IN THE V ADDITIONAL CITY CIVIL COURT AT CHENNAI

Present :- Thiru. **S. Isvarane** M.A.L.L.B.,

V Additional Judge.

Monday, the 30th day of September, 2019

APPEAL SUIT No. 39 / 2018

1. Mrs. Sayeeda Hussain
2. Mrs. Zira Hussain .. Appellants / Defendants 1 & 3

//Versus//

1. Mr. Shyamsundar Mookim
2. Mrs. Vijaya Mookim .. Respondents/ Plaintiffs

3. Mr. Tanveer Hussain
4. Mr. Ravi K. Martin
5. Mr. Kabil Pansari
6. Mrs. C. Shanthy .. Respondents/ Defendants 2,4,5 & 6

On appeal against the judgment and decree dated 21.09.2017 made in O.S.No. 4607/2014 by the Learned IV Assistant Judge, City Civil Court, Chennai.

O.S.No. 4607/2014

Between

1. Mr. Shyamsundar Mookim
2. Mrs. Vijaya Mookim … Plaintiffs

//And//

1. Mrs. Sayeeda Hussain
2. Mr. Tanveer Hussain
3. Mrs. Zira Hussain
4. Mr. Ravi K Martin
5. Mr. Kabil Pansari
6. Mrs. C. Shanthy . Defendants

This appeal coming up before me on 04.09.2019 in the presence of M/s. V. Krishnamoorthy, M. Uma Shankar, R. Udaya Kumar, S. Alan David Rufus and N. Mohan Kumar, counsels for the appellants and of M/s. R.N. Amarnath and M. Chithira Gomathy, counsels for the respondent 1 & 2 and the respondents 3 to 6 are called absent and set ex-parte and upon hearing the argument of both side and on perusing the grounds of appeal, judgment and decree of the trial court and other material papers on record and having stood over for consideration till this day, this court delivered the following;

JUDGMENT

This appeal has been preferred against the judgment and decree dated 21.09.2017 made in O.S.No. 4607/2014 by the Learned IV Assistant Judge, City Civil Court, Chennai.

2) The suit has been filed for (a) directing the defendants 1 to 3, 5 and 6 to execute and register a sale deed with respect to 515 sq. ft built up area out of 2246 sq.ft built up area morefully described in the schedule ‘C’ in favour of the plaintiffs 1 & 2 jointly and hand over

vacant possession of the 515 sq. ft of built up area in the second floor of the schedule ‘C’ to the plaintiffs 1 & 2 jointly and in the event of defendants 1 to 3, 5 and 6 fail to execute and register a sale deed, direct an officer of this court to execute and register the sale deed in favour of the plaintiffs and hand over vacant possession of the property to the plaintiffs, (b) for directing the defendants 1 to 4 to execute and register a sale deed with respect to 353 sq ft of built up area of out 2246 sq. ft built up area morefully described in the schedule ‘C’ in favour of the 2nd plaintiff exclusively and hand over vacant possession of the 353 sq. ft of built up area in the second floor of the schedule ‘C’ to the 2nd plaintiff exclusively and in the event of the defendants 1 to 4 fail to execute and register a sale deed, direct an officer of this court to execute and register the sale deed in favour of the 2nd plaintiff and hand over vacant possession of the property to the 2nd plaintiff and for costs. The suit was decreed by the trial court. Aggrieved by the same the defendants 1 & 3 have preferred this appeal against the judgment and decree.

For the sake of convenience, the parties are referred hereunder according to the litigative status and ranking before the trial court.

3) **<u>The averments in the plaint in brief:-</u>**

a) Originally the vacant land admeasuring 6200 sq.ft. was owned by one Syed Nazir Hussain and he entered into a joint venture agreement with M/s. Alsa Investments Pvt. Ltd dated 09.10.1992 for developing the said properties. It is agreed by both parties that the developer shall put up construction and they shall share the construction equally by which they shall enjoy all the common benefits, rights and equities equally. As far as the land concerned it was agreed that each shall hold 50% of share jointly. The said agreement was modified by supplementary agreement dated 25.02.1998 with respect to allotment of share alone. As per the above said agreement the 1st defendant's husband shall keep 3100 sq.ft. of undivided share and the developer shall keep 3100 sq.ft. of UDS share. As per the plan, the developer shall construct 6200 x 1.99 (FSI) – 12,338 sq.ft. and as per agreement dated 09.10.1992 the 1st defendant's husband will keep 3100 x 1.50 (FSI) = 4650 sq.ft.

