



S.A.No.1010 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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JUDGMENT RESERVED ON : 02.08.2024

JUDGMENT PRONOUNCED ON : 28.10.2024

CORAM

THE HON'BLE MRS. JUSTICE N.MALA

S.A.No.1010 of 2021

and

CMP.No.19003 of 2021

Angayarkanni

...Appellant

VS

1. Sundaramoorthy
2. Arikrishnan
3. Kamala @ Selvi
4. Sundar @ Munisamy
5. Patchaiammal

...Respondents

Prayer: Second Appeal is filed under Section 100 of the Code of Civil Procedure Code, 1908 to set aside the Judgment and Decree dated 10.11.2014 passed in O.S.No. 52 of 2008 by Additional Sub Judge at Pondicherry as confirmed in the Judgment and Decree dated 20.07.2021 passed in A.S.No.1 of 2015 by the Honble Principal District Judge at Puducherry.

For Appellant : Mr.C.Ravichandran

For Respondents : Mrs.V.Kamala Kumar

for R1

For RR2 to 5 – No appearance



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JUDGMENT

The 5th defendant in the suit is the appellant in the Second Appeal. The Second Appeal is filed against the confirming judgment of the lower appellate court decreeing the plaintiff's suit for declaration of title and permanent injunction.

2.The parties will be referred to as per their rank in the trial court.

Gist of the Plaintiff and Amended Plaintiff:

3. The plaintiff filed the suit for declaration of title and for permanent injunction. The defendants 1 & 2 were the original owner's of the suit property having purchased the same under registered sale Deed dated 18.01.1996. The defendants 1 & 2 entered into a sale agreement with the plaintiff on 04.06.1997 for sale of the suit property for sale consideration of Rs.25,000/-, received a sum of Rs.15,000/- as advance and thereafter received a further sum of Rs.5,000/- as advance. As defendant's failed to execute the sale Deed in terms of the sale Agreement, the plaintiff filed the suit in O.S.No.211 of 1999 on the file of the Additional Subordinate Judge, Puducherry, for specific performance. The defendant's 1 & 2 executed the sale Deed on 17.08.1999 in favour of the plaintiff and thereafter the suit was dismissed as not pressed on 29.10.1999. According to the plaintiff, he was put in possession of the suit property and the Patta was also transferred in his name. The plaintiff states that while the plaintiff tried to take



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steps to secure the property by putting up a fence, the 3rd defendant objected to the same. The matter was taken to the police station and it was then that the plaintiff came to know that the 1st and 2nd defendants with a view to defraud the plaintiff, in collusion with the 3rd defendant, executed a Power of Attorney in favour of the 3rd defendant on 04.06.1998, for sale of the property and the 3rd defendant in pursuance of the Power of Attorney executed a sale Deed in favour of the 4th defendant on 16.07.1998. The 4th defendant thereafter sold the property to the 5th defendant on 05.03.2007. The plaintiff states that all the transactions of the defendant's were fraudulent, sham and nominal and not binding on the plaintiff. The plaintiff left with no other option was hence constrained to file the suit for declaration of his title and for permanent injunction restraining the defendant's from interfering with his peaceful possession and enjoyment of the suit property.

4. The defendant's filed separate written statement. The 1st and 2nd defendant filed a common written statement and so also defendants 3 & 4. The 5th defendant filed a separate written statement.

5. The gist of the defendant's written statements are as follows:

The defendant's 1 & 2 filed a written statement denying generally all the averments made in the plaint. The defendant's 3, 4 & 5 denied the plaintiff's contention that the defendant's 1 & 2 colluded with the 3rd defendant and executed



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a Power of Attorney in favour of the 3rd defendant to thwart the plaintiff's efforts to enforce the agreement of sale in his favour. The defendant's further denied the plaintiff's possession of the suit properties. According to the defendant's, it was the plaintiff who had colluded with the defendant's 1 & 2 and created the alleged suit Agreement and maneuvered to obtain the judgment and decree in O.S.No.211 of 1999. According to the defendant's the alleged sale Agreement was a fraudulent document purposely manipulated by the plaintiff in collusion with the 1st and 2nd defendant to defeat the lawful right, title and interest of the defendant's 3, 4 & 5. The 5th defendant apart from reiterating the contentions of the defendant's 3 & 4 further submitted that she was a bonafide purchaser for value of the suit property. The 5th defendant further stated that the plaintiff had approached the court with unclean hands by giving an entirely false story on her right to the suit property.

