IN THE HIGH COURT OF JUDICATURE AT MADRAS

29.10.2024

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THE HONOURABLE MR.JUSTICE K.RAJASEKAR

Second Appeal No.604 of 2022
and C.M.P.No.11964 of 2022

Shree Venkateshwara Infrastructures & Properties
Represented by its Proprietor
S.Mohana Priya @ Priya Srinivasan
Having Office at No.80, 13th Street
UR Nagar Extension, Anna Nagar West
Chennai 600 040 ... Appellant

Vs.

1.Poonguzhali
2.Hemanth Raj ... Respondents

PRAYER: The Second Appeal filed under Section 100 of C.P.C. against the Judgment and Decree dated 26.02.2021 in A.S.No.60 of 2019 on the file of XX Additional City Civil Court at Chennai, reversing the Judgment and decree dated 31.10.2017 in O.S.No.541 of 2015 on the file of IV Assistant City Civil Court at Chennai in dismissing the suit for recovery of money.

For Appellant : Mr.C.Shankar

For Respondents : Mr.C.Sugumar
for M/s.T.Jeyaraj

JUDGMENT

This second appeal is filed challenging the reversing judgment of the First Appellate Court, decreeing the suit for recovery of Rs.3,90,000/- with interest, which is being the sale consideration paid by the 1st plaintiff for purchasing a plot in favour of her son.

2.For the sake of convenience, the appellant and the respondents will be referred to as defendant and plaintiffs respectively.

3.According to the plaintiffs, the 1st plaintiff is the mother and the 2nd plaintiff is the son. The mother / 1st plaintiff has intended to purchase a property in favour of her son and had approached the defendant who is the property developer. Originally the defendant had entered into an agreement with the 1st plaintiff with regard to Plot Nos.68 and 69 for a total sale consideration of Rs.4,80,000/-, thereby, the 1st plaintiff had issued a cheque for Rs.40,000/- bearing cheque No.002604 dated 09.08.2014 towards advance payment. The said cheque was returned on a technical ground. Hence, the 1st plaintiff had issued another cheque bearing No.002605 and obtained a receipt No.00017 dated 18.08.2014. Subsequently, the defendant informed the plaintiffs that the plot Nos.68 and 69 were already sold out and convinced them to purchase Plot No.30 and insisted them to make payment at the earliest. Accordingly, the 1st plaintiff issued a post dated cheque bearing No.002607 for a sum of Rs.3,50,000/- dated 06.09.2014, for which a receipt was also issued on 05.09.2014. On such payment, when the 1st plaintiff demanded the defendant to register the land in their favour at the earliest, it was then conveyed to her that if she comes forward to pay the amount by way of cash, registration of Plot No.30, will be done immediately. Hence, on the same day i.e. 05.09.2014 she had paid Rs.4,40,000/- by way of cash. However, the defendant had issued a receipt only for a sum of Rs.3,30,000/- citing the reason that they have issued a cash receipt for a sum of Rs.3,30,000/- to avoid income tax liability and that they have also recorded that the entire sale consideration has been paid. Therefore, the 1st plaintiff had separately issued an instruction to the bank to stop the payment for the post dated cheque issued to the defendant dated 06.09.2014. Since the 1st plaintiff did not get any reply from the defendant for registration of sale deed, she was confined to issue a legal notice dated 16.10.2014 to settle the issue. However, the defendant has not come forward to execute the sale deed. On 12.11.2014, the 1st plaintiff has also lodged a police complaint against the defendant. She had also issued another legal notice dated 29.11.2014 which was replied by the defendant on 10.12.2014. Thereafter, the plaintiffs filed the present suit.