b) Further in the supplementary agreement it was agreed that the owner (1st defendant's husband) have right to park 4 cars in the parking area and shall have exclusive right over the terrace area and the owner will relinquishes 896 sq.ft. of commercial space to the developer for a consideration of Rs.23,00,000/-. Thereafter, the 1st defendant's husband sold his 1957.50 sq.ft. of UDS in the land and 3919 sq.ft. of build up area to 4 persons and the balance UDS viz. 3100-1957.5 = 1142.5 is kept by him and the same is now in possession of defendants 1 to 3. The defendants 1 to 3 are the legal heirs of Late. Syed Nazir Hussain.

c) The 2nd plaintiff purchased 550sq.ft. of UDS in the land and 1093 sq.ft. of build up area ('B' schedule property) from the 4th defendant by a registered sale deed dated 13.12.2006. The plaintiffs 1 & 2 jointly purchased the 'A' schedule property from the 6th defendant by a registered sale deed dated 17.05.2010. The 6th defendant purchased the property from the 5th defendant. The 4th & 5th defendants purchased their respective properties from late Syed Nazir Hussain. The plaintiffs are joint owners of 957.5 sq.ft. of land and the 2nd plaintiffs having exclusive right over another 550 sq.ft. of land and they have jointly entitled to get their proportionate built up area in 'A' schedule property to the extent of 957.5 sq.ft. X 1.99

= 1915 sq.ft. and the 2nd plaintiffs is entitled to get 'B' schedule property exclusively to the extent of 550 sq.ft. x 1.99 = 1093 sq.ft in the built up area. But the plaintiffs 1 & 2 are provided with 1400 sq.ft. in the built up area instead of 1915 sq.ft. in the built up area in A Schedule property. The 2nd plaintiff is provided with 740 sq.ft, Instead of 1093 sq.ft. of built up area in B Schedule property.

d) The defendants 1 to 3 who are the legal heirs of Syed Nazir Hussain have 1378 sq.ft. built up area instead of 1142.5 sq.ft. . The defendants keeping excess area of 868 sq.ft. thereby the plaintiffs jointly entitled to get 515 sq.ft in A schedule and the 2nd plaintiff exclusively entitled to get 353 sq.ft. In B schedule from the defendants 1 to 3. Thus the defendants 1 to 3 have to relinquish the total extent of 868 sq.ft of built up area in the 2nd floor in favour of the plaintiffs. The plaintiffs were under the bonafide impression that the proportionate built up area to the common purchased by the plaintiffs was given to plaintiffs by the defendants. During the year 2009-2011 when there was a dispute between the plaintiffs and the 1st defendant with regard to the parking of car in the common area, the plaintiffs measured the property. Thereafter, it came to the knowledge of the plaintiffs that lesser area was given to the plaintiffs. The plaintiffs approached the defendants on several occasions to resolve the dispute, but the defendants did not come forward to register the deed. Therefore, the plaintiffs sent a notice on 10.09.2012 and the same was returned as 'unclaimed'. The defendants did not fulfill the demand made by the plaintiffs. Hence, the suit.

4) <u>The averments in the written statement of Defendants 1, 2 & 3 in brief:-</u>

a) These defendants could not be directed to execute any sale deed as they did not receive any consideration from the plaintiffs. Further the specification of the ‘C’ schedule property is incorrect. Further, the apartment consist 4 flats which are owned by different owners. Hence, the defendants only were not supposed to execute the sale deed. Further the plaintiffs speaks about the agreement which entered between one Syed Nazir Hussain and M/s. Alsa Investments Pvt. Ltd, but the plaintiffs are not party to the agreements. Therefore, the plaintiffs have no right to claim based on the terms and conditions elicited in the above mentioned agreements.

b) Further the plaintiffs purchased the properties from defendants 4 & 6. Hence, any dispute regarding the purchase should arise only between the plaintiffs and the defendants 4 & 6 only, who are the purchasers and sellers respectively. Further, there is no implied contract /agreement between the plaintiffs and the defendants 1 to 3. The plaintiffs have stated that as per law they are entitled to certain area but they have not mentioned the specific Act or provisions of law which they are referring in the plaint. The defendants 1 to 3 are possessing clear title for their property.

