- with subsequent interest from the date of plaint till date of realisation to the plaintiff with costs.

2. The case of the plaintiff is that he is a contractor doing in Civil, Mechanical and Electrical works. The defendants entrusted the work of constructing a Shopping Complex in the property of the defendants opposite of Government General Hospital at Karur at the cost of Rs.7 lakhs. The plaintiff accepted the offer made by the defendants. The agreement between the plaintiff and the defendants that the plaintiff has to construct the shopping complex out of his own materials and later has to collect the bill



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amounts from the defendants. Then the plaintiff commissioned the work given by the defendants and has completed the work to the satisfaction of the defendants in the year 1993. The plaintiff has submitted 9 bills to the first defendant for the work undertaken by him. The first defendant has not settled some of the bills fully. The plaintiff is producing herewith the xerox copy of the 9 bills as document Nos.1 to 9 and it is prayed that the Court may be pleased to treat the same as part and parcel of this plaint. The plaintiff has also submitted another miscellaneous bill for the sum of Rs.9,450/- for the work done by him. Still the defendants are liable to pay a sum of Rs.54,460/- to the plaintiff. The first defendant has paid a sum of Rs.5,000/- on 13.01.1995. Finally, the plaintiff has submitted a letter on 17.04.1995 with the first defendant demanding a sum of Rs.54,460/-, the balance amount due from the defendants to the plaintiff. In the above letter, the correspondent and the consulting Engineer have also endorsed. The plaintiff is also producing the said letter as document No.10 and it is prayed that the Court may be pleased to treat the same as part and parcel of this plaint. In spite of repeated demands and requests made by the plaintiff, the



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defendants have not chosen to settle the amount due to the plaintiff. The defendants are miserably evading for the same so far. The second defendant is the Superior of the first defendant. So the second defendant is added as a necessary party in this suit to get a valid and binding decree. The defendants are bound to pay interest at the rate of 18% from 13.01.1995. Therefore, the plaintiff has filed a suit for recovery of Rs.60,996/- with subsequent interest from the date of plaint till date of realisation due to the plaintiff from the defendants.

3. The first defendant filed a written statement denying the averments made in the plaint and stated that the first defendant has paid total sum of Rs.6,72,309.20/- P to the plaintiff, which is duly signed and accepted by the plaintiff in due course. It is specifically stated that the plaintiff has not performed his contract according to the conditions of the contract and all of a sudden, he abandoned the construction work without any notice and the construction work is incomplete and till date the plaintiff has not completed the construction work as per the contract with the first



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defendant. It is specifically stated that the incomplete work done by the plaintiff is more than Rs.1,00,000/- and still the plastering work in the back side of all the shops is not completed by the plaintiff, weathering course for shops 1 to 18 is not completed by the plaintiff. Due to urgency, the weathering course for 7 shops have been done by this 1st defendant by the C.S.I.Industrial School boys and spent a sum of Rs.8,988/- parapet wall for 27 shops has not been constructed by the plaintiff till now. Sub-shad and stire case wall are not constructed for two shops and white wash and colour wash for all the shops was not done by the plaintiff. Hence, the above incomplete works are yet to be completed by the plaintiff. The total sum of construction work accepted by the plaintiff is Rs.7 lakhs and the amount paid by the first defendant to the plaintiff is Rs.6,72,309.20/-P and the incomplete work to be completed by the plaintiff is worth more than Rs.1 lakh. Further, it is specifically stated that in I.A.No.115/1996 is in the above suit, this defendant has filed an application for appointment of Commissioner with help of qualified Civil Engineer to value the construction works left out by the plaintiff and accordingly, the



