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IN THE HIGH COURT OF DELHI AT NEW DELHI

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RFA No.312/2002

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23rd August, 2011

SH. SHAMSHER SINGH & ANR.

..... Appellants
Through: Ms. Smita Maan and Mr. Jitin
Tewathia, Advocates

VERSUS

SMT. NANDI DEVI & ORS.

..... Respondents
Through: Mr. Nidesh Gupta, Sr. Advocate
with Mr. Tarun Gupta and Mr. T.
C. Bhardwaj, Advocates.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? **Yes**
3. Whether the judgment should be reported in the Digest? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The challenge by means of this Regular First Appeal under Section 96 of Code of Civil Procedure, 1908 (CPC) is to the impugned judgment and decree dated 02.03.2002, and by which judgment the trial court decreed the suit of respondent no.1/plaintiff and thereby has granted a declaration that qua the suit land the judgment and decree dated 01.08.1995 passed in suit No.516/93 in favour of the

appellants/defendant nos. 2 and 3 is not binding upon the plaintiff/respondent no.1.

2. The facts of the case are that defendant no.1 executed and registered in favour of the plaintiff/respondent No.1 sale deeds dated 22.12.86 and 3.2.1987 (Ex.PW1/1 to Ex.PW1/3) with respect to the subject land measuring 37 bighas and 10 biswas in village Paprawat, Nazafgarh, Delhi. The further case of respondent no.1/plaintiff was that the son of defendant no.1/respondent no.2 had filed a suit No.51/87 challenging these sale deeds and which suit was dismissed by Shri Pawan Kumar, Sub-Judge, Delhi vide order dated 17.09.88. Even the defendant no.1/respondent no.2 had filed a suit no. 1782/87 in the original side of this Court against the respondent no.1/plaintiff for cancellation of the sale deeds and which suit was got dismissed as withdrawn by defendant no.1/respondent no.2 on 04.02.1992 pursuant to a compromise dated 27.01.1992. The respondent no.1/plaintiff claims to have thereafter paid on 12.2.1993 a Government loan of Rs.30,000/- on behalf of respondent no.2/defendant No.1. It is then averred by respondent no.1/plaintiff that on 16.08.1995 she came to know about impugned judgment and decree for specific performance dated 01.08.1995 in favour of the appellants/defendant nos. 2 and 3 and against defendant No.1/respondent no.2 which therefore forced the plaintiff/respondent

No.1 to file the subject suit for declaration as to the nullity of the judgment and decree dated 01.08.1995 as respondent no.1/plaintiff claimed that she had no notice of the agreement to sell dated 15.11.86 executed by defendant no.1/respondent no.2 in favour of the appellants/defendant nos. 2 and 3.

3. The appellants/defendant nos. 2 and 3 contested the suit. Defendant no.1/respondent No.2 did not appear and was proceeded ex parte. It was pleaded by the appellants that respondent no.1/plaintiff was not a *bona fide* purchaser for value and the judgment and decree dated 01.08.1995 for specific performance could not be executed on account of status quo order granted on 13.02.1996 by Revenue Court.

4. In the replication besides reiterating her case, respondent no.1/plaintiff stated that she had moved an application under Section 151 CPC in Suit No. 516/1993 wherein the judgment and decree dated 01.08.1995 was passed but the said application was dismissed on the ground that the respondent no.1/plaintiff was not a party to the suit.

5. The trial court, after the pleadings were completed, framed the following issues:-

“ (i) Is the suit maintainable in its present form?

(ii) Is the suit properly valued for the purposes of court fee and jurisdiction?

(iii) Is the decree and judgment of 01.08.1995 of the court of Sh. P.S. Teji, ADJ is fraudulent and collusive and hence nullity?

(iv) Relief.”