6. Before the trial court the plaintiff examined himself as P.W1 and marked Ex.A1 to Ex.A13. The 3rd defendant examined himself as D.W1, the Power Agent of the 5th defendant examined himself as D.W2 and the 1st defendant examined himself as D.W3. The defendant's marked Ex.B1 to Ex.B6 on their side.

7. The trial court framed relevant issues and additional issues. The trial court held that the sale Deed dated 17.08.1999 in favour of the plaintiff by the defendant's 1 & 2 was true and valid. The trial court further found that the Power



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of Attorney in favour of the 3rd defendant and the sale Deeds in favour of the 4th and 5th defendants were not genuine documents. The trial court also found that the plaintiff as absolute owner of the suit property was entitled to the relief of permanent injunction. On the said findings the trial court decreed the suit as prayed for.

8. Aggrieved by the judgment and decree of the trial court, the 5th defendant preferred the appeal in A.S.No. 1 of 2015 on the file of the Principal District Judge, Puducherry. The lower appellate court concurred with the finding of the trial court that the plaintiff had proved the validity and genuineness of the sale Deed in his favour. The lower appellate court on the basis of the evidence of D.W3 held that the plaintiff was in possession of the suit property. The lower appellate court on its aforesaid findings confirmed the judgment and decree of the trial court.

9. Aggrieved by the concurrent judgment and decree of the courts below, the 5th defendant has filed the above Second Appeal.

10. Learned counsel for the appellant/ 5th defendant referring to the substantial questions of law submitted that the suit as framed was not maintainable for failure of the plaintiff to challenge the sale Deed dated 16.07.1998, under



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Ex.A7, and the sale Deed dated 05.03.2007, under Ex.B4, by way of declaration that same were null, void, sham, nominal and not binding on the plaintiff. Learned counsel further submitted that courts below failed to note that title over the suit property under Ex.A5 dated 17.08.1999 did not pass to the plaintiff, since on the date of execution of the said sale Deed, the defendants 1 and 2 had lost their title over the said property, in view of the sale Deed dated 16.07.1998 under Ex.A7 equivalent to Ex.B3. Learned counsel further submitted that the courts below failed to note that the plaintiff had failed to discharge the burden cast on him and that it was settled principle of law that the plaintiff could not pick loop-holes in the defendants case and the plaintiff has to succeed on the strength of his own case. The learned counsel submitted that as the court's below committed grave error in appreciation of the facts and law involved in the case, the Second Appeal should be allowed.

11. Learned counsel for the respondents on the other hand submitted that the Second Appeal deserved to be rejected as no substantial questions of law were involved. Learned counsel submitted that this court under Section 100 CPC could not interfere with the concurrent findings of fact of the courts below. Learned counsel referring to first substantial question of law submitted that the execution of the agreement of sale dated 04.06.1997 under Ex.A1 was not disputed by the defendants 1 and 2, owners of the property and further the courts below



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concurrently found that Ex.A1, was not forged document, created in collusion with the defendants 1 and 2, and hence charge was created in favour of the plaintiff in respect of the suit property on the basis of Ex.A1. Learned counsel relied on Section 55(6)(b) of Transfer of Property Act,1882 and also judgment of Hon'ble Supreme Court in the case of *Videocon Properties Ltd. Dr.Bhalchandra Laboratories and others* reported in (2004) 3 SCC 711, in support of her submission. Learned counsel further submitted that under Ex.A1, not only a charge was created in the suit property in favour of the plaintiff but also Ex.A1, created a right and interest in favour of the plaintiff over the suit property, in as much as the plaintiff was handed over physical possession of the suit property by the defendants 1 and 2 under Ex.A1, bringing into play part performance as contemplated under Section 53-A of the Transfer of Property Act,1882.

