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S.A. Nos.1123 & 1124 of 2014

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED : 18.07.2023

CORAM

**THE HON'BLE MRS. JUSTICE T.V.THAMILSELVI**

S.A.Nos.1123 & 1124 of 2014  
and  
M.P.Nos.1 of 2014 & 1 of 2015

E.Suresh Kumar

... Appellant in both SAs

Vs

S.Senthil Kumar

... Respondent in both SAs

**PRAYER in S.A.No.1123 of 2014** : Second Appeal filed Under Section 100 of the Civil Procedure Code, against the Judgment and decree of XVII Additional Judge, City Civil Court at Chennai, made in A.S.No.140 of 2011 dated 07.02.2013 reversing the Judgment and decree and judgment of the VII Assistant City Civil Court, Chennai made in O.S.No.9169 of 2006 dated 16.11.2010.



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**PRAYER in S.A.No.1124 of 2014 :** Second Appeal filed Under Section 100 of the Civil Procedure Code, against the Judgment and decree of XVII Additional Judge, City Civil Court at Chennai, made in A.S.No.139 of 2011 dated 07.02.2013 reversing the Judgment and decree and judgment of the VII Assistant City Civil Court, Chennai made in O.S.No.9169 of 2006 dated 16.11.2010.

For Appellant in both SAs : Mr.G.Thangavel

For Respondent in both SAs : Mr.S.Krishnasamy

### **JUDGMENT**

The appellant has preferred these Second Appeals against the Judgment and decree of learned XVII Additional Judge, City Civil Court at Chennai, made in A.S.Nos.139 & 140 of 2011 respectively, dated 07.02.2013, reversing the Judgment and decree and judgment of the VII Assistant City Civil Court, Chennai made in O.S.No.9169 of 2006 dated 16.11.2010.

2. The appellant herein is the plaintiff in O.S.No.9169 of 2003 before the learned VII Assistant Judge, City Civil Court, Chennai and the



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respondent herein is the defendant who has filed counter claim in the written statement.

3. For the purpose of convenience, the parties herein are referred to as they are ranked in the suit.

4. The plaintiff filed the suit for permanent injunction against the defendant not to cause any interference of the enjoyment of the suit property by the defendant, described as Ground Floor Flat G1 with 493 Sq.ft. of undivided land, situated in Plot No.27, with sub-divided Survey No.611/2016, No.137, Velacherry, Guindy Taluk. The contention of the plaintiff is that he entered into sale and construction agreement with the defendant / owner of the property for purchase of 493 Sq.ft. of undivided land in plot No.27 and to put up a flat in the Ground Floor in the said vacant land for a total sum of Rs.18,36,100/- and the plaintiff had paid an advance of Rs.8,61,100/- to the defendant on 31.08.2006. Thereafter, he applied a loan from HDFC Bank for a sum of Rs.9 lakhs and the said amount was paid by the Bank to the defendant on behalf of him through cheque on



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05.10.2006. Besides, he had paid Rs.2,24,100/- to the defendant and having received entire sale consideration, the defendant executed a sale deed in favour of him on 05.10.2006, and thereafter he performed the house warming ceremony and is residing in the property. As the market value of the property increased, the defendant had asked more money and was causing trouble to the plaintiff. Hence, the plaintiff issued notice, eventhough the defendant caused disturbance, and by giving reply with false allegations the defendant caused interference. Hence, the suit.

5. The learned counsel for the defendant submitted that the defendant is the absolute owner of the entire Plot No.27, measuring 2400 sq.ft. by way of purchase and he proposed to put up construction of 4 dwelling units Ground Floor 2 units, and 2 flats in the First Floor, and he completed 80% of the construction, While so, the brother of the plaintiff, namely Dinesh Kumar approached to purchase a flat introducing him that he is an Auditor of AG office, Chennai. He agreed to purchase 707 sq.ft. undivided share and flat No.1 in the First Floor for a total construction of Rs.24,74,000/- and out of that, he paid Rs.3,18,150/- as a costs towards the undivided share and