6. The main issue was issue no.3 and while dealing with this issue, the trial court has firstly referred to the fact that respondent no.1/plaintiff has got proved and exhibited sale deeds in her favour of the subject land as Ex.PW-1/1 to PW-1/3 and also that the physical possession of the suit land was handed over to the plaintiff/respondent No.1 by defendant no.1/respondent no.2. The trial court has also referred the fact that though the appellants claim that defendant no.1/respondent no.2 had also executed sale deed with respect to another piece of land measuring 49 bighas, however, no such sale deed in favour of appellants was filed. The trial court has then referred to the fact that appellants themselves moved an application before the Court which passed the judgment and decree dated 01.08.1995 for modification on the ground that the decree needed to be amended because of a status quo order passed by the Revenue Court dated 13.2.1996, however this application was dismissed by the Court which passed the decree holding that the appellants can claim the alternative relief of recovery of money.

7. During the course of the arguments it became clear that the judgment and decree dated 01.08.1995 passed in suit no. 516/1993

which has been declared as nullity by the trial court was passed when the sale deeds in favour of respondent no.1/plaintiff had already been executed. Thus, on the date of passing of the decree for specific performance in favour of the appellants/defendant nos.2 and 3 and against defendant no. 1/ respondent no.2, the defendant no.1/respondent No.2 was not the owner of the suit property and therefore was legally incapable of executing a sale deed in favour of the appellants. The law in this regard is laid down by the Supreme Court in the case reported as ***Durga Prasad and Anr. Vs. Deep Chand and Anr. AIR 1954 SC 75*** wherein the Supreme Court held that in a suit for specific performance, once the subject property is transferred by the proposed seller to a third party, it is incumbent to make the third party (respondent no.1/plaintiff in the present case) as party to the suit for specific performance inasmuch as the original proposed seller would have no title for being transferred pursuant to the decree for specific performance. The relevant paragraphs of the decision of the Supreme Court in the case of ***Durga Prasad (supra)*** are contained in paragraphs 37 to 42 of the said judgment and which read as under:-

“37. The practice of the courts in India has not been uniform and three distinct lines of thought emerge. (We are of course confining our attention to a purchaser's suit for specific performance). According to one point of view, the proper form of decree is to declare the subsequent purchase void as

against the plaintiff and direct conveyance by the vendor along. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchase alone.

38. The only statutory provisions which bear on this point are section 91 of the Indian Trusts Act, 1882, section 3 of the Specific Relief Act, 1877, illustration (g), and section 27 of that Act, and section 40 of the Transfer of Property Act.

39. Section 91 of the Trusts Act, does not make the subsequent purchaser with notice a trustee properly so called but saddles him with an obligation in the nature of a trust (because of section 80) and directs that he must hold the property for the benefit of the prior "contractor", if we may so describe the plaintiff, "to the extent necessary to give effect to the contract." Section 3 illustration (g) of the Specific Relief Act makes him a trustee for the plaintiff but only for the purposes of that Act. Section 40 of the Transfer of Property Act enacts that this obligation can be enforced against a subsequent transferee with notice but not against one who holds for consideration and without notice. Section 27 of the Specific Relief Act does not carry the matter any further.

All it says is that specific performance may be enforced against

" (a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract".

None of this helps because none of these provisions directly relate to the form of the decree. It will therefore be necessary to analyse each form in the light of other provisions of law.

40. First, we reach the position that the title to the property has validly passed from the vendor and the resides in the subsequent transferee. The sale to him is not void but only

voidable at the option of the earlier "contractor". As the title no longer rests in the vendor it would be illogical from a convincing point of view to compel him to convey to the plaintiff unless steps are taken to re vest the title in him either by cancellation of the subsequent sale or by reconveyance from the subsequent purchaser to him. We do not know of any case in which a reconveyance to the vendor was ordered but Sulaiman C.J. adopted the other course in Kali Charan v. Janak Deo AIR 1932 All 694 . He directed cancellation of the subsequent sale and conveyance to the plaintiff by the vendor in accordance with the contract of sale of which the plaintiff sought specific performance. But though this sounds logical the objection to it is that it might bring in its train complication between the vendor and the subsequent purchaser. There may be covenants in the deed between them which it would be inequitable to disturb by cancellation of their deed. Accordingly, we do not think that is a desirable solution.

