



Spl. Civil Suit No. 547/2013

Judgment

CNR No. MHPU02-002286-2013

Received on : 20/03/2013

Registered on : 20/03/2013

Decided on : 02/01/2023

Duration : Ys. Ms. Ds.
09 11 10

**IN THE COURT OF ADDL. JUDGE SMALL CAUSES COURT & JT. CIVIL
JUDGE, SENIOR DIVISION, PUNE, AT : PUNE.**
(Presided over by A. A. Ghaniwale)

SPL. CIVIL SUIT NO. 547/2013.

Exh. No. 106.

M/s. Rajyog Developers
partnership Firm registered under the
Partnership Act 1920 having its
registered office at 9 (Part)
Mangalwar Peth, Pune - 411 011.
Through one of its partnership
Mr. Ashok Milapchand Jain
Age : Adult, Occupation : Business,
Residing at : B-26, Adinath Society,
Pune - 411 037.

... Plaintiff.

Versus

- 1] Ganpat Kannu Rathod**
Age : Adult, Occupation : Business,
- 2] Mrs. Madhu Ganpat Rathod**
Age : Adult, Occupation : Housewife,
Both R/at : 1) 8/5, Mangalwar Peth,
Indira Complex Building,
Pune - 411 011.
2) c/o Ganpat Kannu Rathod
C.T.S. No. 172, Somwar Peth,
Pune - 411 011.

... Defendants.

Shri. G. D. Karnik, Advocate for plaintiff.
Shri. A. J. Agarwal, Advocate for defendants.

**Suit for declaration and
recession of contract and for
possession.**

J U D G M E N T

[Delivered on : 02.01.2023]

The plaintiff sought a relief of recession of contract/agreement dated 30/12/2008 on a ground of breach of the terms and condition by the defendants and for possession of the flat.

The facts of the suit in short as under :-

2] According to plaintiff, the plaintiff is registered partnership firm and carrying out business of promoters and developers. The property situated at CTS No. 9, Mangalwar Peth, Pune - 411011 was taken for development. Previously, tenants occupying the said property. The defendants are also tenants, therefore, the plaintiff enter into an agreement dated 30/12/2008 for development of the property. The defendants were in possession of one room admeasuring 310.67 sq. ft. it was agreed between them that, after development, the plaintiff will give 491 sq. ft. carpet area i.e. 614 sq. ft. built up area + 72 sq. ft. terrace on first floor in proposed new building namely Rajyog Apartment and defendant will pay Rs. 6,29,622/- in installment. The agreement was registered on 30/12/2008.

3] Then, agreement was executed in between plaintiff and defendant No. 1 and for the convenience of defendant No. 1, the name of defendant No. 2 was inserted in the said agreement. The defendant No. 2 is wife of defendant No. 1. It was agreed between them that, if payment delayed, the defendant will pay interest at the rate of 9% per annum to the plaintiff. Plaintiff alleged that, the defendant was always

late in making payment of due installment. He duly submitted the chart below para No. 6 of the plaint. As per the allegations of plaintiff, as the defendant not paying the installment regularly and installment remains due, the plaintiff issued demand notices dated 24/08/2009, 01/10/2009, 22/10/2009, 10/11/2009 and finally on 09/02/2010. Despite receipt of those notices, defendant deliberately failed and neglect to payment. Consequently, plaintiff issues legal notice on 22/03/2010 through advocate Nagare-Diwan and Associates and thereby cancelled the agreement dated 30/12/2008 and thereby called upon the defendant to come and register the deed of agreement. The defendant received the said notice and issued false reply dated 14/07/2010. According to plaintiff defendant illegally tried to find fault in the demand notices, legal notice of plaintiff. Plaintiff claiming that Rs. 4,53,634/- was payable on the date of receipt of reply notice, however, defendant send a cheque of Rs. 1,88,886/-. As the agreement was resigned by the plaintiff, the plaintiff did not encashed the cheque. Plaintiff further alleged that, there was typographical error in legal notice dated 22/03/2010 and defendant took disadvantage of the said clerical errors and avoided payment and gave false reply.