12. As regards, the 2nd substantial question of law, learned counsel for the plaintiff submitted that as the plaintiff and the defendants 1 and 2 had no knowledge of the sale Deed dated 16.07.1998 under Ex.A7, executed by the 3rd defendant as power agent of the defendants 1 and 2 in favour of his wife, 4th defendant, the plaintiff could not be expected to pray for setting aside the same. Learned counsel, relying on Section 19(b) of the Specific Relief Act, 1963 submitted that the rights of the subsequent purchaser, the appellant/ 5th defendant



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herein were subject to the decree of specific performance, as the suit agreement was enforceable against them, unless it was proved by the subsequent purchaser, that the appellant/ 5th defendant was a bonafide purchaser for value without notice of the original agreement. Learned counsel for the plaintiff relied on the Judgment of the Hon'ble Supreme Court in the case of *Maharaj Singh &Ors. Vs. Karan Singh (Dead) thr. Lrs. &Ors., in Civil Appeal No.6782/2023*, in support of the above proposition. Learned counsel therefore submitted that there were no merits in the Second Appeal and same deserved to be dismissed.

13. I have heard both the learned counsels and perused the materials placed on record.

14. This Court admitted the Second Appeal on the following substantial questions of law:

(i) Whether the lower Appellate Court committed error in holding that Defendants 1 and 2 had created a charge in favour of the Plaintiff in respect of the suit property on the basis of agreement of sale deed dated 04.06.1997 under Ex.A1?

(ii) Whether the execution of sale deed by Defendants 1 and 2 on 17.08.1999 in favour of the Plaintiff, without setting aside the sale deed dated 16.07.1998 in favour of the 4th Defendant and granting of declaratory decree by the Courts below can be



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sustained?

Gist of facts of the case:

15. The undisputed fact is that the suit property belonged to defendants 1 and 2, they having purchased the same on 18.01.1996 under a registered Document No.200 of 1996 from one Rathinam under Ex.A4. The said defendants as the absolute owners of the suit property executed an agreement of sale (Ex.A1) in favour of the plaintiff on 04.06.1997, agreeing to sell the same for a sale consideration of Rs.25,000/- and received a sum of Rs.15,000/- as advance. The defendants having failed to perform their part under the agreement of sale, the plaintiff filed the suit for specific performance in O.S.No.211 of 1999. In the suit the defendants 1 and 2 appeared and expressed their unconditional willingness to execute a sale Deed in favour of the plaintiff. Accordingly, the sale Deed was executed on 17.08.1999 by the defendants 1 and 2 in favour of the plaintiff under Ex.A5. Thereafter the suit in O.S.No.211 of 1999 was disposed of by the judgment and decree dated 29.10.1999 under Ex.A2 and Ex.A3 as not pressed. According to the plaintiff, he was put in possession of the suit property in pursuance of the sale on 17.08.1999. While so, the plaintiff came to know that the defendants 1 and 2 executed a general Power of Attorney dated 04.06.1998 and registered the same on 15.07.1998 under Ex.A6 in favour of the 3rd defendant and the 3rd defendant on the next day registered a sale Deed under Ex.A7 in favour of his wife, the 4th defendant. Thereafter under Ex.B4, dated 05.03.2007, the 4th defendant executed a



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sale Deed in favour of the 5th defendant. According to the plaintiff, when he was trying to put up a fence to secure his possession of the suit property, the defendants objected and prevented the plaintiff from going ahead with the construction. For five years thereafter stalemate continued. Again on 20.01.2008, when the plaintiff tried to clean up the suit property for starting construction, the 3rd defendant stopped the plaintiff and threatened him with dire consequences, if he continued the work. The plaintiff reported the same to Mettupalayam Police Station on the same day, but the police officials advised the plaintiff to seek redress before a court of law, as the dispute was of civil nature. The plaintiff was therefore constrained to file the suit for declaration of title and permanent injunction.

