



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 24.02.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU

Second Appeal No.69 of 2015 and M.P.No.1 of 2015

M.J.Basil

.. Appellant/2nd Defendant

-Vs-

E.N.Kosalram

.. Respondent/Plaintiff

SECOND APPEAL filed under Section 100 of Code of Civil Procedure against the judgment and decree passed by the learned Subordinate Judge, Thiruvallur in A.S.No.36 of 2012, dated 11.03.2014 by confirming the judgment and decree passed by the learned District Munsif, Thiruvallur in O.S.No.207/2004 dated 14.03.2012.

For Appellant : Mr.G.Prem Anand Rao

For Respondent : Mr.V.R.Thangavelu
(Caveator)

J U D G M E N T

The 2nd defendant in O.S.No.207 of 2004 on the file of the learned District Munsif, Thiruvallur is the appellant herein. The respondent is the plaintiff in the suit. One Mr.M.Sabastin was the first defendant in the suit. The said suit was filed for specific performance of the sale agreement entered into between the 1st defendant and the plaintiff by which the 1st defendant has agreed to sell the suit property to the plaintiff. The 2nd defendant is the subsequent purchaser who claims that he is a bonafide purchaser without notice of the said sale agreement. The trial court decreed the suit as prayed for, directing the defendants to execute a sale deed in favour of the plaintiff. As against the same, the appellant herein filed an appeal before the learned Subordinate Judge, Thiruvallur in A.S.No.36 of 2012. In that First Appeal, the 1st defendant in the suit was not impleaded as a respondent. The 1st defendant also did not prefer to file any appeal against the decree and judgment of the trial court. Thus, in the first appeal, the respondent herein was the sole respondent. The lower appellate court by decree and judgment dated 11.03.2014 dismissed the said appeal thereby confirming the decree and judgment of the trial court. Challenging the same, the appellant is before this Court with this



Second Appeal. In the Second Appeal also, the first defendant, against whom the decree was passed by the trial court and confirmed by the lower appellate court, has not been impleaded as a party.

2. This Second Appeal has come up before me today for admission. I have heard the learned Counsel for the appellant and the learned Counsel appearing for the respondent who has made appearance by filing a Caveat. I have also perused the records carefully.

3. The case of the plaintiff/respondent herein is that the 1st defendant M.Sabastin was the owner of the suit property. According to him, the 1st defendant had entered into a sale agreement with the plaintiff on 04.09.2002 thereby agreeing to sell the suit property to the plaintiff for a total sale consideration of Rs.80,000/-. A sum of Rs.30,000/- was paid as advance towards part sale consideration on the same day. Subsequently, a sum of Rs.15,000/- was paid towards balance sale consideration on 28.11.2002. Thus, a total sum of Rs.45,000/- has been paid. The remaining sale consideration of Rs.35,000/- has been deposited by the plaintiff to the credit of the trial court during the pendency of this suit. Therefore, according to the plaintiff, despite several requests made to the 1st defendant to perform his part of contract and despite such request was made through P.W.2, the 1st defendant did not come forward to perform his part of contract, though the plaintiff was all along ready and willing to perform his part of contract. It is further stated that subsequently, the plaintiff came to know that on 01.08.2003, the 1st defendant has sold the suit property to the 2nd defendant. It is also stated that the 2nd defendant is a close relative of the 1st defendant and with sufficient notice of the earlier sale agreement, he purchased the suit property. Thus, according to the plaintiff, the 2nd defendant/appellant is not a bonafide purchaser for value. With these allegations, the plaintiff filed a suit for specific performance.

4. The 1st defendant initially appeared before the trial court on service of summons. He filed a written statement wherein he admitted the execution of the sale agreement dated 04.09.2002. But his contention in the written statement was that time was essence of the contract and though he was ready and willing to perform his part of contract, the plaintiff did not come forward to perform his part of contract within the time stipulated in the agreement. In other words, according to him, he was always ready and willing to execute the sale deed in favour of the plaintiff, but the plaintiff was not able to purchase the suit property by paying the total sale consideration due to non-availability of funds. In those circumstances, according to the 1st defendant, after 9 months of the expiry of the time stipulated in the sale agreement, he sold away the property on 01.08.2002 to the 2nd defendant. Thus, according to the



1st defendant, he is not liable to perform his part of contract as the time prescribed in the agreement had expired long before.