c) Further the plaintiffs have purchased the ‘B’ schedule property on 13.12.2006 and ‘A’ schedule property on 17.05.2010, whereas the suit was filed on 08.08.2014 only. Hence the suit is filed beyond the period of limitation and it is not valid legally. The plaintiffs are illegally occupying the space meant for the 1 to 3 defendants. Further, the defendants denied that they are willing to settle the dispute by surrendering the part of the portion owned by them. The defendant did not receive any legal notice from the plaintiffs. The plaintiffs with an intention to grab the property defendants 1 to 3, have filed the suit and approached this court with unclean hands. The suit is devoid of merits and liable to be dismissed.

5) <u>The averments in the written statement of the 6th defendant in brief :-</u>

The 6th defendant admits the avernments made in the plaint. As per law the defendants 1 to 3 are not entitled to keep more area then what is their proportionate area as per law and also builders agreement. It is true that the defendants 1 to 3 have to relinquish their right over 515 sq.ft. of built up area in the 2nd floor in favour of the plaintiffs 1 & 2 and 353 sq.ft. of built up are in favour of the 2nd plaintiff. Thus, the defendants 1 to 3 have to relinquish the total extent of 868 sq.ft. of built up area in the 2nd floor in their favour. The defendants 1 to 3 are keeping 868 sq.ft. built up area in excess of the proportionate build up area and the same is to be surrendered to the plaintiffs. This defendant is neither necessary party nor proper party to the suit. The suit as against this defendant is not maintainable and liable to be dismissed.

6) The defendants 2, 4, 5 remained ex-parte in the trial court. On the basis of the plaint, written statements, documents and other material, the following issues were framed by the trial court.

Issues:

1.	Whether the plaintiff is entitled for specific performance as prayed for in the prayer?
2.	To what other reliefs?

7) Before the trial court, on the side of the plaintiffs, PW1 was examined and Ex.A1 to A13 were marked. On the side of the defendants DW1 was examined and no exhibits were marked. Upon hearing the arguments on both sides and upon perusing the documents, the trial court decreed the suit on merits. Aggrieved over the judgment and decree, the defendant 1 & 3 have filed this appeal on the following

8) **Grounds of Appeal**

a) The trial court failed to appreciate the specific contention of the Appellants/Defendants 1 & 3 that the suit was barred by limitation and erred in decreeing the suit in favour of the 1st and 2nd respondents/plaintiffs.

b) The trial court failed to consider the fact that the appellants are entitled to 896 sq. ft of commercial space and 5988 sq.ft of residential space together with 50% undivided share in the land as per the supplementary agreement dated 25.02.1998 marked as Ex.A1.

c) The trial court miserably mislead and hoodwinked by the respondents/plaintiffs by making false representations that the appellants are in possession of extra sq.ft but the extent of 868 sq. ft claimed by the respondents as excess is part of the commercial space allotted to the appellants as per the supplementary agreement dated 25.02.1998.

d) The trial court failed to appreciate the basic principle Caveat Emptor. The respondents/plaintiffs should have verified the extent and other details of the flat at the time of purchase and cannot belatedly approach the court.

e) The trial court failed to consider that the respondents/plaintiffs had not preferred an application for appointment of an Advocate Commissioner to ascertain the extent of built up area available in the suit schedule premises when a specific allegation is made that the appellants/defendants usurped an extent of 868 sq. ft built up are belonging to them.

f) The trail court failed to consider the basic principle of involved in apartment building that built up mentioned in the sale deed or agreement for construction includes common area and the plinth area or carpet area would be less than the built up area mentioned the documents.

g) The trial court erred in decreeing the suit in favour of the respondents/plaintiffs without taking into consideration that the plaintiffs themselves have prayed for appointment of Advocate Commissioner in their suit and if the same have been done, would have vividly proved that the extent claimed by the respondents/plaintiffs belong to the appellants being their commercial area allotted to them by way of a supplementary agreement dated 25.02.1998.

h) The trial court has come to the conclusion that the appellants/defendants are holding excess of built up area without relying on the documentary evidences but only based on a stray answer given by the first appellant during cross examination.

I) The Judgment and decree of the trial court is liable to be set aside.