4.The case of the appellant / defendant is submitted that, originally the cheque issued by the 1st plaintiff for a sum of Rs.40,000/- was dishonoured and the same was replaced by another cheque which was encashed by them. When the 1st plaintiff expressed her inability to purchase the plot Nos.68 and 69 as she was not able to mobilise the funds, she opted to purchase plot No.30. Accordingly, the advance amount paid by her earlier was considered as the advance amount paid for the plot No.30. Subsequently, the 1st plaintiff had also issued a cheque bearing No.002607 dated 06.09.2014, for a sum of Rs.3,50,000/-, which was also dishonoured, and the defendant never received Rs.4,40,000/- as stated by the 1st plaintiff. The defendant has also issued a reply notice on 14.11.2014 to the legal notice issued by the 1st plaintiff on 16.10.2014. When the 1st plaintiff had issued a legal notice once again on 29.11.2014, it was also replied suitably. The contention that the 1st plaintiff has paid Rs.4,40,000/- by way of cash is not acceptable, as she had only issued a cheque for Rs.3,50,000/- dated 06.09.2014 which was dishonoured. The total sale consideration for Plot No.30 is Rs.3,90,000/- and the same was not paid. When the plaintiffs never paid the entire sale consideration, they are not entitled for refund of any amount including the advance amount paid by them.

5.Based on the pleadings, the trial Court framed the following two issues:

1.Whether the plaintiffs are entitled to the claim of Rs.4,80,000/- from the defendant?

2.To what other reliefs.

6.After framing of issues, both sides adduced their evidences and the 1st plaintiff examined herself as P.W.1 and marked Ext.A1 to Ext.A11. On the side of the defendant D.W.1 was examined and no Exhibits were marked.

7.After considering the evidence placed on record, the trial Court found that the plaintiffs have failed to prove the payment of Rs.4,80,000/- and accordingly dismissed the suit. Subsequently, the plaintiffs filed regular Appeal. The First Appellate Court after considering the evidence placed on record and also based on the Ext.A11 - the receipt issued acknowledging the money and also appreciating the evidence on the side of the defendant, also based on the exchanges of legal notices between the parties, accepted the submissions of the plaintiffs and decreed the suit to the extent of refund of Rs.3,90,000/- by the defendant.

8.Aggrieved over the same, the present Second Appeal is preferred by the defendant in the suit. This appeal was admitted on the following Substantial Questions of Law:

i. *Whether the inconsistent pleading in the Plaint submitted by the Respondents / Plaintiffs herein shall be a fatal to the case of the plaintiffs?*

ii. *Whether the Respondents / Plaintiffs herein had discharged their* *burden of proof under Section 101 of Evidence Act in respect of payment of Rs.3,30,000/- on 05.09.2014 by cash to the Appellant / Defendant herein?*

iii. Whether it is correct to state that the Onus of proof was shifted to the appellant / defendant herein in respect of the receipt of payment of Rs.3,30,000/- as held by the First Appellate Court?"

9.The learned counsel for the appellant / defendant submitted that the payment of Rs.3,30,000/- by way of cash has been presumed by the First Appellate Court by wrongly interpreting the Ext.A11 - Receipt. This document was issued only as an acknowledgement for the receipt of the cheque, whereas this has been interpreted as a receipt for the cash payment without any evidence, thereby the First Appellate Court has committed an error in accepting the same. Further, the 2nd plaintiff in whose name the receipt in Ext.A11 was issued was not at all entered into the witness box and evidence recorded in this regard by examining the 1st plaintiff is not valid. Further, the plaintiffs have taken a contradictory plea such a way that even though the plaintiffs claim that Rs.4,80,000/- was paid by the plaintiffs, and the First Appellate Court has found that the payment of Rs.4,80,000/- by way of cash is not proved and the plaintiffs have not challenged the finding that the 1st plaintiff had paid only Rs.3,30,000/-, thereby they have contradicted their stand of payment of cash to the defendant. The trial Court has also shifted the burden of proof of proving the receipt on the side of the defendant when there is a clear denial by the defendant regarding the issuance of Ext.A11 to the effect that it was not a cash receipt.