16. The defendants 3, 4 & 5 stated that the plaintiff colluded with the defendants 1 and 2 and created agreement of sale ante-dating the same. The defendants further submitted that the suit, O.S.No.211 of 1999, was a collusive suit filed with malafide intention to defeat the lawful right, title and possession of the 5th defendant. The defendants further stated that the sale Deed in favour of the plaintiff did not convey any right, title and interest to the plaintiff, as the alleged sale Deed was manipulated by him and never acted upon. The defendants stated that the alleged sale agreement and the sale Deed in favour of the plaintiff was sham and nominal. The defendants therefore prayed for dismissal of the suit. The



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defendants 1 and 2 filed a written statement denying generally all the contentions and allegations raised in the plaint and prayed for the dismissal of the suit.

Discussions:

II Substantial Question of law:

17. At the outset the relevant recitals of the sale agreement Ex.A1 executed by the defendants 1 and 2 in favour of the plaintiff under Ex.A1 on 04.06.1997 are extracted. They are as follows:

"இதனடியில் கண்ட சொத்தானது 18.01.1996-ல் எழுதி, ஊவர்கரை உதவிப் பதிவாளர் அலுவலகத்தில் புக்-1, வால்யூம்-1060-ல் பக்கம் 237 முதல் 239 வரையில் 200-ஆம் எண்ணாகப் பதியப்பட்ட கிரயப்பத்திரப்படி நம்மில் 1-வது பார்ட்டிக்குச் சொந்தமானதும், அவரது அனுபோகத்திலும், சுவாதீனத்திலும் இருந்து வருவதுமான பின்னால் சொத்து விபரத்தில் குறிப்பிடப்பட்ட சொத்தை நம்மில் 2-வது பார்ட்டிக்கு விற்க சம்மதித்து இருபார்ட்டிகளும் விலைபேசி தீர்த்துக்கொண்ட கிரயவிலை ரூபாய்.25,000/- (ரூபாய் இருபத்தைந்தாயிரம் மட்டும்) இதில் இன்றைய தேதியில் நம்மில் முதல் பார்ட்டி 2-வது பார்ட்டியிடமிருந்து அச்சாரமாக பெற்றுக்கொண்டது ரூபாய்.15,000/- (ரூபாய் பதினைந்தாயிரம் மட்டும்). பாக்கி கிரயத்தொகையை நம்மில் 2-வது நபர் இன்றுமுதல் 10-(பத்து) மாத காலகெடுவுக்குள் 1-வது பார்ட்டியிடம்



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கொடுத்து தன்சொந்த செலவில் கிரயப் பத்திரம் எழுதி கிரயம் பெற்றுக்கொள்ள நம்மில் 2-வது பார்ட்டி சம்மதிக்கின்றார்.

மேற்குறிப்பிட்டப்படி நம்மில் 1-வது பார்ட்டி 2-வது பார்ட்டியிடமிருந்து ண அச்சாரத் தொகையைப் பெற்றுக்கொண்டு பின்கண்ட சொத்தில் ஓரிஜினல் பத்திரத்தை நம்மில் 2-வது பார்ட்டியிடம் ஒப்படைத்துவிட்டார். மேற்கண்ட கெடுவுக்குள் 1-வது பார்ட்டி பின்கண்ட சொத்திற்குண்டான சகலவிதமான மூலதஸ்தாவேஜ்கள், 30-வருடத்திற்குண்டான வில்லங்க சான்றிதழ் மற்றும் சொத்தை அளந்து சர்வே செய்து பின்கண்ட சொத்தை நம்மில் 1-வது பார்ட்டிக்குப் பட்டா மாற்றம் செய்து சொத்தை சர்வ வில்லங்க கத்தியாய் நம்மில் 2-வது பார்ட்டிக்கு கிரயம் செய்துக்கொடுத்து பாக்கி கிரயத்தொகையை பெற்றுக்கொள்ள 1-வது பார்ட்டி சம்மதிக்கின்றார். அதனால் இன்றைய தேதியிலேயே பின்கண்ட சொத்தை 2-வது பார்ட்டிக்கு சுவாதீனம் செய்து கொடுத்து இடத்தையும் இன்றைய தினமே 1-வது பார்ட்டி ஒப்படைத்துவிட்டார்கள்.