9) The **points for consideration** in this appeal are

i.	Whether the trial court was right in decreeing the suit on merits?
ii.	Whether the appeal has to be allowed or not?

10) **On the points (i) & (ii)** :-

The defendants 1 & 3 who suffered a decree before the trial court has preferred this appeal against the Judgment and decree of the trial court in O.S.No. 4607/2014 on the file of

IV Assistant Judge, City Civil Court, Chennai dated 21.09.2017. The case of the plaintiffs is that the plaintiffs 1 & 2 are the joint owners of 'A' schedule property and the 2nd plaintiff is the individual owner of the 'B' schedule property. The plaintiffs 1 & 2 purchased 'A' schedule property from the 6th defendant. The 2nd plaintiff purchased the 'B' schedule property from the 4th defendant. The defendants 1 to 3 are the legal heirs of one Syed Nazir Hussain, who was the original owner of the property measuring 6200 sq. ft. The said Syed Nazir Hussain entered into a joint venture agreement with one M/s. Alsa Investments Pvt Ltd dated 09.10.1992 for developing the property as flats. As per the agreement, the developer shall put up construction in the entire property and the owners shall share the construction equally. It was also agreed that they shall enjoy the common benefits, rights and equities equally. So far as the land is concerned, they shall hold 50% : 50% of undivided share of the land. The said agreement was modified by a supplementary agreement dated 25.02.1998. As per the agreement, Syed Nazir Hussain and the developer are entitled to 3100 sq.ft of undivided share in the land. The developer shall construct 6200 x 1.99 (FSI) = 12,338 sq.ft. As per the original agreement, the owner will keep 3100 x 1.50 (FSI) = 4,650 sq.ft. As per the supplementary agreement, the owner shall have right to park four car parking area and exclusive right over other the terrace area and owner will relinquish 896 sq. ft right over the commercial space in favour of the developer. The said Syed Nazir Hussain sold the undivided share to four persons as follows:-

1. Kapil Pansari 957.5 sq. ft of undivided share.
2. Gladstone Agencies Ltd 280 sq.ft of undivided share.
3. Mrs.Hu Yuhan and Dr. Huiukhan 170 sq. ft of undivided share.

4. Ravi K Martin 550 sq. ft of undivided share.

In total, Nazir Hussain sold 1957.5 sq. ft of of undivided share out of 3100 sq. ft. Similarly, he sold 3919 sq.ft of built up area to the purchasers. The 2nd plaintiff purchased 550 sq. ft of undivided share in the land with built up area of 1093 sq. ft on 13.12.2006 from the 4th defendant. The plaintiffs 1 & 2 jointly purchased 957.5 sq. ft of undivided share with built up area 1915 sq. ft from the 6th defendant on 17.05.2010. The plaintiffs had an occasion to measure the property when there was a dispute regarding parking space in the common area and regarding metro water tax payment. When the property of the plaintiffs were measured, they found that instead of 1915 sq. ft built up area, they are providing with only 1400 sq. ft. Similarly, instead of 1093 sq. ft of built up area, they have provided with 750 sq. ft, the remaining property was kept by the legal heirs of the Syed Nazir Hussain, who are the defendants 1 to 3 herein, they are occupying 896 sq.ft more than what they are entitled to. The plaintiffs are having the deficient space of 515 sq. ft regarding 'A' schedule property and 353 sq. ft regarding 'B' schedule property. The defendants 1 to 3 are entitled to keep 1378 sq. ft, which is described as 'C' schedule property hereunder. However, the defendants 1 to 3 are keeping 2246 sq. ft under their control. The plaintiffs tried to approach the defendants 1 to 3 for settling the dispute amicably, but the defendants 1 to 3 did not come forward for settling the dispute. Hence the plaintiffs issued a legal notice on 27.10.2012 calling upon the defendants 1 to 3 to relinquish their right of 800 sq. ft built up area in favour of the plaintiffs. The plaintiffs also demanded the defendants 4 to 6 to persuade the defendants 1 to 3 to relinquish their right over 800 sq. ft. Since the defendants 1 to 3 did not receive the legal notice, the plaintiffs are constrained to file this suit to direct the defendants 1 to 3, 5 & 6 to execute and register a sale deed with respect to 515 sq. ft built up area out of 2246 sq. ft of built up area morefully described in 'C' schedule in favour of the plaintiffs 1 & 2 and also to hand over the possession. The plaintiffs also seek a direction to the defendants 1 to 3, 5 & 6 to execute and register a sale deed in favour of the plaintiffs with respect to 515 sq. ft. of built up area out of 2246 sq. ft of built up area described as C Schedule in the plaint and a direction to the defendants 1 to 4 to execute and register a sale deed in favour of the plaintiffs with respect to 353 sq. ft. of built up area out of 2246 sq. ft of built up area described as C Schedule in the plaint also to hand over the possession.