10.Per contra, the learned counsel for the respondents / plaintiffs submits that, proof of payment of cash and issuance of receipt of Ext.A11 has been proved by the plaintiffs, and D.W.1 author of Ext.A11 has stated that in the Receipt - Ext.A11, it has been recorded that the entire sale consideration has been paid by the plaintiffs. There is also no specific denial either in the reply notice or in the written statement that they have not received a sum of Rs.4,40,000/- by way of cash. Whereas they have evasively stated that they have not executed Ext.A11 for the purpose of receipt of cash. Even though the First Appellate Court based on Ext.A11 decreed the lesser amount than the cash paid by them, and the plaintiffs' non-inclination for filing the appeal against the same could not be considered that the plaintiffs themselves have taken inconsistent pleading. He further submitted that their pleading is very clear to the effect that they have paid Rs.40,000/- by way of cheque for the advance amount subsequently, the remaining balance sale consideration of Rs.4,40,000/- was paid by way of cash and they have also obtained separate receipt for payment of cash, specifically stating that the entire sale consideration is fully paid. He also submitted that since the 1st plaintiff is the person who has come forward to purchase the land in favour of her son, she alone is aware of the entire transactions that took place between the parties. Even though in the receipt Ext.A11, Hemanth Raj has subscribed his signature, the receipt was only issued to the 1st plaintiff after receiving the cash from her. Thereby, the First Appellate Court has rightly considered the case and decreed the suit.

11. I have considered the submissions made on both sides and perused the records.

12.The plaintiffs have heavily relied on, two receipts to prove payment of entire sale consideration, the first receipt is for payment of sale advance of Rs.40,000/- by way of cheque and the same is admitted by the defendant. The second receipt is Ext.A11 - Receipt dated 05.09.2014. It is the case of the plaintiffs that the defendant has informed them that Plot Nos.68 and 69, which were originally booked by the plaintiffs were not available for purchase and the defendant has offered Plot No.30 and also pressurized them to purchase it. On 05.09.2014 morning the 1st plaintiff came forward to issue the post dated cheque dated 06.09.2014 for a sum of Rs.3,50,000/-. After issuance of the cheque on the same day, a separate receipt was issued. However, on the same day, she was informed to pay the balance sale consideration by way of cash and the defendant promised the 1st plaintiff that they would register the sale deed at the earliest in favour of the plaintiffs. When a cash of Rs.4,40,000/- was paid for sale consideration, a receipt was issued only for Rs.3,30,000/- on the ground citing income tax liability. This issuance of receipt and payment of cash have not been mentioned in the first legal notice issued by the plaintiffs in Ext.A4 dated 16.10.2014. However in the notice, the plaintiffs have demanded the defendant to register the sale deed immediately. According to the plaintiffs, even after receiving the notice, the defendant had not come forward to register the document or came forward to reply or deny the demand of the plaintiffs. Thereafter, the 1st plaintiff had lodged a police complaint against the defendant. She had also marked Ext.A6, the C.S.R. receipt issued by the police for receipt of the complaint. Since the police have not come forward to proceed further with the complaint, she was constrained to issue a second legal notice dated 29.11.2014, in which she had categorically stated about the payment of cash of Rs.4,40,000/- and issuance of receipt only for a sum of Rs.3,30,000/-. This notice was replied by the defendant on 10.12.2014 stating that the reply issued for the first notice holds good. In the reply notice dated 10.12.2014, the defendant had not denied many crucial facts, more particularly the receipt of cash and execution of receipt for a sum of Rs.3,30,000/- citing income tax liability. The First Appellate Court has recorded in its finding that the defendant at the earlier stage failed to deny the demand of the plaintiffs and the reply notice alleged to be sent also not marked. This raises suspicion against the defendant. It further held that the second reply notice was also not containing any repudiation regarding receipt of the cash, execution of Receipt - Ext.A11, confirming final and full payment of sale consideration.

13.It is true that the person who is relying on the document shall come forward to prove that document. In this case Ext.A11 which is claimed to be a cash receipt for a sum of Rs.4,40,000/- shall be proved by the plaintiffs. In this case the 1st plaintiff examined herself and marked this Ext.A11 - Receipt, and she contended that this receipt was issued to her after receiving cash of Rs.4,40,000/-. To substantiate her evidence, she relied on the endorsement acknowledging the payment of entire sale consideration. She has also stated after payment of cash, she has issued instruction to bank to stop payment on the cheque issued by her, for a sum of Rs.3,50,000/- as per Ext.P9. She had demanded the registration of sale deed within two days after payment of cash and it was agreed by the defendant and subsequently the defendant had failed to execute the sale deed. Since the plaintiffs have marked Ext.A11, Ext.A9 and allegations of payment of cash and payment of entire sale consideration were not denied by the defendant, the evidence of P.W.1 shall be acceptable, in the absence of any contra evidence.