41. We are not enamoured of the next alternative either, namely, conveyance by the subsequent purchaser along to the plaintiff. It is true that would have the effect of vesting the title to the property in the plaintiff but it might be inequitable to couple the subsequent transferee to enter into terms and covenants in the vendor's agreement with the plaintiff to which he would never have agreed had he been a free agent; and if the original contract is varies by altering or omitting such terms the court will be remaking the contract, a thing it is no power to do; and in any case it will no longer be specifically enforcing the original contract but another and different one.

42. In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in Kafiladdin v. Samiraddin `MANU/WB/0158/1930, and appears to be the English

practice. See Fry on Specific Performance, 6th edition, page 90, paragraph 207; also Potter v. Sanders 67 E.R. 1057.. We direct accordingly.” (underlining added)

8. In view of the ratio of the decision in the case of ***Durga Prasad (supra)*** in addition to the conclusion of the trial court, the impugned judgment and decree will also have to be sustained on the ground that respondent no.1/plaintiff was not made a party to the suit no. 516/1993 which passed the judgment and decree dated 1.8.1995 and thus there is no decree passed against respondent no.1/plaintiff. As held in the case of ***Durga Prasad (supra)*** such a decree against an original seller/defendant no.1 would have no effect in the absence of the subsequent transferee/actual owner of the suit property. Further, the appellants themselves in the present case moved an application for correction of the decree dated 1.8.1995, however, the said application was dismissed by holding that the appellants are entitled to alternative relief of recovery of money from the respondent no.2/defendant No.1 and which order became final as the same had not been appealed against.

9. Learned counsel for the appellants in support of the appeal argued two main points. The first argument was that respondent no.1/plaintiff failed to prove that she was a *bona fide* purchaser of the property and therefore, the suit ought not to have been decreed. The second

argument was based on the decision in the case of **Ashan Devi & Another Vs. Phulwasi Devi & others 2003 (9) SCALE 783** and which judgment was relied upon for the proposition that respondent no.1/plaintiff could not have filed an independent suit but could have only filed objections in execution proceedings of the judgment dated 1.8.1995.

10. In my opinion, both the arguments as advanced by the counsel for the appellants are misconceived. Firstly, though no doubt respondent no.1/plaintiff in her examination in chief did not make any averment of she being the *bona fide* purchaser, however, this lacuna was removed when in the cross-examination on a question being put on behalf of the appellants, it was denied that there was any agreement to sell executed in favour of the appellants by the defendant No.1/respondent No.2. Further, the appellants even in their affirmative evidence did not at all depose of respondent no.1/plaintiff not being the *bona fide* purchaser of value. Accordingly, I hold that respondent no.1/plaintiff discharged the onus on her that she was a bona fide purchaser for value.

11. So far as the argument based on the decision in the case of **Ashan Devi(supra)** is concerned, the argument is again without merit because the need of respondent no.1/plaintiff to approach the Executing Court and get the issue decided would only have arisen if the appellants had applied for execution of the decree and have thereafter, sought to take

possession in execution of judgment and decree dated 01.08.1995. Since, no execution proceeding were filed there does not arise any scope of applicability of the provisions of Order 21 Rule 97 to Order 21 Rule 106 CPC being the provisions under the heading “Resistance to delivery of possession to decree holder or purchaser”.

Accordingly, I reject the argument that respondent no.1/plaintiff could not have filed the subject suit and ought to have filed objections in execution only.

12. In view of the above, I do not find any merit in the appeal. An Appellate Court is not entitled to interfere with the judgment of the trial court unless the judgment of the trial court is illegal either in facts or in law. Merely, because two views are possible, the Appellate Court will not interfere with one plausible and possible view which has been taken by the trial Court. The appeal is therefore dismissed, leaving the parties to bear their own costs. Trial Court record be sent back.

AUGUST 23, 2011
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VALMIKI J. MEHTA, J.