மேற்குறிப்பிட்டபிரகாரமும் அதாவது கெடுவுக்குள் 1-வது பார்ட்டி மேற்கண்ட விதமாக எல்லாவிதமான தஸ்தாவேஜ்களுடன் தாயாராக இருந்து கிரயம் செய்துக் கொடுக்க ஏதவாக 1-வது பார்ட்டி அறிவிப்பு நோட்டீஸ் கொடுத்தும் 2-வது பார்ட்டி கிரயம் செய்துக் கொள்ளத்



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தவறினால் இன்றைய தேதியில் 1-வது பார்ட்டியிடம் கொடுத்த அட்வான்ஸ் தொகையை இழந்துவிடவேண்டியது.

மேற்குறிப்பிட்ட பிரகாரமும் அதாவது கெடுவுக்குள் 2-வது பார்ட்டி கிரயம் பெற்றுக்கொள்ளத் தயாராக இருந்து 1-வது பார்ட்டி கிரயம் செய்துக்கொடுக்கத் தவறினால் ண 2-வது பார்ட்டி பின்கண்ட சொத்தின் மீதும், 1-வது பார்ட்டியின் மீதும் கோர்ட்டில் "ஸ்பெசிபிக் பெர்பாமன்ஸ் ரிலீப் ஆக்ட்"-ன் கீழ் வழக்கு தொடர்ந்து பாக்கி கிரயத்தொகையை 1-வது பார்ட்டியின் பெயரில் கோர்ட்டில் செலுத்தி ண கோர்ட்டார் மூலம் சேல்-டு டிகிரி பெற்று பின்கண்ட சொத்தை 2-வது பார்ட்டியே கிரயம் பெற்றுக்கொள்ளவும், ண கோர்ட் செலவு, ஸ்டாம்ப் ரூட்டி முதலான அனைத்து செலவையும் 1-வது பார்ட்டியே ஏற்றுக்கொள்ளவும் சம்மதிக்கின்றார்.

மேற்குறிப்பிட்ட கெடுவுக்குள் பின்கண்ட சொத்தை 1-வது பார்ட்டி எவ்வித வில்லங்கத்திற்கு உட்படுத்தவோ அல்லது வேறு யாருடனும் முன்தேதியிட்டு அச்சார உடன்படிக்கை செய்துக்கொள்ளவோ, அல்லது பொதுஅதிகாரம் செய்துக்கொடுக்கவோ 1-வது பார்ட்டிக்கு உரிமையில்லை - அப்படி மேற்கண்டவாறு ஏதேனும் வில்லங்கம் ஏற்படுத்தினால் அது 2-வது பார்ட்டியை எவ்விதத்திலும் கட்டுப்படுத்தாது என்றும் 1-வது பார்ட்டி உறுதி அளிக்கின்றனர்."



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18. Before proceeding further, in my view, it is necessary for better appreciation of the facts to refer to the documents and their dates.

<i>S.No.</i>	<i>Exhibits</i>	<i>Description of Documents</i>	<i>Dates</i>
1.	Ex.A1	Sale Agreement executed by D1 & D2 in favour of plaintiff on or before 04.04.1998	04.06.1997
2.	Ex.A6	Deed of Power of Attorney executed by D1 & D2 in favour of D3	04.06.1998
3.	Ex.A7	Sale deed executed by D3 in favour of D4	16.07.1998
4.	Ex.A5	Sale Deed executed by D1 & D2 in favour of plaintiff	17.08.1999
5.	Ex.A2	Judgement in OS/211/1999	29.10.1999
6.	Ex.A3	Decree in OS/211/1999	29.10.1999

19. Keeping in mind the above dates the recitals in the sale Agreement are alluded to. From a reading of the terms of the sale agreement, it is clear that the plaintiff agreed to have the sale Deed executed in his favour within 10 months of the sale agreement. The 10 month's period stipulated under the agreement expired on 04.04.1998. As per the terms of the agreement, between 04.06.1997 to 04.04.1998, the defendants 1 and 2 were precluded from creating any encumbrance over the property. It was only after the expiry of the 10 months period precisely 2 months thereafter that, the defendants 1 and 2 executed the Power of Attorney in favour of the 3rd defendant under Ex.A6. The said power was registered on 15.07.1998 and on the very next day, the 3rd defendant executed