14.According to the defendant, they had received a cheque for a sum of Rs.3,50,000/- and issued Ext.A11- Receipt. Whereas, Ext.A11 issued for a sum of Rs.3,30,000/-, which is not an exact amount mentioned in the cheque. There was an attempt made by the defendant to state that Rs.20,000/- is to be collected towards stamp charges, hence after deducting the stamp charges, for the remaining amount this receipt has been issued. It is the definite case of defendant that though a receipt- Ex.A3 was issued for receipt of two cheques, Ext.A11 another receipt was issued on the very same day i.e. 05.09.2014. Admittedly, this cheque dated 06.09.2014 was not presented for encashment by the defendant. They have stated that Rs.20,000/- is adjusted towards stamp value and no iota of evidence was produced that there is an adjustment of Rs.20,000/- for the purpose of payment of stamp charges. If there is an adjustment of stamp duty, that could have been done only at the time of final settlement of payments. Whereas in the receipt, Ext.A11 the defendant avoided filling the important column, relating to the mode of payment. There is no reason given by defendant as to why they have not filled this column. Though there is a line to mention the cheque number or demand draft number and also the name of the bank, in the receipt - Ext.A11 (which would indicate receipt of cheque), the same was not filled by the defendant. Now, the defendant taking advantage of the same, claiming that it is only a receipt for the cheque. In the cross examination of D.W.1 who is the author of the receipt - Ext.A11, she had acknowledged the issuance of Ext.A11, that she had filled the receipt and she had also admitted the endorsement that the entire sale consideration amount due from the plaintiffs is settled. The plaintiffs claim that the total sale consideration payable by the plaintiffs is Rs.4,80,000/- for the plot Nos.68 and 69 admitted by the defendant, whereas the defendant claims that since the plot No.30 is valued as Rs.3,70,000/- the plaintiffs were asked to pay Rs.3,90,000/- including Rs.20,000/- for stamp duty and no evidence in this regard has been adduced by the defendant. Ext.A9 - stop payment request is made by the 1st plaintiff on 11.09.2014 and shows till then, the defendant had not presented the cheque for encashment. Having executed the receipt for acknowledging the receipt of money for the entire sale consideration, the defendant has not presented the cheque for encashment, even after the issuance of notice by the plaintiffs, demanding the defendant to execute the sale deed, defendant had not shown any interest to encash the cheque clinchingly supports the plaintiffs claim that D.W.1 had received the entire sale consideration by way of cash and executed the Ext.A11. The trial Court, by relying on the averment made in the police complaint - which was enquired by the police as petition enquiry in C.S.R. - Ext.A6, held that, the plaintiffs have made contradictory averments about the payment of cash. In the police complaint it had been stated that on 05.09.2014 mostly, she had paid Rs.1,10,000/- and evening she had paid Rs.3,30,000/-. The averments were not made in Ext.A4 - Legal notice dated 16.10.2014. In the cross examination of P.W.1, defendant has neither elicited the above facts nor challenged this averment. On a careful reading of the case of the plaintiffs in the present case, her case is that she had paid Rs.4,40,000/- on 05.09.2014 whereas the receipt was given only for Rs.3,30,000/-. She has also stated the same before the trial Court and the defendant contended only that they had received the cheque and issued receipt and they had not received cash.