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Commissioner filed a report along with the Engineer's report and the incomplete work done by the plaintiff is estimated by the qualified Civil Engineer Rs.62,000/-. Hence, it is critical clear that the first defendant is not liable to pay any amount to the plaintiff. Further, as per the commissioner's report, the first defendant had made an excess payment of Rs.34,309.20/-P to the plaintiff and the plaintiff has to reimburse the excess payment made by the first defendant. The defendants have filed a separate application under Order 8 Rule 6(A) of C.P.C., for counter claim. At the outset, the suit filed by the plaintiff is barred by law of limitation. Further, the suit is on the basis of contract and the plaintiff has to strictly prove the work done by him as per the contract and to complete work as per the terms and conditions agreed between the parties to the satisfaction of the defendants institution. The alleged suit amount of Rs.60,996/- arrived by the plaintiff is incorrect and false and this defendant is not liable to pay any amount to the plaintiff much less the suit amount. The plaintiff has to pay Rs.34,309.20/-P to the defendants. He has filed separate application for counter claim under Order 8 Rule 6(A) and Section 151 of C.P.C.



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4. After completing the pleadings and framing of issues, on the side of the plaintiff, the plaintiff was examined as P.W.1 and marked 13 documents as Ex.P1 to Ex.P13. On the side of the defendants, D.W.1 was examined and marked 9 documents as Ex.D1 to Ex.D9 and Court documents Ex.C1 and Ex.C2 were marked.

5. On considering the above said oral and documentary evidence, the trial Court dismissed the suit filed by the plaintiff with costs and partly allowed the counter claim filed by the defendants by directing the plaintiff to pay a sum of Rs.28,034/- to the defendants from the date of plaint till the date of payment with 6% interest p.a.

6. Aggrieved by the dismissal order, the plaintiff has filed an appeal in A.S.No.20/2003 before the District Court, Karur. On hearing the arguments, considering the entire materials and re-appreciated the oral and documentary evidence, the appellate Court dismissed the appeal by confirming the judgment and decree of the trial Court and partly allowed the



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counter claim of the defendants and directed the plaintiff to pay a sum of Rs.27,606.80/- to the first defendant.

7. Aggreived by the said judgments and decrees, the appellant/plaintiff has filed the present appeal.

8. At the time of admitting the present second appeal, this Court had framed the following substantial question of law for consideration:

"1) Having agreed under Ex.A-12 to pay the amount due and payable by the plaintiff to the defendants, is the learned District Judge right in dismissing the suit relying upon the report of the Commissioner?

ii) Admittedly the construction having been completed in 1992, having taken possession and leased out the same to tenants in 1993 by the defendants are not the defendants estopped from contending non-completing by the plaintiff?

iii) Is the learned District Judge right in relying upon the report of the Commissioner without the



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Commissioner being examined as a witness, especially when it is not the case of the defendants that plaintiff failed in completing the construction as agreed?

9. The learned counsel appearing for the appellant would submit that the learned appellate Court erred in note that there is no denial regarding the work done by the plaintiff in the written statement. The learned District Judge ought to have seen that the defendant had not chosen to allege that the plaintiff did not complete the work when the plaintiff sent a letter claiming the money for work. There was no evidence denying the completion of work by the plaintiff. The learned District Judge erred to find that the contract amount of Rs.7,00,000/- was only an approximate value. There was no specific contract between the plaintiff and the defendants to put up any compound wall and to whitewash the buildings. There was no such allegation against the plaintiff in the letter dated 17.04.1995. In the letter, dated 17.04.1995 (Ex.A.12) the defendants having admitted the same recommended to despatch the same. The defendants had chosen to file their written statement after the report of the Commissioner and made on ground



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of non-completion of work. The learned District Judge failed to see that taking the ground of non-completion of work in the written statement but being not taken in any of the bill transactions is only an after thought. It was the practice between the plaintiff and defendant that the defendant will give the money as and when the plaintiff completes the part of work. The learned District Judge failed to note that the plaintiff would submit the bill for the completed work. The Bills sent by the plaintiff (Ex.A12 & A13) were accepted by the first defendant. The learned District Judge ought not to have relied upon the commissioner's report and decided the suit. The learned District Judge ought not to have dismissed the suit on the main ground that plaintiff did not file any objections to the Commissioner's report and prayed for allowing the second appeal.

10. The learned counsel appearing for the respondents would submit that the Courts below have rightly dismissed the suit and allowing the counter claim.