4] Plaintiff further pleaded that, as plaintiff rescind the contract, as the defendant has paid some of Rs. 1,88,886/-, plaintiff is ready and willing to refund the said amount. During pendency of suit on 15/09/2016 the defendant unlawfully entered in the suit premises by breaking open the lock. Plaintiff submits that, the defendant informed the plaintiff that, one of the partner of plaintiff firm namely Jitendra Bhandari received a balance amount and executed possession receipt on 09/09/2016. According to plaintiff, Mr. Jitendra Bhandari

having no right and interest to execute such possession receipt in favour of defendants. Therefore, plaintiff sought a decree of declaration that agreement dated 30/12/2008 have been lawfully terminated and also sought a declaration that possession receipt dated 09/09/2016 is illegal, null and void and direction to direct the defendant to hand over the possession of suit premises.

5] The defendant No. 1 submitted written-statement at Exh.10 and defendant No. 2 at Exh. 28. It is their common contention that, the plaintiff executed an agreement for development and admitted their tenancy rights and plaintiff agreed that, the plaintiff will give 614 sq. ft. built up area and 72 sq. ft. as a terrace to the defendants and defendant will pay Rs. 6,29,622/- and defendant paid Rs. 1,88,888/-. They further alleged that, it was agreed between them that, plaintiff will hand over possession however, work of the plaintiff was closed up-to two years by Pune Municipal Corporation, therefore the defendant did not pay the amount as per slab wise. They further submitted that, they were residing elsewhere, but plaintiff did not pay the rent, therefore, they sustained loss of Rs. 8 to 10 thousand per month. They denied the receipt of demand notice of plaintiff, however, admitted that, they received the notice dated 22/03/2010 and denied its contents and they replied the said notice. In additional written-statement, they submitted that, during pendency of suit, one of the partner Mr. Jitendra Bhandari executed possession receipt and received an amount as a full and final settlement and Jitendra Bhandari not made a party to this suit with this they prayed for dismissal of the suit.

6] Considering rival submission of the parties and material on

record, my learned predecessor framed issues and additional issues at Exh. 12, I have recorded my findings against each with reason as under:-

Sr. No.	<u>Issues</u>	<u>Findings</u>
1.	Do plaintiff proves that defendant has committed breach of terms of agreement by not paying the amount of consideration as per schedule ?	No.
2.	Whether plaintiff proves that defendant No. 2 is formal party to the agreement dated 30/12/2008 ?	No.
3.	Whether suit is within limitation against defendant No. 2 ?	Yes.
4.	Is plaintiff entitled for recession of agreement dated 30/12/2008 ?	No.
5.	Does the plaintiff prove that possession receipt dated 09/09/2016 is null and void ?	No.
6.	Whether the plaintiff is entitled for declaration as sought ?	No.
7.	What order and decree ?	As per final order.

REASONS

7] Considering the nature of dispute between the parties, in my view it would proper to discuss all these issues at once.

8] On behalf of plaintiff, one of the partner Ashok Milapchand Jain examined at Exh. 50 and relied on document Exh. 59 to 73. On the other hand, defendant examined defendant No. 1 at Exh. 94, defendant No. 2 at Exh. 99 and Dw-3 Jitendra Kanhyalal Bhandari at Exh. 100.

AS TO ISSUE NOS. 1 TO 7 :-

9] As the issues are interlinked, therefore it would be proper to discuss at once.

10] Perusal of the evidence of the parties, it transpired that, they testified as per their pleading. Therefore, to avoid the repetition I am not discussing their evidence. Dw-3 testified that, he was the partner of plaintiff firm, Mr. Ashok Milapchand Jain and Bharat Rathod also partners of plaintiff firm, he did not give consent nor executed any power of attorney to Ashok Milapchand Jain for institution of suit, according to him Ashok Milapchand Jain has illegally filed this suit. He further testified that, he himself entered into an agreement of development with the defendants on 30/12/2008 and it was registered and it does not bear the signature of partners Ashok Milapchand Jain and Bharat Sonlal Rathod. He also deposed that, Ashok Milapchand Jain issued notice to defendant No. 1 without his consent and no notice was issued to defendant No. 2 and the defendant No. 2 issued a reply notice and cheque of Rs. 1,88,886/-, Ashok Milapchand Jain intentionally not encashed it. He further added that, being a partner of Rajyog Developers, he gave the possession of flat No. 108, first floor to the defendants and executed possession receipt and received a cheque of Rs. 6,29,622/- and no such amounts remain due against the defendant and he has cancelled notice dated 22/03/2011 issues by Ashok Milapchand Jain etc.