15.The evidence of P.W.1 shows that by issuance of legal notice, Ext.A4, plaintiffs demanded the defendant to do registration at the earliest. If she had not paid the entire sale consideration, she would not have demanded the defendant to come forward to execute the sale deed. Even though she has not stated anything about the payment of cash in the first legal notice, she has indicated in Ext.A4 that she had paid the entire sale consideration to the defendant and there is no reply to this legal notice and also there is no denial of receipt of the entire sale consideration. Only after lodging the police complaint and after issuing the second legal notice, the defendant has taken a stand that they have not received the entire sale consideration. They have also not denied specifically the allegation made against them that they had issued Ext.A11 after receiving the cash of Rs.4,40,000/-. These facts have been brushed aside by the trial Court. The First Appellate Court has held that since the receipt stands only for Rs.3,30,000/-, the payment of cash to the extent of Rs.3,30,000/- alone is acceptable. I am of the view that finding recorded by the First Appellate Court is proper and the same is based on the evidence placed on record and not based on any perverse finding. It is contended by the defendant that, since this finding was not challenged by the plaintiffs, the same shall be contended that the plaintiffs have made inconsistent pleading and stand. This Court is unable to sustain this view, in view of the fact that not challenging the judicial order did not mean that they have agreed with the findings of the First Appellate Court and the plaintiffs contradict with their case. In this case, the trial Court had dismissed the suit and the First Appellate Court had partly dismissed the suit. The plaintiffs may have satisfied with the decreed amount and may not intend in continuing the litigation. Similarly, in the pleading they have not made any inconsistent plea as contended by the defendant. The plaintiffs' case is very clear and unambiguous. According to them, they had approached the defendant to purchase the plot Nos.68 and 69 for a total sale consideration of Rs.4,80,000/- subsequently, the defendant pressurized them to purchase plot No.30 and she had agreed and issued a cheque for Rs.3,50,000/- on 05.09.2014. On the same day, as per the demand of the defendant, she had paid Rs.4,40,000/- by way of cash and received Ext.A11 for payment of cash, however, receipt was issued only for a sum of Rs.3,30,000/- after endorsing that the entire sale consideration was paid. Subsequently, she had also demanded the defendant to execute the sale deed, which was not replied and after lodging a police complaint, again after issuing legal notice, she had

filed the Suit. This Court finds no inconsistent pleading and facts stated in the Suit is clear and easily projecting the case of plaintiffs and accordingly the substantial question of law No.1 is answered.

16.One of the grounds taken by the defendant is that the non examination of Hemanth Raj is fatal to the case of the plaintiffs, since the receipt was issued only in the name of Hemanth Raj. On a careful perusal of the Ext.A11, it shows that the receipt was issued in the name of Hemanth Raj. However, the fact remains that the first payment and the cheques were all issued only by the 1st plaintiff to the defendant and the same was also accepted by the defendant. Only for the purpose of disputing Ext.A11, they have taken this stand and this receipt alone is issued in favour of Hemanth Raj. Admittedly, the entire bank transactions stand in the name of Poonguzhali, who is the 1st plaintiff herein. It is also the evidence of the 1st plaintiff that she alone has involved in the entire transaction including negotiation and payment of money etc. Hence, this Court deems it appropriate to consider that the 1st plaintiff is the fit person to depose in this case and non examination of Hemanth Raj would no way raise any adverse inference against the plaintiffs.

17.As discussed supra in earlier paragraphs, the evidence of 1st plaintiff coupled with Ext.A11 - receipt for payment of Rs.3,30,000/- and also by marking the legal notice issued by the plaintiffs, the plaintiffs have probabilized their case for payment of cash amount of Rs.3,30,000/-. Therefore, the plaintiffs have shifted the burden of proof to the defendant herein. However, the defendant was not able to show any evidence to support their case that they have not received the payment. Having issued the receipt, after acknowledging and declaring that the entire amount due from the plaintiffs is settled and coupled with their inaction or their action intentionally not making any further demand from the plaintiffs to make payment for the sale consideration for registration is, only raises presumption against them that they have not bonafidely defended the suit and they have failed to discharge the onus of proof of their defence. Accordingly, this Court is of the view that the plaintiffs have established their case and the judgment and decree passed by the First Appellate Court

K.RAJASEKAR, J.

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is a well considered one and warrants no interference and the substantial questions of law 2 and 3 accordingly answered in favour of the plaintiffs.

18.This appeal stands dismissed accordingly. The Judgment and Decree passed by the XX Additional City Civil Court, Chennai, in A.S.No.60 of 2019 shall stand confirmed. Consequently, the connected miscellaneous petition is closed. No costs.

29.10.2024

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Index: yes / no
Neutral Citation

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