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the registered sale Deed in favour of his wife, the 4th defendant. It was long after the execution of the sale Deed in favour of the 4th defendant under Ex.A7 that the plaintiff issued the suit notice dated 19.04.1999 in O.S.No.211 of 1999 to the defendants 1 and 2. The plaintiff stated that neither he, nor the defendants 1 and 2 had knowledge of the execution of the sale Deed, Ex.A7 by the 3rd defendant in favour of the 4th defendant and therefore the defendants 3 and 4 were not impleaded in the suit in O.S.No.211 of 1999. It is to be seen if the said contention of the plaintiff can be endorsed.

20. From the terms of the sale agreement extracted supra, it is clear that the defendants 1 and 2 were restrained from encumbering the property by way of lease, sale, Power of Attorney etc., for a period of 10 months from the date of agreement of sale and the said period expired on 04.04.1998. It was therefore the bounden duty of the plaintiff to cause reasonable enquiry on the encumbrance, if any, over the property beyond 04.04.1998. Admittedly, the Power of Attorney was executed in favour of the 3rd defendant by the defendants 1 and 2 on 04.06.1998 i.e two months after the period stipulated in the agreement and the said Power of Attorney was registered on 15.07.1998. On the next day (ie) on 16.07.1998, the 3rd defendant executed the registered sale Deed in favour of the 4th defendant i.e. 16.07.1998. It is not the case of the plaintiff in the plaint that before getting the



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sale Deed in his favour from the defendants 1 & 2, he had enquired with them about creation of any encumbrance over the property. Even in the evidence of the plaintiff, there is no such statement. It would be very relevant to note here that the plaintiff admitted that he is a real-estate dealer. The plaintiff is therefore conversant with the formalities of registration of documents, encumbrance certificates etc. Prudence therefore required the plaintiff to verify the encumbrance over the property before registration. It is further pertinent to note that the plaintiff in his evidence deposed that on 20.12.2002 he complained to the police against the 3rd defendant, and he was advised to file civil suit and that even after knowledge of the 4th defendant's sale Deed, the plaintiff did not take any steps to cancel it. The relevant portion is as follows:

"20.12.2002 இல் புகார் கொடுத்தேன். நானும், 3வது பிரதிவாதியும் பத்திரம் வைத்துள்ளதால் நீதிமன்றம் மூலம் தீர்க்க சொன்னார்கள். பிரதிவாதியும் கிரையப் பத்திரம் வைத்துள்ளது தெரிய வந்த பிறகு அந்த பத்திரத்தை ரத்து செய்ய நடவடிக்கை ஏதும் எடுக்கவில்லை."

The plaintiff even in the plaint admits that the statement with the 3rd defendant continued for 5 years after the police complaint on 20.12.2002. The plaintiff has not given any plausible reasons for not taking steps against the defendant's documents even though he was aware of the same 5 years prior to the suit. As the plaintiff failed either to enquire the defendants 1 and 2 or to verify the



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encumbrance over the property, the contention of the plaintiff that he was not aware of the Power Deed in favour of the 3rd defendant and the sale Deed in favour of the 4th defendant and therefore he did not implead them as parties in the suit O.S.No.211 of 1999, in my view, cannot be accepted.

21. Even the suit O.S.No.211 of 1999, in my view is a collusive suit between the plaintiff and the defendants 1 and 2. The plaintiff obtained the registered sale Deed in his favour under Ex.A5 on 17.08.1999 and the suit was dismissed as not pressed on 29.10.1999, without even recording the sale in favour of the plaintiff. No reasons were assigned by the plaintiff for not reporting to the court about the execution of the sale Deed in his favour, moreso, when the plaintiff and the defendants recited in the sale Deed that the sale Deed was executed in pursuance of the undertaking given to the court.