11) The defendants 1 & 3 strongly objected the case of the plaintiffs claiming that there is no contract between the plaintiffs and the defendants 1 to 3 and hence, the plaintiffs cannot seek for execution of sale deed from the defendants 1 to 3. The built up area of 2246 sq. ft is not available in Flat No. D 7/14. "C' schedule property is incorrect. The plaintiffs have seeking the relief in respect of the property, which is not in existence. The apartment consists of four flats owned by different owners. The portion of built up area could not be taken up squarely from the said apartment as claimed by the plaintiffs. The defendants have not chosen to include the developer namely Alsa Investments Pvt Ltd as a party to the suit. If at all any dispute regarding the purchase, it should arise between the plaintiffs and the defendants 4 & 6 from whom, the plaintiffs have purchased the property. The defendants 1 to 3 are in no way connected with the plaintiffs regarding the purchase of the flats. The plaintiffs are third parties, who cannot claim any right based on the development agreement between Syed Nazir Hussain and Alsa Constructions. The calculation given by the plaintiffs

are imaginary calculations. The 'B' schedule property was purchased by the 2nd plaintiff as early as 2006 and 'A' schedule property was purchased from the 4th and 6th defendants in the year 2010, whereas, the suit was filed in the year 2014. The suit is barely barred by limitation. The plaintiffs are causing much annoyance to the residents of the flat. The suit is filed with an intention to grab the property of the defendants.

The 6th defendant who is the vendor of the plaintiffs, filed his written statement supporting the case of the plaintiffs.

12) The trial court after going through the pleadings, evidence and documents has come to a conclusion that there is deficit built-up area sold to the plaintiffs and the defendants 1 to 3 are liable to give up 868 sq.ft of built up area and also liable for the expenses of the plaintiffs for registration and other incidental charges. Aggrieved by the finding, the defendants 1 & 3 have preferred this appeal.

13) On perusal of records and as pointed out by the D1 & D3 counsel, it is clear that the following points were raised by the defendants 1 & 3 before the trial court which were not dealt in proper perspective. **Firstly**, the builder of the suit property namely Alsa Constructions who developed the same as apartments, has not been added as a party in the suit. The said builder alone can throw light on the aspects like **super built-up area**, **plinth area(built-up area)**, **carpet area** etc. of the suit building and apartments therein. This makes the suit bad for non-joinder of necessary party. **Secondly,** the area mentioned in the sale deed of the plaintiff's is only **super built-up area** also called as **saleable area** which includes the corridor,

staircases, lobby, lift, etc. So, the said area may not be available within the 4 walls of the apartment. **Thirdly**, the previous owners of the A & B Schedule properties have not chosen to dispute the area/extent conveyed to them. The 2nd plaintiff being the **second hand purchaser** of the **B Schedule** property and plaintiffs 1 & 2 being the **third hand purchasers** of **A Schedule** property, wants to hold their vendor's vendor and vendor's vendor's vendor responsible for the alleged shortage of built-up area which is not permissible. **Fourthly,** the vendor of the 2nd plaintiff namely Ravi K. Martin, had purchased the B Schedule property in the year 2002 from the (late) Syed Nazir Hussain who is the husband of the D1 and father of D2 & D3. Similarly, the vendor's vendor of the Plaintiffs 1 & 2 namely Kapil Pansari purchased the A schedule property(only UDS) from the (late) Syed Nazir Hussain in the year 2005. But this suit was filed only in April 2013 and was numbered only in August 2014, seeking relief against the D1 to D3 who are the LRs of late. Syed Nazir Hussain which is hopelessly barred by limitation. **Fifthly**, when there is alleged shortage in built-up area, the purchaser can only claim for the damages from their vendors either by entirely rescinding the sale and getting the refund of the entire sale consideration or to seek for refund of the amount paid in excess to the extent transferred. The plaintiffs have no cause of action against the D1 to D3.