5. The appellant herein/the 2nd defendant in the suit has filed a separate written statement wherein he has stated that he was not aware of the earlier sale agreement. It is also stated that he is a bonafide purchaser for value. He has also stated that the sale agreement could not be performed now because the time prescribed in the sale agreement had expired.

6. Based on the above pleadings, the trial court framed appropriate issues. On the side of the plaintiff, he was examined as P.W.1 and one Mr. Ramamoorthy was examined as P.W.2 and as many as 4 documents were exhibited on his side. As I have already pointed out, the first defendant remained ex-parte. The 2nd defendant/appellant herein, however, did not lead any oral evidence nor did he file any document in his favour. Having considered all the above, the trial court decreed the suit which is confirmed by the lower appellate court. That is how, the appellant is before this Court with this Second Appeal.

7. In this Second Appeal, the learned Counsel for the appellant would submit that there was collusion between the plaintiff and the 1st defendant and that is the reason as to why the 1st defendant remained ex-parte. The learned Counsel for the appellant would further submit that in the plaint itself, the plaintiff in paragraph 7(b) has admitted that the appellant is a bonafide purchaser for value, but the courts below have failed to consider the same is his grievance.

8. The learned Counsel for the respondent/plaintiff would submit that the 2nd defendant is non else than the sister's husband of the wife of the 1st defendant. It is also stated that the 2nd defendant/appellant is fully aware of the above sale agreement. Thus, according to him, there was a collusion between the 1st defendant and the 2nd defendant and the 2nd defendant is not a bonafide purchaser for value. The learned Counsel for the respondent would, however, point out that though such positive evidence has been let in, the appellant herein did not choose to let in any evidence, either oral or documentary, to disprove that he is not related to the 1st defendant. The learned Counsel for the respondent would further point out that the very fact that the appellant has not chosen to depose in his favour would give rise to an adverse presumption against him under Section 114 of the Indian Evidence Act. The learned Counsel would also submit that at any rate, there is no substantial question of law involved in this Second Appeal.



9. I have considered the above submissions.

10. As I have already pointed out, there is no denial of execution of the sale agreement between the 1st defendant and the plaintiff. There is also no denial of the part-payment made by the plaintiff. There is also no denial of the fact that the plaintiff has deposited the balance of sale consideration before the lower court. There is no denial of the fact that the 1st defendant remained ex-parte and the appellant herein did not choose to lead any evidence either oral or documentary. It is a question of fact as to whether the appellant is the bonafide purchaser for value or not. The details of the transaction by which the appellant has purchased the property from the 1st defendant is within the knowledge of the 1st defendant and the appellant. Therefore, it would have been appropriate for the appellant to lead evidence as to the genuineness of the transaction between him and the 1st defendant so as to prove that he is the bonafide purchaser for value. When he has not gone to the witness box to give evidence or to lead another oral evidence and when he has not produced any document to show that he paid the sale consideration, I am of the view that it is absolutely necessary for this Court to draw adverse inference against the appellant herein. Apart from that, as I have already narrated, the burden is upon the appellant to prove that he is the bonafide purchaser for value. This burden emanates from Section 101 of the Indian Evidence Act. Since he has not proved the said fact by let in evidence either oral or documentary, I hold that the courts below were right in holding that he is not the bonafide purchaser for value.

11. As rightly pointed out by the learned Counsel for the respondent, two courts below, on appreciating the evidence, have also held that the time is not the essence of the contract and that the plaintiff is entitled for a decree for specific performance. As has been pointed out already, the courts below have also held that the appellant is not a bonafide purchaser for value. Since all these conclusions are based on questions of fact and since there is no question of law, more particularly, a substantial question of law, this Second Appeal cannot be admitted at all. Incidentally, I should also mention that the 1st defendant, against whom there is a decree, was not even added as a respondent by the appellant before the lower appellate court as well as before this Court. For all these reasons, I am inclined only to dismiss the Second Appeal as there is no merit at all.



12. In the result, the Second Appeal fails and the same is accordingly dismissed. No costs. Consequently, connected Miscellaneous Petition is also closed.

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Assistant Registrar

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Sub Assistant Registrar

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To

- 1.The Subordinate Judge, Thiruvallur.
2. The District Munsif, Thiruvallur.

Copy to:The Section Officer, V.R.Section,
High Court, Madras.

- 1 cc to Mr.G.Prem Anand Rao ,Advocate, SR.No.9898
1 cc to Mr.V.R.Thangavelu ,Advocate, SR.No.10132

S.A.No.69 OF 2015

rj(co)
pmk.26.3.2015