22. In the back drop of the above facts, the learned counsel for the appellant/ 5th defendant submitted that subsequent purchaser i.e. 4th defendant was a necessary party to the suit in O.S.No.211 of 1999 and in the absence of the 4th defendant, no title could be transferred to the agreement holder if he/she was successful in the suit for specific performance. Learned counsel relied on several



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judgments in support of the said proposition. In my view, it would suffice to refer to the judgment of this court in the case of *Chinna Vannan v. Alamelu and others* reported in 88 L.W 767. It was held as follows:

“4.....The agreement-holder can acquire title to the property only if proper conveyance is executed by the subsequent purchaser as well. Though this judgment might be interpreted as holding that the sale deed in purchase of a decree for specific performance is to be executed only by the subsequent purchaser and to that extent is not fully supported by the view of the Supreme Court in Durga Prasad v. Deep Chand the decision is certainly an authority for the position that the original owner by himself could not confer or convey any title in respect of the property, which he had already sold to a subsequent purchaser. These principles clearly show that the subsequent purchaser is a necessary party in a suit for specific performance and the decree should direct both the owner and the subsequent purchaser to execute the conveyance in favour of the agreement-holder.....”

The Division Bench of this court in the case of *A.Ramakrishnan @ Ramakrishnappa Versus N.Parvathi and Others* reported in (2024) 1 MLJ 446, relying on the judgment of the Hon'ble Supreme Court in the case of *Lala Durga Prasad and Another v. Lala Deep Chand and Others* reported in AIR 1954 SC 75,



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held as follows:

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“19. While dealing with the right of an agreement vendor to sell the property and the right of a purchaser, after the agreement of sale, the Hon'ble Supreme Court has clearly spelt out that on execution of Sale Deed by the agreement vendor, the title in the property stood transferred to the subsequent purchaser and therefore, the subsequent purchaser should be added as a defendant and should be made to join execution of the Sale Deed, so that the title stood transferred to the purchaser if he/she is successful in a suit for specific performance.”

23. It is therefore clear that in the absence of the 4th defendant, the sale in favour of the plaintiff is invalid, as the defendants 1 and 2 could not pass title to the plaintiff, having parted with the same in favour of the 4th defendant before execution of the sale in favour of the plaintiff.

24. As the title had passed to the 4th defendant by virtue of Ex.A7, the plaintiff's title was inchoate. The plaintiff in order to remove the insuperable obstruction in the form of sale Deed Ex.A7, in favour of the 4th defendant, ought to have prayed for declaration that the sale Deed Ex.A4 was null and void, sham, nominal and not binding on him. So also, the plaintiff should have prayed for



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declaration as regards Ex.B4. The plaintiff was not a party to the sale Deeds and therefore he was not required to seek cancellation of the same. But when the plaintiff sought to establish his exclusive title he was bound to remove the unsurmountable obstruction under Ex.A7 & Ex.B4, by praying for a declaration that the said sale Deeds were invalid so far as he was concerned. I am fortified in my view by the judgment of this court in the case of *Vellayya v. Kamaswami*, reported in *ILR (1940) Mad 73*, held as follows:

“When, the plaintiff seeks to establish a title in himself and cannot establish that title without removing an insuperable obstruction such as a decree to which he has been a party or a deed to which he has been a party, then quite clearly he must get that decree or deed cancelled or declared void 'in toto', and his suit is in substance a suit for the cancellation of the decree or deed even though it be framed as a suit for declaration. But when he is seeking to establish a title and finds himself threatened by a decree or a transaction between third parties, he is not in a position to get that decree or that deed cancelled 'in toto'. That is a thing which can only be done by parties to the decree or deed or their representatives. His proper remedy therefore in order to clear the way with a view to establish his title, is to get a declaration that the decree or deed is invalid so far as he himself is concerned and



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he must therefore sue for such a declaration and not for the cancellation of the decree or deed.”

In the light of the above discussions, I am of the view that the suit of the plaintiff as framed is not maintainable without a specific prayer to declare the sale Deed dated 16.07.1998 in favour of the 4th defendant as non-est and not binding on him. I therefore answer the 2nd substantial question of law in favour of the appellant/ 5th defendant.