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there is a balance of Rs.21,55,850/- towards the cost of construction of F1 flat. On 21.08.2006, with regard to undivided share of 707 sq.ft. sale deed was executed in favour of said Dinesh Kumar as he paid part of the sale consideration of Rs.3,16,150/- and towards balance construction cost, he promised to arrange the same by way of loan. Further, the defendant submits that, at the instance of the Dinesh Kumar, he entered into sale and construction agreement on 31.08.2006 with his brother Sureshkumar and plaintiff, and he agreed to purchase 498 Sq.ft. of undivided share of Rs.2,24,100/- and for cost of construction, he agreed to pay Rs.16,12,000/- for construction of G1 flat. On that date, the plaintiff handed over the ICICI Bank cheque for Rs.10 lakhs issued by his brother Dinesh Kumar, with a request not to present the cheque immediately. Subsequently, the plaintiff made an arrangement and raised a loan of Rs.9 lakhs from HDFC Bank and cheque was drawn in favour of the defendant on 05.01.2006. Sale deed was executed in respect of undivided land 493 sq.ft in favour of the plaintiff and, out of Rs.9 lakhs, a sum of Rs.2,24,100/- was adjusted towards cost of undivided shares, and balance amount was retained for construction of G1 flat. On 25.10.2006, at request of both plaintiff and his brother, he converted



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the flats into Duplex hall by putting up extra amount. They wanted to perform the house warming ceremony only on a precious day, though there was balance amount towards construction of the flats and only for the said ceremony, keys were handed over to the plaintiff. In the meanwhile, the defendant, at the instructions of Dinesh Kumar, entered into transaction with one Elumalai with regard to purchase of the property. Later, he came to know that the property does not belong to Elumalai and he was put into trouble. Further more, the defendant asked the plaintiff and the said Dinesh Kumar to pay the cheque amount of ICICI Bank, but they have not paid, and when the cheque was presented, it was returned. So, the balance amount payable by the plaintiff is Rs.9,61,100/-, apart from additional charges and his brother Dinesh Kumar was bound to pay Rs.21,55,850/-. As long as they have not paid the balance consideration, they are not entitled to take possession of the flats. But through rowdy elements, both the plaintiff and his brother, opened the door and forcibly trespassed in the occupied G1 and F1 flats. Though complaint was given, it was not taken on file stating that it a Civil dispute, and suppressing the same, he filed a suit, as if the defendant is causing interference. In fact Dinesh Kumar is a Government Servant, but



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he illegally trespassed and caused hindrance, following which, both plaintiff and his brother cheated him, and so he filed a counter claim towards the balance consideration for Rs.9,78,862/- with interest along with the drainage, EP/EB charges and also prayed to create 'charge' over the property.

6. On hearing both sides, the learned trial Judge, after framing of issues, by relying the sale and construction agreement Ex.A1 and sale deed Ex.A2 which stands in the name of the plaintiff, concluded that the plaintiff has proved his title and possession over the property, and thereby, the trial Court granted a relief of permanent injunction holding that plaintiff is a true owner, and the counter claim of the defendant was dismissed, holding that defendant has not produced any document to prove the counter claim, nor established that entire sale consideration was not paid by the plaintiff.

7. Challenging both the findings, the defendant has preferred an appeal in A.S.Nos.139 & 140 of 2011 on the file of Additional City Civil Court, Chennai. The learned first Appellate Judge analysed the facts and



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evidence, and finally concluded that the plaintiff has not paid the entire sale consideration and also rejected the findings of the trial Court and finally held that entire sale consideration was not paid and Ex.A1 and Ex.A2 were improperly appreciated by the trial Court. The Lower Appellate Court also concluded that the defendant proved the counter claim. Accordingly, the appeal was allowed, setting aside the findings of the learned trial Judge. Challenging the same, the plaintiff has preferred this Second Appeal.