14) The plaintiffs filed the suit claiming that they have measured the property and found that there is shortage of built-up area/extent which was sold to them. ‘A’ schedule property was purchased by the plaintiffs 1 & 2 from the 6th defendant. ‘B’ schedule property was purchased by the 2nd plaintiff from the 4th defendant. There is no direct purchase by the plaintiffs from neither the builder nor from the owner of the property. The ‘B’ schedule

property was purchased in the year 2006. 'A' schedule property was purchased in the year 2010 from the respective vendors. This suit was numbered in the year 2014. The plaintiffs claimed that only when a dispute arose regarding parking area and payment of water tax, the plaintiffs were constrained to measure the property to ascertain the extent. The plaintiff has not chosen to lead any evidence to show who measured their apartment, when the measurement was done, how it was measured, whether the person measured is a qualified person, what are the units of measurements noted, who were all present during the measurement, whether the approved building plan was referred by the person who measured the same etc. It is also not stated or proved which area was measured. Whether the super-built up area was measured? **or** plinth area(built-up area) was measured? **or** carpet area was measured? There is always a difference between the **Super built-up area(saleable area)** and **built up area(plinth area)** and **carpet area** of a flat. Understanding these terms may be useful to decide this case.

Carpet Area : A carpet area is an area which can be covered by a carpet. It is the wall to wall distance which makes for the net usable floor area of the house. This area does not include the area covered by the external walls, balcony or terrace. However, the carpet area, which becomes one's personal space includes the thickness of the inner or room partition walls of the house. Generally, carpet area constitutes around 70 percent of the built-up area encompassing the living room, the bedrooms, and other rooms, the kitchen, and the bathrooms.

Built-up Area or Plinth Area : The built-up area is the comprehensive area which is the sum of the carpet area and the thickness of walls of the housing unit. The area spanned by the balcony or terrace is also counted. Mostly, it constitutes about 70 to 80 percent of the super built-up area of the property. Built-up area = Carpet area + area of walls + area of the balcony.

Super Built-up Area : The super built-up area is the total sum of the built-up area and the space occupied by common areas like the lobby, staircase, elevator, shafts, clubhouse, etc. Often, developers charge buyers based on this area. Thus, it is referred to as 'saleable' area. Closely related to the super built-up area is the loading factor which is the proportionate share of the common area in an apartment determined by applying a multiplier (1.25 or 1.30) to the carpet area. This amounts to an increase of 25 percent or 30 percent of the total saleable area. Loading is the difference between the super built-up area and the carpet area of the flat. Developers price the apartment based on the loading factor.

15) Therefore, it is clear that what is usually mentioned in the sale deed of any flat or apartment is the **Super Built-up Area** and not the plinth area or carpet area. The super built up area includes common areas like lobby, staircase, lift room, swimming pool etc. Whereas, the carpet area is the area within the four walls of the flat, which includes balcony and sit outs. The plinth area is not only the carpet area, but also the areas occupied by the walls of the flat. The Ex.A2 agreement between Alsa Constructions and (late)Nazir Hussain, at point No.3 clearly refers only the Super Built-up Area of 4650 sq.ft. inclusive of common areas. Ex. A5 sale deed between Nazir Hussain and M/s. Gladestone Agencies refers only 566 sq.ft. of super built-up area. The Ex.A7 sale deed executed by Nazir Hussain to Ravi K. Martin refers to 1093 sq.ft. of super built-up area. This is the B Schedule property in this suit. Therefore, the plaintiffs are not clear whether the area/extent in shortage alleged by them is in the super built-up area or plinth area or carpet area? It is also pertinent to note that the 1st purchaser of the A schedule property namely Kapil Pansari purchased the UDS alone from the Nazir Hussain. It follows that he must have entered into a construction agreement with the builder. But, the said construction agreement or builders agreement is not produced by the plaintiffs. No approved building plan of the suit building has been filed by both the parties. The plaintiffs have purchased available two flats in the **third floor** of the building. The Defendants 1 & 3 are holding available two flats in the **second floor**. The **first floor** is commercial space of which the defendants retained 896 sq.ft. initially vide Supplementary Agreement(Ex.A3) and later sold the same to M/s. Gladstone and M/s. Huiyukhan by two separate sale deeds. The plaintiffs have wrongly stated in their plaint that the Nazir Hussain released his right in 896