11] Heard both counsel at length. Learned counsel for plaintiff submitted that, the defendants committed breach of contract by not paying the installment as per the agreed terms and conditions, after

receiving notice defendant failed to comply the same, therefore, the plaintiff constrained to cancel the contract, the possession receipt Exh.73 executed by one of the partner is without any right and it is illegal and as per the registered partnership deed and terms and conditions, only Ashok Jain has right to file this suit and to take legal actions etc. She further argued that, as per the terms and conditions of the agreement Exh. 72, the agreement was lawfully cancelled, demand notice duly served on defendants and the act of Dw-3 is not permissible and contrary as well as against the rights of partnership firm and relied on case reported in *Chainraj Ramchandra Vs. V. S. Narayanswami and Ors.*, MANU/TN/0245/1982, *Porbandar Commercial Co-operative Bank Ltd. Vs. Bhanji Lavji and Ors.*, MANU GJ/0089/1985, *Nandalal Deepchand and Co. Vs. Dwarka Co-operative Housing Society Ltd. Manu GJ/0327/2000* and *Punjab and Sindh Bank and Anr. Vs. Manoram Agencies Alhabad & Ors.*, 2008 (5) ALJ (NOC) 963 (ALL) etc.

12] On the other hand, learned counsel for defendant argued that, as the agreement Exh. 72 executed by Dw-3, the contention of plaintiff that, only Pw-1 having right to take legal action or to enter into legal contract is not tenable, if Dw-3 has no right to execute lawful agreement, then plaintiff cannot relied on the said agreement and suit of the plaintiff is also not tenable on this ground. He further argued that, the person i.e. one of the partner who executed development agreement Exh. 72 accepted the balance due amount and issues possession receipt, it is binding on plaintiff firm, if agreement is cancelled, the plaintiff firm must restore the possession of property of defendants, which is not possible because plaintiff constructed the building, as there is any dispute between partners of partnership firm,

defendant would not penalize for the same. According to defendants the building was not completed within the tenure, completion certificate issued on 25/04/2011 demand notice issued on 22/03/2010 which were premature demand notice and as Dw-3 in the capacity of partner of partnership firm, issued possession receipt and received due amount as a full and final settlement from defendants, therefore suit of the plaintiff liable to be dismissed.

13] I have given anxious consideration to the submission of both sides and carefully gone through the material place before me as well as cited authority. Execution agreement by Dw-3 in favor of defendants is not disputed. According to plaintiff, as per the terms and conditions of the agreement, defendant did not pay balance amount. Considering this fact, in my view it would be proper to discussed here about said agreement Exh. 72. Perusal of agreement Exh. 72 it transpired that, it was executed in between Dw-3 being partner of plaintiff's firm and defendant and Mundada and Company who gave the consent. It appears from this document that at Page No. 7 both parties agreed about the payment schedule step wise as at the time of agreement 10%, at the time of completion of plinth work 10%, at the time of completion of 1 to 4 slab 10% each, after completion of bricks work 10%, after completion of plaster 5%, after completion of tiles and kitchen work 5%, after completion of plumbing work 5%, after completion of light fitting door and window 4%, 5% after colouring, 4% after common area and 2% at the time of getting possession. It has also agreed between them that, in case of delay up-to one month, on due amount, the plaintiff will be entitled for interest at the rate of 9% P.A. and on continuous or regular default of payment by the

defendants, plaintiff is entitled for cancellation of agreement, however, plaintiff must issue two months prior notice and in that case plaintiff is entitled to resale the flat third person and plaintiff will repay the amount to the defendant.