8. The learned counsel for the appellant submitted that the First Appellate Court erroneously observed as if the burden of proof lies upon the plaintiff with regard to payment of the sale consideration, which was already established by him through Ex.A1 sale deed. The Sale agreement and sale deed Ex.A1 and Ex.A2, were properly appreciated by the trial Court. Further, he also submits that the transaction with Dinesh Kumar has nothing to do with the plaintiff's right over the property. But the First Appellate Court erroneously observed as if the cheque issued by the plaintiff's brother / Dinesh Kumar for Rs. 10 lakhs for a part of the sale consideration, which is concerned with Ex.A1 document and failed to appreciate the fact that the



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sale deed was executed in favour of the plaintiff on 05.10.2006 itself before the issuance of the cheque for Rs.10 lakhs and without appreciating those facts, the First Appellate Court erroneously decreed the counter claim in favour of the defendant and as such, the findings of the Lower Appellate Courts are liable to be set aside.

9. The Second Appeals were admitted by this Court on 20.11.2014, on the following Substantial Questions of Law.

*"(a) Whether the valid sale deed dated 05.10.2006 duly executed and registered before the Sub Registrar Office under valid document could be disputed by adducing the evidence of claim basing / based on the bounced cheque which was issued by the another person in respect of the other property ?*

*(b) Whether the cheque amount of Rs.10,00,000/- duly payable by the brother of the Appellant / Plaintiff to and in favour of the Respondent / Defendant could be made as a liability against the Appellant / Plaintiff ?"*



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10. By way of reply, the learned counsel for the respondent / defendant submitted that as per Ex.A1 sale and construction agreement undivided share of 493 sq.ft was agreed for purchase by the plaintiff along with the construction agreement with regard to construction in the Ground Floor of the said vacant site for the total consideration of Rs.18,36,100/-. So, also the plaintiff's brother Dinesh Kumar also entered into agreement to purchase undivided share of 707 sq.ft. along with the construction for total consideration of Rs.24,74,200/-. As agreed by both plaintiff and his brother, they have not paid the part of the sale consideration.

11. The learned counsel for the respondent argues that the plaintiff gave HDFC Bank cheque for a sum of Rs.9 lakhs, which was adjusted towards Rs.2,24,100/- for the cost of undivided share of land and balance amount was retained for construction of G1 Flat, except the cheque for Rs.9 lakh rupees, no other amount was paid by the plaintiff and so, the cheque issued by the plaintiff's brother for Rs.10 lakh also returned by the Bank as "insufficient fund". Hence both of them cheated the defendant without paying the cost for construction and illegally trespassed and



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occupied the suit property, which was rightly appreciated by the learned First Appellate Judge, which needs no interference by this Court and prayed to dismiss the appeal.

12. Considering the submissions made by both sides, the facts reveal that the plaintiff and his brother Dinesh Kumar entered into sale and construction agreement with defendant for G1 and F1 Flats with undivided share of the land. Accordingly, the plaintiff and the defendant entered into sale and construction agreement of Ex.A1 and based on that, the undivided vacant site of the said flat was conveyed to the plaintiff through Ex.A2 sale deed on 05.10.2006. On the same day, the brother of the plaintiff issued ICICI Bank cheque for Rs.10 lakhs on behalf of the plaintiff, which was returned by the Bank as "insufficient fund" and the same is proved by the defendant through document Ex.B17. Furthermore, the issuance of the cheque by Dinesh Kumar on behalf of the plaintiff is also established by the defendant through Ex.A7 Memorandum of agreement, wherein there is an undertaking given by the plaintiff's brother that the said cheque was issued by him on behalf of the plaintiff. To deny Ex.A7, the plaintiff has not



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adduced any contra evidence by examining his brother Dinesh Kumar.