25. Though the finding on the 2nd substantial question of law would suffice to allow the Second Appeal, for the purpose of completion the 1st substantial question of law is also discussed.

I Substantial Question of Law:

26. At this stage, I would like to refer to the judgment of the Hon'ble Supreme Court in the case of *Union of India and others Versus Vasavi Cooperative Housing Society Limited and Others*, reported in (2014) 2 SCC 269. The Hon'ble Supreme Court held that “*in a suit for declaration of title, the burden always lies on the plaintiff to make out and establish a clear case for granting such a declaration and the weakness, if any, of the case set up by the defendants*



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would not be a ground to grant relief for the plaintiff.” Therefore it is the duty of the plaintiff to establish his case and he cannot rely on the lacunae in the defendant's case.

27. It is the contention of the learned counsel for the plaintiff that under Ex.A1 a charge was created over the suit property in favour of the plaintiff and therefore the plaintiff was entitled to enforce the said charge against the said property in the hands of third parties. Learned counsel for the appellant/ 5th defendant on the other hand submitted that mere agreement of sale does not of itself create any interest or charge over the suit property.

Section 54 of the Transfer of Property Act, 1882 reads as follows:

“54. “Sale” defined. - “Sale” is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Sale how made. - Such transfer, in the case of tangible immoveable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immoveable property of a value less than one hundred rupees, such transfer may be made either by a



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registered instrument or by delivery of the property.

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Delivery of tangible immoveable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.

Contract for sale. - A contract for the sale of immoveable property is a contract that a sale of such property shall take place on terms settled between the parties. It does not, of itself, create any interest in or charge on such property.”

28. It is clear from Section 54 of the Transfer of Property Act, that the agreement of sale does not of itself create any interest or charge in the suit property. The Hon’ble Supreme Court in the case of *Narandas Karsondas Versus S.A.Kamtam and Another* reported in (1977) 3 SCC 247 held as follows:

“32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. See Rambaran Prosad V. Ram Mohit Hazra. The fiduciary character of the personal obligation created by a contract for sale is recognised in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not



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amounting to an interest or easement therein.”

29. So also Division Bench judgment of this court in its latest judgment reported in (2024) 1 MLJ 446 held that Section 54 of the Transfer of Property Act clearly spells that contract of sale by itself does not create any interest over immovable property. In view of the settled law the contention of the plaintiff that a charge was created in favour of the plaintiff under Ex.A1, cannot be countenanced. The courts below on a misconception of the law erroneously held that under Ex.A1, a charge was created in favour of the plaintiff with respect to the suit property. I therefore answer the 1st substantial question of law in favour of the appellant/ 5th defendant.

30. Though the learned counsel for the respondents raised other issues relating to Section 19(b) of the Specific Relief Act and Section 53-A of Transfer of Property Act, and also produced judgments in support of the same, in my view in the absence of any plea in this regard, the said submissions cannot be entertained. As the judgments relied on by the learned counsel for the respondents are not applicable to the facts of the case, the same are not referred to in the judgment.

31. As regards, the contention of the learned counsel for the plaintiff that the Second Appeal was not maintainable as the same did not involve any substantial



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questions of law, but raised only questions of fact, I am of the view that on the facts of the case, the said contention cannot be accepted. It is clear from the judgments of the courts below that they committed grave error in thinking that a mere agreement of sale created a charge over the property and the suit as framed was maintainable. In my view the said findings are based on total misconception of law and facts and therefore this court can very well exercise its jurisdiction under Section 100 CPC.

I therefore find merits in the Second Appeal and hence the same is allowed. Consequently, connected CMP is closed. No costs.

28.10.2024

Index:Yes/No

Speaking Order:Yes/No

Neutral Citation:Yes/No

dsn

To

1. The Additional Sub Judge,
Puducherry.

2. The Principal District Judge,
Puducherry.



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N.MALA,J.

dsn

PRE-DELIVERY JUDGMENT IN
S.A.No.1010 of 2021

JUDGMENT PRONOUNCED ON
28.10.2024