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11. It is seen from the records that the first appellate Court held that there is an agreement that the plaintiff should build the premises for Rs.7 lakhs. But it was submitted by the first respondent that the commercial complex was not yet completed and work worth Rs.1,00,000/- was still pending. The commissioner appointed in this case has inspected the construction works with the help of the building Engineer and gave the report of the Engineer as well as Commissioner and the same were marked as Ex.C1 and Ex.C2. The plaintiff and the first defendant have not filed any objection for marking of Commissioner's and Engineer's report and hence, the report of the commissioner cannot be rejected. Since the same has not been objected to by both parties at the time of marking the reports, now the parties cannot oppose the said documents for argument sake.

12. The Commissioner has stated in his report that worth about Rs.1,02,621/- work has not been completed by the plaintiff. The Commissioner has deducted 40% from the above amount on the basis of the price rate of the year 1992 and assessed the value of the unfinished work at



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Rs.61,572/- (or) Rs.62,000/-. The plaintiff has received a sum of Rs. 6,61,034.20/- from the respondents and in addition, in the year 1995, the plaintiff has received a sum of Rs.5,000/- and that amount was not included. The plaintiff has admitted that he has received a sum of Rs.6,66,034.20/- including Rs.5,000/-. The plaintiff, in his evidence has admitted that he has not filed any objection for the Commissioner's report and Engineer's report.

13. The fact that the amount of Rs.7 lakhs was fixed for the construction work of 33 shops was only an approximate amount and it is not an amount as agreed by the parties is not accepted by the first appellate Court. Even though the plaintiff has agreed to build a shopping mall with 33 shops for Rs.7 lakhs, on perusal of Ex.C2 the Building Engineer's report, it is clear that the works worth Rs.61,572.60/- have not been completed. From the above, it came to know that the plaintiff has completed the work to the tune of Rs.6,38,427.40/-, however, as per the evidence of P.W.1 it is seen that the plaintiff has received a sum of Rs.6,66,034.20/- towards construction work. Hence, from the above facts, it is true that the plaintiff



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has received an excess amount of Rs.27,606.80/- (Rs.6,66,034.20 - 6,38,427.40). Hence, this Court comes to the conclusion that the plaintiff has to pay excess amount of Rs.27,606.80/- to the first defendant towards construction work.

14. From the above, this Court is of the view that the plaintiff has not completed the work as agreed by him within the period stipulated by this Court and more over, the Commissioner has visited the place in question and filed a report that he has not completed the work as agreed by him to the value above mentioned and on this basis. Therefore, the plaintiff has to pay a sum of Rs.27,606.80/- to the first defendant towards the value of work that was not completed by the plaintiff as agreed by him.

15. Regarding the first question of law, in the absence of any other valid evidence produced by the plaintiff, the plaintiff shall pay the amount to the defendant and the District Judge was right in considering the report of the Commissioner.



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16. Regarding the second question of law, even though, the shops were made ready, final works were not completed by the plaintiff and the said fact was proved by the Advocate Commissioner's report. Hence, the defendants cannot be estopped from contending that the non-completion of work by the plaintiff, even though, the same were rented to the tenants.

17. Regarding the third question of law, if the parties have any objection for the Commissioner's report they could have very well examine the commissioner as a witness and in the absence of any other plea made by the plaintiff, he cannot now raise the question that it is not correct to rely upon the report of the commissioner on the ground that the Commissioner was not examined as a witness by the parties.

18. It is seen from the perusal of the oral and documentary evidence produced on either side, this Court is of the view that only based on the factual aspects, the claim was made by the plaintiff and hence, this



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Court finds no error or illegality in the findings of the Courts below and as such the second appeal is liable to be dismissed.

19. For the reasoning above stated, the second appeal stands dismissed, however, there is no order as to costs.

Index : Yes / No

Speaking Order : Yes / No

19.08.2024

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To

1.The District Court,

Karur.

2.The Sub-Court,

Karur.

3. The Section Officer,

VR Section,

Madurai Bench of Madras High Court,

Madurai.



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V.BHAVANI SUBBAROYAN, J.

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