14] Now turn back on the argument advanced by learned counsel for plaintiff, she argued that, as per the agreed terms between the partners, only Ashok Jain having right to look after the entire construction activities and all legal matters. For that purpose she relied on photocopy of partnership agreement Exh. 103. Perusal of this agreement it shows that, there is specific clause at para No. 17 as mentioned by learned counsel for plaintiff. If we accept this term in strict sense, then except Ashok Jain, none of the partners are entitled to execute any agreement with the tenant or with the third person. But as Dw-3 executed an agreement with the defendant and the plaintiff i.e. one of the partner accepting said agreement as a lawful agreement, that means the said term-condition was a nominal term and not strictly accepted in the sense as it was written. In other words, as agreement Exh. 72 treating lawful by plaintiff, that means, all the partners having right to enter into lawful contract and said condition is nominal one.

15] Learned counsel for plaintiff drawn my attention on Section 19 of the Indian Partnership act, 1932, I am discussing the same as under :-

Section 19.- Implied authority of partner as agent of the firm. - (1) Subject to the provisions of Section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority".

(2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to -

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property belonging to the firm, or

(h) enter into partnership on behalf of the firm.

Usage or customs of trade. - The implied authority mentioned in S.19 is subject to the contract between the partners as also subject to the usage or custom of the trade. The provisions contained in S.19 give birth to a statutory presumption of the terms of contract between the partners which is rebuttal. The restrictions have been imposed for the benefit of and in the interest of partners; no absolute legal bar has been imposed by the law against partners in acting contrary to the provisions of sub-S. (2); it is certainly open to the partners to relax or waive the restrictions.

16] According to learned counsel for plaintiff, Dw- 3 has no authority to compromise or relinquish any claim or portion of claim by the firm or to withdraw the suit etc. On these points she relied on a case reported as mention above. I have carefully gone through the cited authorities and found that, the gist of these cited authorities are that, in a suit by partner of partnership firm, if another partner received an amount and relinquish the claim with the defendant, such act of the other partner is not acceptable under Section 19 of the Partnership Act. However, in case in hand, the facts are totally different. In case in hand, the development agreement Exh. 72 executed by Dw-3 being one of the partner, plaintiff accepting the said agreement as lawful, Dw-3 being partner of plaintiff partnership firm, issued possession receipt Exh. 73

and received an amount Rs. 6,29,622/- he deposed that, he had issued said receipt and delivered the possession and accepted an amount as a full and final settlement and also deposed that, Pw-1 claiming excessive amount and Dw-3 is not consenting party for issuance of notices to defendants and also not gave consent for institution of this suit. Considering these facts and evidence, in my view it would proper to mention here Section 22 of Indian Partnership Act, 1932 which is described as under :-

Section 22. Mode of doing act to bind firm. - In order to bind a firm, an act or instrument done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm name, or in any other manner expressing or implying an intention to bind the firm.

17] In view of Section 19 of Indian Partnership Act, as the Section 19 described that subject to the provision of Section 22, the act of a partner which is done to carry on, in the usual way business of the kind carried on by the firm, binds the firm. As discussed earlier, the agreement in between defendant and plaintiff firm as executed by Dw-3 being partner, that means the partner i.e. Dw-3 having authority to enter into contract of development agreement and to do the business of the firm as Dw-3 executed said agreement Exh. 72 and he himself deposed that, he was not consenting party for issuance of notice and institution of the suit, therefore, it is expected from the plaintiff to examine third partner to prove that, the evidence of Dw-3 is false and all the partners having no such authority to enter into lawful agreement as per clause 17 of partnership deed and all the partners have consented for issuance of notice to defaulter defendants. Surprise to say that, the plaintiff did not examine third partner Mr. Rathod. Therefore, I am of the view that the restriction by clause 17 put on the partners in the Exh. 103 partnership deed was not applied in strict

sense and as Dw-3 executed agreement that means all the partners were having authority to do legal acts for partnership firm. Therefore, in view of Section 22 of Partnership Act, the act of Dw-3 i.e. issuance of possession receipt and accepting payment is lawful and it is bind on plaintiff firm too. If it is any dispute in between partner inter-se, the partner of plaintiff firm being aggrieved by the act of Dw- 3 may take appropriate action, but for the said act of the Dw-3, defendants can not be held responsible. Therefore, in this suit, cited authorities by plaintiff are not useful for plaintiff.