sq.ft. in commercial space in first floor. But, actually Nazir Hussain retained the 896 sq.ft in the commercial space and relinquished the remaining space which is evident from the supplementary agreement(Ex.A3). A flat built on a land will be based on the FSI (floors space index) allowed in a particular locality. The FSI can vary from area to area and on the basis of the nature of the building constructed on the land. For example, if there is a land of 2000 sq.ft and a building is proposed to be constructed on the land, then, suppose the FSI of a particular locality is 1.5, then, the building can be built in that land 2000 x 1.5 = 3000 sq. ft of covered area on the land. This can be either two floors of 1500 sq. ft or three floors of 1000 sq. ft or four floors of 750 sq. ft. There is no evidence produced on the FSI allowed on the locality of the suit property. The plaintiffs simply claimed that it was 1.5 initially and later it was 1.99 without any evidence.

16) There is absolutely no material show that there was shortage of area/extent of the flat. The plaintiff approached the court only under the mistaken impression that the super-built-up area mentioned in the document will be available within the four walls of the flat. It is also strange to see the prayer of the plaintiffs that they want the defendants 1 to 3 along with 4 to 6 to execute the sale deed for the alleged extent/area in shortage without any right whatsoever. If at all any relief of damages has to be claimed by the plaintiffs, it is against their vendors alone. It is pertinent to note that whenever any flat or building is sold in second hand, the Sub-Registrar through a qualified PWD engineer will measure the building and ascertain the nature of the building before releasing the sale deed registered to prevent undervaluation of the building/property. If really there was lesser extent as alleged, it would have been

brought to the notice of the purchaser during the inspection by the engineer. The plaintiffs who occupy the third floor want their missing extent in the second floor where the defendants 1 & 3 are having their property. There is absolutely no connection or contract between the plaintiffs and the defendants 1 to 3. Further, the plaintiffs waited for a long time and to file the suit for execution of sale deed on the assumption of shortage of area/extent. The suit itself is hopelessly barred by limitation as the starting point of limitation is the first purchase from Nazir Hussain. In the absence of any material to show that the plaintiffs are in shortage of built up area and in the absence of any direct contract between the plaintiffs and the defendants 1 to 3, they cannot claim for execution of any sale deed from the defendants 1 to 3. The latin phrase ***Caveat emptor*** which means "**let the buyer beware**" is directly applicable to this case. It is a principle of law which places the onus on the buyer to perform due diligence before making a purchase. The term is commonly used in real property transactions, because the litigants like plaintiffs may approach the court on assumed rights against the third parties who are no way connected with the litigant. The plaintiffs who are the second/third hand purchasers from the defendants 4 & 6, cannot now agitate that there is shortage of extent in the built up area. When the plaintiffs purchased two fully constructed flats in particular floor with particular number as second/third hand purchasers after several years of its construction, knowing fully well what is the space available in enjoyment and in possession of their vendors, now cannot say that there is a shortage of extent. The vendors of the plaintiffs cannot transfer more extent than what they own and possess. The legal maxim "**nemo dat quod non habet**", literally meaning **"no one gives what he doesn't have"** is squarely applicable to this case. The trial court without considering the above aspects, has wrongly concluded that the plaintiffs are entitled for execution of sale deed. The trial court has committed mistake in decreeing the suit. There is manifest error and illegality in the Judgment of the trial court warranting interference by this court. This appeal is liable to the allowed and the Judgment and decree of the trial court is liable to be set aside. The suit in O.S.No. 4067/2014 is liable to be dismissed without cost. These points are answered accordingly.

17) In the result, this appeal is allowed without cost. The judgment and decree passed by the Learned IV Assistant Judge, City Civil Court, Chennai, in O.S.No.4607/2014 dated 21.09.2017 decreeing the suit is hereby set aside. The suit in O.S.No. 4607/2014 is dismissed without cost.

Dictated by me to the stenographer, transcribed and computerized by her, corrected and pronounced by me in the open court, on this the 30th day of September, 2019.

V Additional District Judge,
Chennai.

Copy to:
IV Assistant Judge, City Civil Court,
Chennai. (With lower court bundle)