Furthermore, there was an agreement between the defendant and Dinesh Kumar which was marked as Ex.B14, which reveals that the said Dinesh Kumar had not agreed to cancel the sale deed standing in his name. Further, the cash receipt received by Dinesh Kumar on the date of the sale deed, with regard to ICICI Bank cheque for Rs.10 lakhs, has not been subsequently honoured, as the cheque was returned for "insufficient funds". Therefore, the issuance of Rs.10 lakhs cheque by Dinesh Kumar on behalf of the plaintiff for the balance consideration, was prima-facie established by the defendant, but the same was not disproved by the plaintiff by examining his brother with material evidence. Apart from that, there was an agreement between the Dinesh Kumar and the defendant which was marked as Ex.B14, and there is a Memorandum of Agreement marked as Ex.A7 which reveals that Dinesh Kumar subsequently agreed to cancel the sale deed and hand over the vacant possession of the flat which he agreed to purchase, wherein also it was agreed that there were terms of compromise and that the plaintiff to pay the balance sale consideration to the G1 flat, after withdrawal of the Civil Suit.

13. All these terms and the recitals of the documents reveal that



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this defendant entered into agreement with plaintiff as well as his brother Dinesh Kumar to sell two flats and received the consideration only for the undivided share of the vacant site. More particularly, the plaintiff has not paid the entire construction cost for the G1 flat. If really the plaintiff has paid the entire construction cost as per agreement Ex.A1 he ought to have proved, by examining Dinesh Kumar, but as discussed above, he has not taken any steps to prove that he has paid the entire consideration. Subsequently, he paid the amount through Bank loan, so that, only the sale deed was executed in his favour by the defendant, but the same was not properly appreciated by the lower Appellate Court.

14. On a perusal of Ex.A1, which is the sale and consideration agreement, it is seen that, he agreed to purchase 493 sq.ft undivided share along with construction fixed for Rs.18,36,100/-. Though Ex.A2 sale deed was executed by the defendant in favour of the plaintiff for undivided share of vacant site for 493 sq.ft. for a consideration of Rs.2,24,100/- the trial Court erroneously concluded that, based on this document, he perfected title over the entire flat. Admittedly, as per Ex.A1 construction agreement, the



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plaintiff was bound to pay Rs.16 lakh for the cost of construction. As discussed above, there is no material evidence on the side of the plaintiff that he had paid entire cost of construction, and if really he paid the entire consideration, there is no necessity for issuance of the cheque for Rs.10 lakhs by the brother of the plaintiff. Moreover, his brother also admitted that the cheque issued for the construction cost related to the plaintiff. Therefore, plaintiff failed to establish that he had paid entire sale consideration. On the other hand, the defendant established that there is a balance amount yet to be paid by the plaintiff. The learned trial Judge erroneously concluded, that as per Ex.A2 document, plaintiff is conferred with title and possession. But as rightly pointed out by the learned counsel for the respondent, without paying the entire consideration, the plaintiff illegally occupied the G1 flat for which he is not entitled and the same was rightly appreciated by the learned First Appellate Judge, which needs no interference.

15. Accordingly, though there is a sale deed Ex.A2, which was



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in the name of plaintiff, but the documents Exs.A7 and B14 clearly reveal that the entire sale consideration was not paid, even on the date of execution of the sale deed, and other terms between the parties were followed, and therefore the plaintiff failed to establish that he had paid entire consideration on the date of execution of the sale deed, which was rightly observed by the learned First trial Judge, which needs no interference by this Court.

16. Accordingly, the Second Appeals are to be dismissed as devoid of merits and the counter claim made by the defendant is proved through the documents Ex.B14 and Ex.A7. The defendant is able to establish that he has paid electricity charges and also proved that there is a balance of consideration to be paid by the plaintiff. Accordingly, counter claim was rightly allowed by the learned first appellate Judge, which needs no interference by this Court. Furthermore, the illegal occupation of the plaintiff is proved by the defendant. Accordingly the findings of the learned first appellate Judge is confirmed and suit is dismissed. Counter claim made by the defendant is allowed.



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17. Accordingly, these Second Appeals are dismissed as devoid of merits. Consequently, the suit filed by the appellant is dismissed. Counter claim made by the defendant is allowed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

**18.07.2023**

Index : Yes/No  
Neutral Citation : Yes/No  
Speaking/Non Speaking order

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To

1. The XVII Additional Judge, City Civil Court at Chennai.
2. The VII Assistant City Civil Court, Chennai.
3. The Section Officer, VR Section, High Court of Madras.

**T.V.THAMILSELVI, J.**

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