18] For a sake of argument, if Court cancelled the agreement Exh. 72, in that case, it is necessary for plaintiff to restore the status of possession of defendants prior to agreement between the parties. As the plaintiff has constructed the flats, it is not possible for plaintiff to restore the said position of tenant. Plaintiff is developer and developed the property for getting monetary profits. As one of the partner received amount from the defendant tenants appearing that it was received with interest, if any loss of interest cause to the partnership firm, the partnership firm could recover the same through the partner Dw-3. For that reason, the tenant would not be liable to penalize. In view of above discussion, I come to conclusion that, as defendants paid the due amount to Dw- 3 i.e. one of the partner of partnership firm and Dw-3 having authority to execute agreement of development and to do all necessary acts of partnership firm and he received an amount and executed possession receipt i.e. means no such amounts remains due against the defendant as alleged by plaintiff. The plaintiff has not committed breach of agreement, the possession receipt executed by

Dw-3 is valid and lawful agreement therefore plaintiff is not entitled for any relief.

19] The plaintiff claiming that the defendant No. 2 is formal party to the agreement dated 30/12/2008. I declined to accept submission of plaintiff because agreement Exh. 72 executed by both defendant and there is no whisper in the terms and conditions of Exh.72 that defendant No. 2 is a formal party. Therefore, in my view it would be proper to mention here Order I Rule 3 of CPC, which is described as under :-

3. Who may be joined as defendants. - All persons may be joined in one suit as defendants where -

(a) any right to relief in respect of, or arising out of, the same act or transaction or series of acts or transactions is alleged to exist against such persons, whether jointly, severally or in the alternative; and

(b) if separate suits were brought against such persons, any common question of law or fact would arise.

20] As defendant No. 2 is one of the party of agreement, she is necessary party and suit cannot be decided in lawful manner in her absence. Therefore, she ought to have joined as a necessary party. I record my finding to the said issue.

21] The defendant raised an objection that, plaintiff added defendant No. 2 after period of limitation, therefore suit is barred by limitation. It be noted that, the plaintiff has instituted the suit against defendant No. 1 i.e. husband of defendant No. 2 for cancellation of development agreement Exh. 72, the suit has been instituted on 20/03/2013. The period of limitation attracted to the cause of action and not to the parties. As suit already commenced/instituted and defendant no. 1 in his written-statement raised an objection of non

joinder of necessary party of defendant No. 2 who is one of the party of development agreement, therefore, she added as a necessary party. Therefore, there is no question of limitation arises separately for defendant No. 2.

22] Considering above discussion, I come to conclusion that, plaintiff fails to discharge the burden, one of the partner of partnership firm i.e. Dw - 3 received the amount as deposited by him, Dw -3 was not consenting party for institution of the suit, Dw-3 being partner of partnership firm having authority to entered into contract, therefore he had issued valid possession receipt in favor of the defendants, if any dispute remains about recovery of amount, it is in between plaintiff firm and Dw-3 and partners have every right to claim it in accordance with law against Dw-3. In this suit, the justice and equity demands that, the tenant would not throw away from the disputed premises. Hence, I have recorded my findings accordingly. Considering all such facts and circumstances of the case parties to bear their coast and I proceed to pass following order

ORDER

- 1] Suit is dismissed. No order as to cost.
- 2] Decree be drawn up accordingly.

[Dictated and pronounced in open Court.]

Date : 02.01.2023.

(A. A. Ghaniwale)
Addl. Judge, Small Causes Court & Jt.
Civil Judge Senior Division, Pune.

: CERTIFICATE :

“I affirm that the contents of this P.D.F. File are same word for word as per original judgment.”

Name of the Stenographer : P. B. Aher (Stenographer Grade - II)

Name of the Court : A. A. Ghaniwale

Addl. Small Causes Court &

Jt. C.J.S.D., Pune.

Dictated on : 02-01-2023

Transcribed on : 02-01-2023

Judgment checked & signed
by Presiding Officer on : 06-01-2023

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